IDAHO CODE

TITLES 29 and 30

CONTRACTS to CORPORATIONS

Current through 2020 Regular Session

MICHIE

IDAHO CODE

CONTAINING THE

GENERAL—LAWS OF IDAHO ANNOTATED

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R. DANIEL BOWEN
ANDREW P. DOMAN **JILL S. HOLINKA**
COMMISSIONERS

TITLES 29–30

MICHIE

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Idaho R. Civ. P.	Idaho Rules of Civil Procedure
Idaho Evidence Rule	Idaho Rules of Evidence
Idaho R. Crim. P.	Idaho Criminal Rules
Idaho Misdemeanor Crim. Rule	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
Idaho App. R.	Idaho Appellate Rules

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USER'S GUIDE

To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set.

ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3, § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law.

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

Year	Adjournment Date
1921	March 5, 1921
1923	March 9, 1923
1925	March 5, 1925
1927	March 3, 1927
1929	March 7, 1929
1931	March 5, 1931
1931 (E.S.)	March 13, 1931
1933	March 1, 1933
1933 (E.S.)	June 22, 1933
1935	March 8, 1935
1935 (1st E.S.)	March 20, 1935
1935 (2nd E.S.)	July 10, 1935
1935 (3rd E.S.)	July 31, 1936

1937	March 6, 1937
1937 (E.S.)	November 30, 1938
1939	March 2, 1939
1941	March 8, 1941
1943	February 28, 1943
1944 (1st E.S.)	March 1, 1944
1944 (2nd E.S.)	March 4, 1944
1945	March 9, 1945
1946 (1st E.S.)	March 7, 1946
1947	March 7, 1947
1949	March 4, 1949
1950 (E.S.)	February 25, 1950
1951	March 12, 1951
1952 (E.S.)	January 16, 1952
1953	March 6, 1953
1955	March 5, 1955
1957	March 16, 1957
1959	March 9, 1959
1961	March 2, 1961
1961 (1st E.S.)	August 4, 1961
1963	March 19, 1963
1964 (E.S.)	August 1, 1964
1965	March 18, 1965
1965 (1st E.S.)	March 25, 1965
1966 (2nd E.S.)	March 5, 1966
1966 (3rd E.S.)	March 17, 1966
1967	March 31, 1967
1967 (1st E.S.)	June 23, 1967
1968 (2nd E.S.)	February 9, 1968
1969	March 27, 1969
1970	March 7, 1970
1971	March 19, 1971

1971 (E.S.)	April 8, 1971
1972	March 25, 1972
1973	March 13, 1973
1974	March 30, 1974
1975	March 22, 1975
1976	March 19, 1976
1977	March 21, 1977
1978	March 18, 1978
1979	March 26, 1979
1980	March 31, 1980
1981	March 27, 1981
1981 (E.S.)	July 21, 1981
1982	March 24, 1982
1983	April 14, 1983
1983 (E.S.)	May 11, 1983
1984	March 31, 1984
1985	March 13, 1985
1986	March 28, 1986
1987	April 1, 1987
1988	March 31, 1988
1989	March 29, 1989
1990	March 30, 1990
1991	March 30, 1991
1992	April 3, 1992
1992 (E.S.)	July 28, 1992
1993	March 27, 1993
1994	April 1, 1994
1995	March 17, 1995
1996	March 15, 1996
1997	March 19, 1997
1998	March 23, 1998
1999	March 19, 1999

2000	April 5, 2000
2001	March 30, 2001
2002	March 15, 2002
2003	May 3, 2003
2004	March 20, 2004
2005	April 6, 2005
2006	April 11, 2006
2006 (E.S)	August 25, 2006
2007	March 30, 2007
2008	April 2, 2008
2009	May 8, 2009
2010	March 29, 2010
2011	April 7, 2011
2012	March 29, 2012
2013	April 4, 2013
2014	March 20, 2014
2015	April 11, 2015
2015 (E.S.)	May 18, 2015
2016	March 25, 2016
2017	March 29, 2017
2018	March 28, 2018
2019	April 11, 2019
2020	March 20, 2020

Title 29
CONTRACTS

Chapter

Chapter 1
GENERAL PROVISIONS RELATING TO CONTRACTS

§ 29-101. Who may contract. — All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

History.

1863, p. 515, § 1; R.S., § 3220; reen. R.C. & C.L., § 3312; C.S., § 5661; I.C.A., § 28-101.

STATUTORY NOTES

Cross References.

Contracts of insane persons, §§ 32-107, 32-108.

Disaffirmance of contract by minor, § 32-103.

Goods over $500, written contracts, § 28-2-201.

Limitation of actions on written contracts, § 5-216; on oral contracts, § 5-217.

Males over the age of 18 years may enter into contracts to comply with "G. I. Bill of Rights," § 65-509.

Statute of frauds, § 9-505.

CASE NOTES

Estoppel.

Parties having reached agreement and entered into a contract set forth and sued upon, are estopped to deny its general nature and force and effect and must act in accordance with such agreement and understanding. Payette Lakes Protective Ass'n v. Lake Reservoir Co., 68 Idaho 111, 189 P.2d 1009 (1948).

Married Women.

Married woman is not "deprived of her civil liberty" within meaning of this section, so as to render her incapable of contracting. Bassett v. Beam, 4 Idaho 106, 36 P. 501 (1894).

This section does not confer upon married women right to make any and all contracts that may be made by a feme sole. Dernham v. Rowley, 4 Idaho 753, 44 P. 643 (1896).

Section 32-904 gives married women the same contractual rights and responsibilities with respect to their separate property as those enjoyed by married men. Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1976).

Restrictive Agreements.

Restrictive agreements as to the use of property are legal. Payette Lakes Protective Ass'n v. Lake Reservoir Co., 68 Idaho 111, 189 P.2d 1009 (1948).

Cited Beard v. Beard, 53 Idaho 440, 24 P.2d 47 (1933); State v. Bronson, 94 Idaho 306, 486 P.2d 1019 (1971).

RESEARCH REFERENCES

ALR. — Infant's liability for use or depreciation of subject matter, in action to recover purchase price upon his disaffirmance of contract to purchase goods. 12 A.L.R.3d 1174.

Infant's liability for services rendered by attorney at law under contract with him. 13 A.L.R.3d 1251.

Enforceability of covenant not to compete in infant's employment contract. 17 A.L.R.3d 863.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction. 29 A.L.R.3d 1270.

Rights in respect of engagement and courtship presents when marriage does not ensue. 46 A.L.R.3d 578.

§ 29-102. Enforcement by beneficiary. — A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

History.

R.S., § 3221; reen. R.C. & C.L., § 3313; C.S., § 5662; I.C.A., § 28-102.

CASE NOTES

Agreement to Pay Debts.

Where the purchaser of a poultry business agreed to pay the business's debts, including a debt to a poultry supplier, and that agreement was supported by adequate consideration and not rescinded, the supplier was a third-party beneficiary of the contract and was entitled to assert and have judgment in its favor by way of setoff against a debt owed by the supplier to the purchaser. Treasure Valley Foods, Inc. v. J-M Poultry Packing Co., 98 Idaho 366, 564 P.2d 978 (1977).

Where buyer agreed in a lease contract, executed with the purchase of the seller's land, to pay the seller's arrearage with a power company, the power company could not enforce that lease provision against the buyer because the lease was executed only to provide cash flow to the buyer and to the

seller to continue to operate a business on the land; hence, the company was not an intended beneficiary of the lease contract. Idaho Power Co. v. Hulet, 140 Idaho 110, 90 P.3d 335 (2004).

Beneficiaries.

A contract between the lessee-grower and crop purchaser, which enumerated the rights and duties of those parties toward each other, was not drawn expressly for the benefit of the farmowner lessor; thus, the farmowner was not entitled to demand performance from the crop purchaser. Wing v. Amalgamated Sugar Co., 106 Idaho 905, 684 P.2d 307 (Ct. App. 1984), overruled on other grounds, NBC Leasing Co. v. R & T Farms, Inc., 112 Idaho 500, 733 P.2d 721 (1987).

Before recovery can be had by a third party beneficiary, it must be shown that the contract was made for his direct benefit or, as sometimes stated, primarily for his benefit; it is not sufficient that he be a mere incidental beneficiary. Adkison Corp. v. American Bldg. Co., 107 Idaho 406, 690 P.2d 341 (1984).

Where a contract was not made expressly for the benefit of any of the plaintiffs as third parties to the arrangement between the contracting parties, and where it referenced Utah law in a generalized statement that the rights and obligations of the parties should be governed in accordance with the laws of Utah, this did not suffice to invoke the terms of this section, and the district court's decision that the plaintiffs, who did not have valid liens, could recover under the Utah bond statutes as an alternative theory was vacated. Great Plains Equip., Inc. v. Northwest Pipeline Corp., 132 Idaho 754, 979 P.2d 627 (1999).

Where the owners entered into a contract with the general contractor for the design of a cabin and the supply of construction materials, the owners were not permitted to directly sue a subcontractor for breach of contract as a third party beneficiary where the benefits the owners received from the subcontractor's performance were merely incidental. Nelson v. Anderson Lumber Co., 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

Client, the promisor, directed his promise to pay to the company, making the company the named promisee of the note, and as such, the company did not have an enforceable right against the client as a third party beneficiary

but, rather, had an enforceable right as the promisee of the note so long as the note was otherwise enforceable; thus, the district court's holding that the company may enforce the note as a third party beneficiary was made in error. Sirius LC v. Erickson, 144 Idaho 38, 156 P.3d 539 (2007).

This section does not give a party to a contract the right to enforce the contract against a nonparty on the ground that the nonparty is a third-party beneficiary to the contract. Clearwater REI, LLC v. Boling, 155 Idaho 954, 318 P.3d 944 (2014).

Company was not a third-party beneficiary of the bid contract between a business and a general contractor, for purposes of this section, given that the contract did not clearly show an intent expressly to benefit the company. De Groot v. Standley Trenching, Inc., 157 Idaho 557, 338 P.3d 536 (2014).

Comparison.

California and Oklahoma have statutes providing that third party beneficiaries may sue to enforce nonrescinded contracts. See Cal. Civ. Code, § 1559 and Okla. Stat., tit. 15, § 29. These statutes have been interpreted to leave untouched the doctrine that after acceptance or reliance, a third party beneficiary contract cannot be unilaterally rescinded. Baldwin v. Leach, 115 Idaho 713, 769 P.2d 590 (Ct. App. 1989).

Federal Rule.

The federal court decisions permit a third person, not a party to a contract, to enforce the promissory obligation only where he is the beneficiary solely interested in the promise. Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2, 59 F.2d 19 (9th Cir.), cert. denied, 287 U.S. 638, 53 S. Ct. 87, 77 L. Ed. 552 (1932).

Intent to Benefit.

The contract itself must express an intent to benefit the third party; this intent must be gleaned from the contract itself unless that document is ambiguous, whereupon the circumstances surrounding its formation may be considered. Adkison Corp. v. American Bldg. Co., 107 Idaho 406, 690 P.2d 341 (1984).

Under Idaho law, if a party can demonstrate that a contract was made expressly for his benefit, he may enforce that contract, at any time prior to

rescission, as a third party beneficiary. Baldwin v. Leach, 115 Idaho 713, 769 P.2d 590 (Ct. App. 1989).

There was no evidence in the record showing that hauler and farmer intended to benefit dairyman when they entered into an agreement regarding the hauler handling hay produced by the farmer. At most, dairyman was only an "incidental beneficiary" within hauler's contemplation when the agreement was made. Hilt v. Draper, 122 Idaho 612, 836 P.2d 558 (Ct. App. 1992).

If a party can demonstrate that a contract was made expressly for its benefit, it may enforce that contract, prior to recision, as a third-party beneficiary; the test for determining a party's status as a third-party beneficiary, capable of properly invoking the protection of this section, is whether the agreement reflects an intent to benefit the third party. Seubert Excavators, Inc. v. Eucon Corp., 125 Idaho 744, 874 P.2d 555 (Ct. App. 1993), rev'd on other grounds, 125 Idaho 409, 871 P.2d 826 (1994).

Under this section, if a party can demonstrate that a contract was made expressly for its benefit, it may enforce that contract, prior to rescission, as a third-party beneficiary. The test for determining a party's status as a third-party beneficiary, capable of properly invoking the protection of this section, is whether the agreement reflects an intent to benefit the third party. The third party must show that the contract was made primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary. Further, the contract itself must express an intent to benefit the third party. This intent must be gleaned from the contract itself unless that document is ambiguous, whereupon the circumstances surrounding its formation may be considered. Am. W. Enters. v. CNH, LLC, 155 Idaho 746, 316 P.3d 662 (2013).

Leases.

Fact that lease was to expire in two years if plaintiff failed to sublease to defendants, shows that extension agreement between landlord and plaintiff for five years was made expressly for defendant's benefit and sustains defendant's claim of third party beneficiary of the extension agreement. Knight v. Fox Caldwell Theatres Corp., 70 Idaho 148, 212 P.2d 1027 (1949).

Public Contracts.

Absent a manifest intent to the contrary, construction contracts between a contractor and a state or other public body for highway repair or construction of a new highway are generally not considered as being for the benefit of third persons, but are, on the one hand, for the benefit of the state in the performance of its duties to maintain highways on behalf of the public and, on the other hand, for the benefit of the contractor by way of compensation to be paid. Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967).

Provisions of contract between local improvement district and construction company, whereby construction company agreed to provide continuous ingress and egress to and from all businesses that might be affected by the work and to protect such businesses from damages, obligated the construction company to take certain precautionary measures for the benefit of a limited, defined class of third parties, the businesses within the local improvement district; thus, members of that class of third-party beneficiaries were entitled to sue for the construction company's alleged breach of those contract provisions. Just's, Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978).

Rescission.

After a contract for the benefit of a third person has been accepted or acted upon by that person, it cannot be rescinded without his consent. Baldwin v. Leach, 115 Idaho 713, 769 P.2d 590 (Ct. App. 1989).

Violation of Contract With City.

It was error to summarily dismiss a count of a complaint against a construction company by one injured by his truck striking an outcropping of rock adjacent to a street area where defendant was installing sewer pipe under contract with the city, which injury was alleged to have been caused by defendant's violation of a provision of his contract requiring installation of warning devices and of which contract plaintiff claimed to be a third party beneficiary. Stewart v. Arrington Constr. Co., 92 Idaho 526, 446 P.2d 895 (1968).

Subscriber to cable TV was found to be a third party beneficiary of franchise contract between city and cable service with the right to sue for

rate overcharge. Bush v. Upper Valley Telecable Co., 96 Idaho 83, 524 P.2d 1055 (1974).

Cited Sauve v. Title Guar. & Sur. Co., 29 Idaho 146, 158 P. 112 (1916); Dawson v. Eldridge, 84 Idaho 331, 372 P.2d 414 (1962).

§ 29-103. Presumption of consideration. — A written instrument is presumptive evidence of a consideration.

History.

R.S., § 3222; reen. R.C. & C.L., § 3314; C.S., § 5663; I.C.A., § 28-103.

STATUTORY NOTES

Cross References.

Consideration in negotiable instruments, § 28-3-303.

CASE NOTES

Acknowledgment of Services.

The written acknowledgment of broker's services and promise to pay therefor, being unrelated to the oral promise to pay for such services when yet to be performed, was sufficient to satisfy the requirements of the statute of frauds or § 9-508, such written instrument being presumptive evidence of a valid consideration and the burden would rest on appellants to avoid such instrument. Homefinders v. Lawrence, 80 Idaho 543, 335 P.2d 893 (1959).

Attorney's Agreement to Compensate for Improper Advice.

Where attorney, by written agreement, promised client, who was his sister, that he would compensate her for any loss she may suffer as a result of taking his advice in failing to waive community property rights in order to take specific bequests under will, an agreement of forbearance to sue would be presumed as consideration for the agreement. Frasier v. Carter, 92 Idaho 79, 437 P.2d 32 (1968).

Consideration.

Where one under influence of threats or persuasion, and for purpose of avoiding a present or threatened embarrassment agrees to pay or recognize a claim that has no foundation either in equity or law, such agreement is without consideration and void. Vane v. Towle, 5 Idaho 471, 50 P. 1004 (1897); Blaine County Nat'l Bank v. Timmerman, 42 Idaho 338, 245 P. 389 (1926).

Where contract is introduced in evidence and no proof offered of failure of consideration, court's conclusion must rest upon construction of contract itself. Citizens' Bank & Trust Co. v. Pocatello Milling & Elevator Co., 41 Idaho 403, 240 P. 186 (1925).

Benefit to third person is sufficient consideration for promise. Citizens' Bank & Trust Co. v. Pocatello Milling & Elevator Co., 41 Idaho 403, 240 P. 186 (1925).

Where promise is made for benefit of several persons, it is not essential to recovery thereon that each of such persons should have contributed to consideration. Citizens' Bank & Trust Co. v. Pocatello Milling & Elevator Co., 41 Idaho 403, 240 P. 186 (1925).

Defense of failure of consideration must be established by fair preponderance of evidence. First Nat'l Bank v. Doschades, 47 Idaho 661, 279 P. 416 (1929).

A proposed amendment by defendants in action brought for a declaratory judgment under a contract which alleged want of consideration, but which did not set up facts, which, if proven, would constitute want of consideration, was defective, since a written instrument is presumptive evidence of consideration. Merritt v. Sims, 78 Idaho 292, 301 P.2d 1108 (1956).

A written instrument is presumptive evidence of consideration, but that presumption is rebuttable and not conclusive, and a party seeking to avoid or invalidate the contract may introduce evidence of a lack of consideration. Lewis v. Fletcher, 101 Idaho 530, 617 P.2d 834 (1980).

Court's decision that option contract that provided for consideration of $1 and other good and valuable consideration was supported by valid consideration was based on substantial and competent evidence where the record demonstrated that 10 years after the fact no one involved had a clear memory of everything that transpired in completing the transaction and the instrument itself provided for "other good and valuable consideration" and there was a written acknowledge of the receipt of such consideration. Dennett v. Kuenzli, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997).

In a dispute involving restrictive covenants, an owner failed to meet his burden of showing that new members did not give consideration when joining the estate and signing an amended covenant; by signing the document, the new members agreed to be bound by all of the terms contained therein. Best Hill Coalition v. HALKO, LLC, 144 Idaho 813, 172 P.3d 1088 (2007).

Guaranty Contracts.

Contract of guaranty in writing imports a consideration. Allis-Chalmers Mfg. Co. v. Citizens' Bank & Trust Co., 3 F.2d 316 (D. Idaho 1924).

Indorsements.

Where indorsement of notes after delivery is in writing, presumption of consideration obtains. Thomas v. Hoebel, 46 Idaho 744, 271 P. 931 (1928).

Mutual Promises.

A mutual contributing or indemnity contract is supported by mutual promises of the signers to each other and payment under it. Caldwell v. McKenna, 54 Idaho 552, 33 P.2d 366 (1934).

Presumption.

Where no consideration is mentioned in document, party is not estopped from showing no consideration in fact. Porter v. Title Guar. & Sur. Co., 17 Idaho 364, 106 P. 299 (1909).

This section and § 29-104 merely provide that a written instrument imports a consideration and that the burden of proving want of consideration lies on the party seeking to avoid it; they do not go to the extent of presuming the source of such consideration. Aker v. Aker, 52 Idaho 713, 20 P.2d 796, cert. denied, 290 U.S. 587, 54 S. Ct. 80, 78 L. Ed. 518 (1933).

Separate Contract of Married Woman.

This presumption is insufficient to obviate necessity of showing, where person sought to be held on a promissory note is a married woman, that debt was contracted for her own use or benefit, or use or benefit of her separate estate. McFarland v. Johnson, 22 Idaho 694, 127 P. 911 (1912).

Specific Performance.

In an action for specific performance the duty of alleging, and the burden of proving inadequacy of consideration, rests on the party relying on it as a defense. Locklear v. Tucker, 69 Idaho 84, 203 P.2d 380 (1949).

Specific performance will not be granted unless the contract is complete, definite and certain in all its material terms, or contains provisions which are capable in themselves of being reduced to certainty. Locklear v. Tucker, 69 Idaho 84, 203 P.2d 380 (1949).

Cited Mochel v. Cleveland, 51 Idaho 468, 5 P.2d 549 (1930); Aker v. Aker, 52 Idaho 713, 20 P.2d 796 (1933); Caldwell v. McKenna, 54 Idaho 552, 33 P.2d 366 (1934); Robertson v. Hansen, 89 Idaho 107, 403 P.2d 585 (1965); Vaughn v. Vaughn, 91 Idaho 544, 428 P.2d 50 (1967); W.L. Scott, Inc. v. Madras Aerotech, Inc., 103 Idaho 736, 653 P.2d 791 (1982); McCandless v. Carpenter, 123 Idaho 386, 848 P.2d 444 (Ct. App. 1993).

§ 29-104. Want of consideration — Burden of proof. — The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

History.

R.S., § 3223; reen. R.C. & C.L., § 3315; C.S., § 5664; I.C.A., § 28-104.

CASE NOTES

Affirmative Defense.

Under certain conditions parol evidence may be introduced to show the true consideration or want of consideration for a promissory note or other instrument; however, the supreme court has consistently held that the defense of want or failure of consideration are affirmative defenses to be pleaded. Rosenberry v. Clark, 85 Idaho 317, 379 P.2d 638 (1963).

Agreement to Pay Client for Loss.

In an action on an attorney's written agreement to compensate a client for any loss sustained by his neglect to advise her to execute a waiver required to qualify for specific bequests under her late husband's will, the burden was upon the personal representative of such attorney to establish any claimed want of consideration. Frasier v. Carter, 92 Idaho 79, 437 P.2d 32 (1968).

Burden Not Met.

In a dispute involving restrictive covenants, an owner failed to meet his burden of showing that new members did not give consideration when joining the estate and signing an amended covenant; by signing the

document, the new members agreed to be bound by all of the terms contained therein. Best Hill Coalition v. HALKO, LLC, 144 Idaho 813, 172 P.3d 1088 (2007).

Issue Not Pleaded.

Contention of appellants that trial court committed error in sustaining respondent's objection to a question propounded to appellant whereby the witness was asked to explain what consideration was paid him by the corporation for the execution of the note and mortgage involved in this suit, such objection, being that an attempt was being made to alter a written instrument by parol evidence, was not sustained, in view of the fact that there was no issue under the pleadings regarding the consideration of either instrument nor anything pleaded by either party claiming want or failure of consideration or fraud on the part of any party. Rosenberry v. Clark, 85 Idaho 317, 379 P.2d 638 (1963).

Rebuttable Presumption.

A written instrument is presumptive evidence of consideration, but that presumption is rebuttable and not conclusive, and a party seeking to avoid or invalidate the contract may introduce evidence of a lack of consideration. Lewis v. Fletcher, 101 Idaho 530, 617 P.2d 834 (1980).

Cited Mochel v. Cleveland, 51 Idaho 468, 5 P.2d 549 (1930); Tobias v. Wolverine Min. Co., 52 Idaho 576, 17 P.2d 338 (1932); Aker v. Aker, 52 Idaho 713, 20 P.2d 796 (1933); Robertson v. Hansen, 89 Idaho 107, 403 P.2d 585 (1965); Vaughn v. Vaughn, 91 Idaho 544, 428 P.2d 50 (1967); W.L. Scott, Inc. v. Madras Aerotech, Inc., 103 Idaho 736, 653 P.2d 791 (1982); Dennett v. Kuenzli, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997).

§ 29-105. Contracts may be oral. — All contracts may be oral except such as are specially required by statute to be in writing.

History.

R.S., § 3224; reen. R.C. & C.L., § 3316; C.S., § 5665; I.C.A., § 28-105.

STATUTORY NOTES

Cross References.

Contracts required to be in writing, § 9-505 et seq.

Goods and choses in action over $500, written contracts, § 28-2-201.

§ 29-106. Contract not put in writing through fraud. — Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing and acts upon such belief to his prejudice, may enforce it against the fraudulent party.

History.

R.S., § 3225; reen. R.C. & C.L., § 3317; C.S., § 5666; I.C.A., § 28-106.

CASE NOTES

Estoppel.

Where defendant led plaintiff to believe that he had signed a written contract for an interest in certain mining claims, and induced plaintiff to purchase claims on which he had options, and to otherwise expend money and time to carry out provisions of the agreement, defendant cannot assert in an action to enforce the contract that contract is void under the statute of frauds because he did not in fact sign the same. Ferguson v. Blood, 152 F. 98 (9th Cir. 1907).

This estoppel arises when one by his acts, representations, or silence induces another to believe certain facts to exist and such other, relying and acting on such belief, is thereby prejudiced. Leaf v. Codd, 41 Idaho 547, 240 P. 593 (1925).

Cited Davenport v. Burke, 27 Idaho 464, 149 P. 511 (1915).

§ 29-107. Corporate or official seal — How affixed. — A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.

History.

R.S., § 3226; reen. R.C. & C.L., § 3318; C.S., § 5667; I.C.A., § 28-107.

§ 29-108. Distinction as to sealed instruments abolished. — All distinctions between sealed and unsealed instruments are abolished.

History.

R.S., § 3227; reen. R.C. & C.L., § 3319; C.S., § 5668; I.C.A., § 28-108.

§ 29-109. Construction of conflicting provisions. — Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form, and if the two are absolutely repugnant, the latter must be so far disregarded.

History.

R.S., § 3228; reen. R.C. & C.L., § 3320; C.S., § 5669; I.C.A., § 28-109.

CASE NOTES

Addenda.

In a dispute over a land-sale contract, even though addenda were controlling over inconsistent provisions in a pre-printed contract, they did not create any additional duty on the part of the seller beyond his obligation to make a good faith effort to obtain marketable title. Johnson v. Lambros, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006).

Intention of Parties.

Contract will be construed in the light of surrounding facts and circumstances to arrive at the real intention of the parties. Wood River Power Co. v. Arkoosh, 37 Idaho 348, 215 P. 975 (1923).

Object and purpose of contract may well be taken into consideration in arriving at a correct understanding of what the parties had in mind in using words, the meaning of which is in controversy. Clarke v. Blackfoot Waterworks, 39 Idaho 304, 228 P. 326 (1924).

Primary test as to character of contract is the intention of the parties to be gathered from the whole scope and effect of language used. Wallace Bank & Trust Co. v. First Nat'l Bank, 40 Idaho 712, 237 P. 284 (1925).

Limitations and Construction.

Courts cannot make contracts for parties. Smith v. Krall, 9 Idaho 535, 75 P. 263 (1904); Machold v. Farnan, 14 Idaho 258, 94 P. 170 (1908); Sorensen v. Larue, 43 Idaho 292, 252 P. 494 (1926).

No recovery of purchase money paid on an executory contract for sale of land can be recovered by vendee on rescission of contract, unless rescission agreement expressly or impliedly provides therefor. Williams v. Skelton, 40 Idaho 741, 237 P. 412 (1925).

Writing Controls Printing.

Words "to be paid as loaded," written into contract with pencil, prevail over that portion of printed contract providing for payment "upon the completion of loading on board cars for shipment." Idaho Prods. Co. v. Bales, 36 Idaho 800, 214 P. 206 (1923).

Typewritten parts of a contract prevail over the printed parts. Weeter v. Reynolds, 48 Idaho 611, 284 P. 257 (1930).

Where contract is partly written and partly printed, written parts control printed parts, unless parts which are antagonistic can be reconciled. Ries v. Pacific Fruit & Produce Co., 50 Idaho 140, 294 P. 336 (1930).

Where the word "Idaho" in certificate of acknowledgment was stricken in two places to change the printed form to make it properly applicable to "Utah" and the word "Utah" was written in both places with a pen, the error in failing to strike the word Idaho and substitute the word "Utah" in one instance was apparently a clerical error which did not vitiate the instrument when read in its entirety, the intent being clearly inferable. Pacific Coast Joint Stock Land Bank v. Security Prods. Co., 56 Idaho 436, 55 P.2d 716 (1936).

In an action by a lessor against the lessee for breach of contract for failure to deliver an operable radiant heating system at the expiration of the lease of a gasoline service station site, where a letter between the parties written after execution of the lease agreement modified and expanded the

lease by adding the radiant heating terms to the basic agreement, written provisions of the letter were part of the same contract and controlled over conflicting provisions of the printed form. Werry v. Phillips Petroleum Co., 97 Idaho 130, 540 P.2d 792 (1975).

Where more specific "due-on-sale" provision of contract was a typed additional provision to the contract while general "due-on-sale" provision was a clause set forth in the printed form, the more specific provision controlled. Barr Dev., Inc. v. Utah Mtg. Loan Corp., 106 Idaho 46, 675 P.2d 25 (1983).

Cited Turner v. Mendenhall, 95 Idaho 426, 510 P.2d 490 (1973); Airstream, Inc. v. CIT Fin. Servs., Inc., 111 Idaho 307, 723 P.2d 851 (1986).

§ 29-110. Limitations on right to sue under contract or franchise agreement. — (1) Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.

(2) Any condition, stipulation or provision in a franchise agreement is void to the extent it purports to waive, or has the effect of waiving, venue or jurisdiction of the state of Idaho's court system. Any condition, stipulation or provision in a franchise agreement, to the extent it purports to assert, or has the effect of asserting, the choice of law is enforceable. This subsection shall apply to any franchise agreement entered into or renewed on or after July 1, 2003, by any person who at the time of entering into or renewing such franchise agreement was a resident of this state or incorporated or organized under the laws of this state.

(3) As used in this section "franchise agreement" means a written contract or agreement by which: (a) A person ("franchisee") is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a third party ("franchisor"); (b) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor of such plan or system; and (c) The franchisee is required to pay the franchisor one thousand dollars ($1,000) or more for the right to transact business pursuant to the plan or system. Such payments shall not include amounts paid: (i) As a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring the credit card; or (ii) For the purchase of goods at a bona fide wholesale price.

History.

R.S., § 3229; reen. R.C. & C.L., § 3321; C.S., § 5670; I.C.A., § 28-110 am. 2003, ch. 378, § 1, p. 1010; am. 2012, ch. 328, § 1, p. 909.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 328, inserted "under contract or" in the section heading; in subsection (1), substituted "under the contract in Idaho tribunals" for "under the contract by the usual proceedings in the ordinary tribunals" and added "as it is against the public policy of Idaho" in the first sentence; and added the last sentence.

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

CASE NOTES

Arbitration.

Stipulation in a building contract to submit differences to arbitrators whose decision shall be final is void. Huber v. St. Joseph's Hosp., 11 Idaho 631, 83 P. 768 (1905).

Compensation Paid Under Federal Law.

Even if an Idaho court would allow reformation of an insurance policy, it would not recognize the parties' choice of Illinois law on the statute of limitation issue, where Idaho had a materially greater interest in the statute of limitation as the forum state within which the damaged property was located and Idaho has expressed a fundamental policy by requiring strict adherence to its statutory limitations period. Industrial Indem. Ins. Co. v. United States, 757 F.2d 982 (9th Cir. 1985).

Compromise Agreements.

By commencing and maintaining action for specific performance of original contract, entering into compromise agreement continuing action for specific performance, and failing to dismiss such action before commencing subsequent action, party elected to rely upon remedy afforded by former action. Christman v. Rinehart, 46 Idaho 701, 270 P. 1059 (1928).

Federal Law.

Idaho law could not be applied in place of federal maritime law where the suit arose from a tort occurring on the high seas and involved the interpretation of a maritime contract for a cruise to Mexico; no public policy exceptions were controlling in an international commercial agreement outside of American waters. Fisk v. Royal Caribbean Cruises, 141 Idaho 290, 108 P.3d 990 (2005).

Fire Insurance Policy.

Statutory amendment by implication is disfavored and will not be inferred absent clear legislative intent; accordingly, the legislature, by providing in § 41-2401 that no fire insurer shall issue fire insurance on a form other than the "New York Standard as Revised in 1943," did not intend to amend the general five-year statute of limitations upon actions brought upon written contracts and did not create a one-year statute of limitations with respect to actions on policies of fire insurance. Sunshine Mining Co. v. Allendale Mut. Ins. Co., 107 Idaho 25, 684 P.2d 1002 (1984).

Provisions within fire insurance policies attempting to limit to one year the time for filing actions on the insurance policies were void under this section. Sunshine Mining Co. v. Allendale Mut. Ins. Co., 107 Idaho 25, 684 P.2d 1002 (1984).

Section 41-2401 requires that fire insurers issue policies only on the New York standard form as revised in 1943; the form includes a clause specifying a 12-month limitation period for claims. However, § 5-216 establishes a five-year statute of limitation for contracts, including insurance policies, and this section prohibits any condition in a contract that would reduce that period; thus, the applicable limitations period for the commencement of a suit for reimbursement was five years. Industrial Indem. Ins. Co. v. United States, 749 F.2d 1390 (9th Cir. 1984).

Forum Selection Clauses.

In case where Florida law controlled as to the enforceability of forum selection clauses, and where Florida law stated that, in order for forum selection clauses to be enforceable, enforcement could not contravene a strong policy enunciated by statute either in the forum where the suit was brought or the forum from which the suit was excluded, this section expressed a strong public policy against the enforcement of forum selection clauses; therefore, forum selection clause in the case could not stand. Cerami-Kote, Inc. v. Energywave Corp., 116 Idaho 56, 773 P.2d 1143 (1989).

Nothing in this section shall affect contract provisions relating to arbitration, so long as the contract does not require arbitration to be conducted outside the state of Idaho. T3 Enters. v. Safeguard Bus. Sys., 164 Idaho 738, 435 P.3d 518 (2019).

A clause in a purchase agreement, finalized in Idaho, that requires any action or proceeding arising out of or relating to the agreement to be brought in Delaware is unenforceable, because it contravenes the strong public policy declared by this section. Gemini Techs., Inc. v. Smith & Wesson Corp., 931 F.3d 911 (9th Cir. 2019).

Land Contracts.

Provision of contract for sale of land that, on nonpayment of consideration, premises should be surrendered by purchasers and payments previously made should be retained by vendors as rent, does not violate this section. McCutcheon v. Thomas, 47 Idaho 188, 273 P. 950 (1928).

Limitation of Actions.

Provision in a contract of issuance to the effect that no action at law or suit in equity shall be commenced before three months nor after six months from date on which affirmative proof of accident must be furnished to the company is repugnant to this section. Douville v. Pacific Coast Cas. Co., 25 Idaho 396, 138 P. 506 (1914).

Provision in a benefit certificate of a fraternal insurance society to the effect that no action may be maintained thereon unless brought within one year of date of death violates this section and is void. Gaffney v. Royal Neighbors of Am., 31 Idaho 549, 174 P. 1014 (1918).

Provision in health and accident policy that no action could be brought on the policy, unless brought within two years after expiration of time to make proof of loss, is void under this section. Harding v. Mutual Benefit Health & Accident Ass'n, 55 Idaho 131, 39 P.2d 306 (1934).

Municipal Contracts.

Provision in contract with municipality that decision of engineer should be binding on parties does not restrict either party from enforcing rights in court and is not in conflict with this section. White v. Soda Springs, 46 Idaho 153, 266 P. 795 (1928).

Venue of Actions.

Stipulation seeking to authorize commencement of action in any other county than that fixed by statute is not binding upon parties. McCarty v. Herrick, 41 Idaho 529, 240 P. 192 (1925).

Waiver of Right.

Clause in a promissory note waiving all rights of appeal is in violation of this section. GMAC v. Talbott, 38 Idaho 13, 219 P. 1058 (1923).

Cited Coeur d'Alene Lakeshore Owners & Taxpayers, Inc. v. Kootenai County, 104 Idaho 590, 661 P.2d 756 (1983); Young Elec. Sign Co. v. State ex rel. Winder, 135 Idaho 804, 25 P.3d 117 (2001).

§ 29-111. Debtor may demand receipt. — A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

History.

R.S., § 3230; reen. R.C. & C.L., § 3322; C.S., § 5671; I.C.A., § 28-111.

§ 29-112. Objection to offer of performance. — All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated.

History.

R.S., § 3231; reen. R.C. & C.L., § 3323; C.S., § 5672; I.C.A., § 28-112.

CASE NOTES

Estoppel.

When a contract was rescinded for fraud as to water rights on lands purchased, the federal court, following the interpretation of this section by the Idaho supreme court, held the vendor was estopped from claiming taxes or rent. Oregon Mtg. Co. v. Renner, 17 F. Supp. 727 (D. Idaho 1937), aff'd, 96 F.2d 429 (9th Cir. 1938).

Where the creditor had not only the opportunity to object but was invited to do so and did nothing, he cannot now complain of the procedure suggested to close the transaction. Dohrman v. Tomlinson, 88 Idaho 313, 399 P.2d 255 (1965).

Tender.

Conditional tender by mortgagor to assignee of mortgage held good where not objected to, although time for objecting was short. Harding v. Home Inv. & Sav. Co., 49 Idaho 64, 286 P. 920, rehearing denied, 49 Idaho 64, 75, 297 P. 1101 (1930).

When no objection is made either to the mode, form or substance of the offer, it constitutes a legal tender. Allis-Chalmers Mfg. Co. v. Harris, 56 Idaho 769, 59 P.2d 345 (1936).

Where vendee made no objection to a tender and offer of an abstract of title, when there was opportunity to do so, he could not later complain of

the insufficiency of the offer or the failure of vendor to produce or actually to deliver the extended abstract. Metzker v. Lowther, 69 Idaho 155, 204 P.2d 1025 (1949).

Where a bank's objection, if it could have been so characterized, was based upon the lateness of the property owners' tender of the money necessary to cure the default on their note, not upon the "mode" of payment or of any offer to pay, the property owners' failure to effect a timely cure was not excused by application of this section since there was nothing in this section that would have required the bank to anticipate a late tender and to give special notice of the obvious — that an untimely tender could be rejected. Owens v. Idaho First Nat'l Bank, 103 Idaho 465, 649 P.2d 1221 (Ct. App. 1982).

Seller's action in making premature withdrawal of escrow papers did not deprive the purchasers of their contract right to cure the existing default within 30 days after the second default notice; it is uncontroverted that on the 30th day the purchasers tendered a partial cure after the papers had been returned and the escrow holder rejected the tender upon the seller's instruction for the contract made no provision for partial cure and the seller was under no general legal obligation of specific statutory obligation. Aldape v. Lubcke, 107 Idaho 316, 688 P.2d 1221 (Ct. App. 1984).

Cited Moody v. Crane, 34 Idaho 103, 199 P. 652 (1921).

§ 29-113. Release for personal injury. — Any agreement entered into by any person within fifteen (15) days after he incurs a personal injury, which may adversely affect his right to be compensated for such injury, may be disavowed by such injured person within one (1) year after the making of the agreement. No agreement disavowed may be introduced as evidence in any subsequent court or administrative proceeding.

History.

1961, ch. 160, § 1, p. 231.

CASE NOTES

Cited Larson v. Emmett Joint Sch. Dist., No. 221, 99 Idaho 120, 577 P.2d 1168 (1978).

§ 29-114. Indemnification of promisee for negligence — Effect on existing agreements. — A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.

This act will not be construed to affect or impair the obligations of contracts or agreements, which are in existence at the time the act becomes effective.

History.

1971, ch. 46, § 1, p. 100.

STATUTORY NOTES

Compiler's Notes.

The term "this act" at the beginning of the second paragraph refers to S.L. 1971, Chapter 46, which is compiled as this section.

The phrase "at the time the act becomes effective" in the last paragraph refers to the effective date of S.L. 1971, Chapter 46, which was effective May 18, 1971.

CASE NOTES

Jury Instructions.

In personal injury action against city, telephone company and two contractors where both contractors admitted that they were responsible for leaving the work area where plaintiff's motorcycle accident occurred in a safe condition for the motoring public and for properly marking or signing the area with appropriate warning devices if the area could not be left in a

safe condition for the motoring public, jury instruction that, in determining any negligence of the city or the telephone company, the jury was allowed to consider only whether the city or the telephone company failed to discover or remedy any defect in the street or any inadequacy in warning of a defect caused by the contractors was correct; therefore, the city was not entitled to indemnification by the telephone company and was not an indemnitee of the telephone company, as referred to in this section; thus, indemnification clause of agreement between phone company and one contractor did not violate this section. Beitzel v. City of Coeur d'Alene, 121 Idaho 709, 827 P.2d 1160 (1992).

Cited Steiner Corp. v. American Dist. Tel., 106 Idaho 787, 683 P.2d 435 (1984).

§ 29-115. Construction contracts. — (1) This section is applicable with respect to all contracts entered into on or after July 1, 1990, between owners and original contractors relating to the construction of any private work of improvement.

(2) In any contract relating to the construction of any private work of improvement, the retention proceeds withheld by the owner from the original contractor or by the original contractor from any subcontractor from any payment shall not exceed five percent (5%) of the payment and in no event shall the total retention withheld exceed five percent (5%) of the contract price. However, the five percent (5%) maximum that may be withheld does not apply if the original contractor or the subcontractor fails to provide a performance bond issued by a surety acceptable to the owner or original contractor if requested to do so by the owner or original contractor respectively. The five percent (5%) maximum shall not apply to any contract for the performance of a private work of improvement to residential real property consisting of one (1) to four (4) units occupied or to be occupied by the owner.

(3) Within thirty-five (35) days from the date on which the work of improvement is substantially complete, as mutually agreed to by the parties to the contract, the retention withheld by the owner shall be reduced to the lesser of one hundred fifty percent (150%) of the estimated value of work yet to be completed in accordance with the contract or the retention then withheld by the owner, not to exceed five percent (5%) of the contract price.

Within thirty-five (35) days from the date of final completion of the work of improvement, the retention withheld by the owner shall be released, except in the event of a dispute between the owner and the original contractor, the owner may withhold from the final retention payment an amount not to exceed one hundred fifty percent (150%) of the estimated value of the issue in dispute. The owner may condition the final release of the retention upon receipt of satisfactory lien waivers from all persons with actual or potential lien claims on the work of improvement.

(4) Subject to subsection (5) of this section, within ten (10) days from the time that all or any portion of the retention proceeds are received by the

original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor.

(5) The original contractor shall not be required to pay the retention to a subcontractor if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed one hundred fifty percent (150%) of the estimated value of the work yet to be completed or issue in dispute.

(6) It shall be against public policy for any party to require any other party to waive any provision of this statute.

History.

I.C., § 29-115, as added by 1990, ch. 415, § 1, p. 1151; am. 1998, ch. 271, § 1, p. 899.

§ 29-116. Computer information agreements. — (1) In an action based on a computer information agreement that contains a choice of laws provision that would result in application of the uniform computer information transactions act to such computer information agreement, such choice of laws provision is voidable by the party against whom enforcement is sought, and the agreement will be governed by the laws of the state of Idaho if either party is a resident of this state or has its principal place of business located in this state.

(2) In an action based on a computer information agreement that does not contain a choice of laws provision, any party may object to the application of the uniform computer information transactions act to such computer information agreement. If such an objection is made, the agreement will be governed by the laws of the state of Idaho if either party is a resident of this state or has its principal place of business in this state.

(3) This section may not be varied or invalidated by the agreement of the parties.

(4) As used in this section: (a) "Computer information" means information in electronic form that is obtained from or through the use of a computer or that is in a form capable of being processed by a computer.

(b) "Computer information agreement" means a contract or agreement to create, modify, transfer, license or otherwise use computer information or rights in computer information, or to perform or support such creation, modification, transfer, license or use.

(c) "Party" means a party to a computer information agreement.

(d) "Uniform computer information transactions act" means the uniform computer information transactions act as approved by the national conference of commissioners on uniform state laws and enacted in any jurisdiction, or any substantially similar law enacted in any jurisdiction.

History.

I.C., § 29-116, as added by 2007, ch. 286, § 1, p. 815.

STATUTORY NOTES

Prior Laws.

Former § 29-116, which comprised I.C., § 29-116, as added by 1993, ch. 397, § 2, p. 1460, expired on July 1, 1995, was automatically repealed and became null and void pursuant to § 3 of S.L. 1993, ch. 397.

Compiler's Notes.

As of May 2018, the uniform computer transaction act had been adopted only in Virginia and Maryland. See *http://www.uniformlaws.org/shared/docs/computerinformationtransactions/ucita final02.pdf*.

Title 30
CORPORATIONS

Chapter

Chapter 1
GENERAL BUSINESS CORPORATIONS

Part 1. General Provisions

Sec.

30-1-101 — 30-1-141. [Repealed.]

Part 2. Incorporation

30-1-201 — 30-1-207. [Repealed.]

Part 3. Purposes and Powers

30-1-301 — 30-1-304. [Repealed.]

Part 4. Name

30-1-401 — 30-1-403. [Repealed.]

Part 5. Office and Agent

30-1-501 — 30-1-504. [Repealed.]

Part 6. Shares and Distributions

30-1-601 — 30-1-640. [Repealed.]

Part 7. Shareholders

30-1-701 — 30-1-747. [Repealed.]

Part 8. Directors and Officers

30-1-801 — 30-1-863. [Repealed.]

Part 9. Domestication

30-1-901 — 30-1-924. [Repealed.]

Part 10. Amendment of Articles of Incorporation and Bylaws

30-1-1001 — 30-1-1022. [Repealed.]

Part 11. Merger and Share Exchange

30-1-1100 — 30-1-1108. [Repealed.]

Part 12. Disposition of Assets

30-1-1201, 30-1-1202. [Repealed.]

Part 13. Appraisal Rights

30-1-1301 — 30-1-1331. [Repealed.]

Part 14. Dissolution

30-1-1401 — 30-1-1440. [Repealed.]

Part 15. Foreign Corporations

30-1-1501 — 30-1-1532. [Repealed.]

Part 16. Records and Reports

30-1-1601 — 30-1-1622. [Repealed.]

Part 17. Transition Provisions

30-1-1701 — 30-1-1704. [Repealed.]

Part 1
General Provisions

Idaho Code § 30-1-101 — 30-1-141

§ 30-1-101 — 30-1-141. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-101 et seq.

STATUTORY NOTES

Prior Laws.

A former Title 30, Chapter 1, consisting of sections 30-101 — 30-166, was repealed as follows:

30-101 — 30-103. Classification — Purpose — Articles of incorporation, which comprised 1929, ch. 262, §§ 1 to 3, p. 545; I.C.A., §§ 29-101 to 29-103; am. 1963, ch. 21, § 1, p. 162; am. 1963, ch. 282, § 15, p. 725; am. 1967, ch. 401, § 1, p. 207; am. 1969, ch. 182, § 1, p. 542; am. 1977, ch. 252, § 1, p. 738; am. 1978, ch. 308, §§ 3, 4, p. 771, were repealed by S. L. 1979, ch. 105, § 1.

30-104 — 30-106. Railroad, wagonroad, telephone or telegraph corporations, which comprised R.S., §§ 2580, 2582, 2583; 1905, p. 161, § 2; 1907, p. 472, § 1; reen. R.C. & C.L., §§ 2715, 2717, 2718; C.S., §§ 4697, 4699, 4700; I.C.A., §§ 29-104 to 29-106, were repealed by S.L. 1977, ch. 252, § 2.

30-107. Corporate name, which comprised I.C., § 30-107, as added by 1978, ch. 308, § 6, p. 771, was repealed by S.L. 1979, ch. 105, § 1.

30-108 — 30-117. Filing of articles — Corporate powers — Shares, which comprised 1864, p. 543, §§ 3, 15; R.S., §§ 2585, 2634, 2635; reen. R.C. & C.L., §§ 2720, 2770, 2771; C.S., §§ 4703, 4753, 4754; 1929, ch. 262, §§ 5 to 11, p. 545; I.C.A., §§ 29-108 to 29-117; am. 1965, ch. 160, § 1, p. 310, were repealed by S. L. 1979, ch. 105, § 1.

30-117A. Nonprofit corporations — Organization — Shares of stock or certificates of membership, which comprised I.C., § 30-117A, as added by 1967, ch. 401, § 2, p. 1207, was repealed by S.L. 1977, ch. 252, § 4.

30-118 — 30-166. Certificates, bylaws, dividends, elections, etc., which comprised S.L. 1864, p. 543, §§ 5, 23; R.S., §§ 2594, 2602, 2603, 2611, 2612, 2648, 2649; am. 1907, p. 540, § 2; R.C. & C.L., §§ 2730, 2738, 2739, 2747, 2748, 2787, 2788; am. 1913, ch. 2, § 1, p. 4; C.S., §§ 4713, 4721, 4722, 4730, 4731, 4767, 4768; am. 1927, ch. 88, § 24, p. 107; am. 1927, ch. 126, § 1, p. 170; am. 1927, ch. 219, § 1, p. 317; S.L. 1929, ch. 262, §§ 12 to 50, p. 545; I.C.A., §§ 29-118 to 29-164; am. 1935, ch. 58, § 1, p. 111; 1935 (1st E.S.), ch. 62, § 1, p. 180; am. 1937, ch. 172, § 1, p. 280; am. 1943, ch. 97, § 1, p. 191; am. 1945, ch. 24, § 1, p. 31; am. 1945, ch. 26, § 1, p. 32; am. 1945, ch. 36, § 1, p. 47; am. 1945, ch. 70, § 1, p. 93; am. 1957, ch. 95, §§ 1, 2, p. 166; am. 1963, ch. 117, § 1, p. 344; am. 1967, ch. 272, §§ 3, 4, p. 745; am. 1967, ch. 401, § 3, p. 1207; am. 1970, ch. 48, § 1, p. 98; am. 1971, ch. 251, § 1, p. 1006; am. 1972, ch. 45, § 1, p. 83; am. 1973, ch. 104, § 1, p. 178; I.C., § 30-166, as added by 1976, ch. 352, § 1, p. 1163; am. 1977, ch. 252, § 5, p. 738; am. 1978, ch. 308, §§ 7 to 10, p. 771, were repealed by S.L. 1979, ch. 105, § 1.

The following sections of the former Idaho Business Corporation Act were repealed by § 1 of S.L. 1997, ch. 366 unless otherwise noted. Where a section has a designation “Reserved” this means that the section number was reserved but that no such section was ever enacted.

30-1-1. Short title. I.C., § 30-1-1 as added by 1979 ch. 105, § 2, p. 251.

30-1-2. Definitions. I.C., § 30-1-2, as added by 1979 ch. 105, § 2, p. 251; am. 1980, ch. 197, § 1, p. 433.

30-1-3. Purposes. I.C., § 30-1-3, as added by 1979, ch. 105, § 2, p. 251.

30-1-4. General powers. I.C., § 30-1-4, as added by 1979, ch. 105, § 2, p. 251.

30-1-5. Indemnification of officers, directors, employees and agents. I.C., § 30-1-5, as added by 1979, ch. 105, § 2, p. 251; am. 1987, ch. 221, § 1, p. 471.

30-1-6. Right of corporation to acquire and dispose of its own shares. I.C., 30-1-6, as added by 1979, ch. 105, § 2, p. 251.

30-1-7. Defense of ultra vires. I.C., § 30-1-7, as added by 1979, ch. 105, § 2, p. 251.

30-1-8. Corporate name. I.C., § 30-1-8, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 405, § 1, p. 1272.

30-1-9. Reserved name. I.C., § 30-1-9, as added by 1979, ch. 105, § 2, p. 251.

30-1-10. Registered name. I.C., § 30-1-10, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 2, p. 117; am. 1994, ch. 405, § 2, p. 1272.

30-1-11. Renewal of registered name. I.C., § 30-1-11, as added by 1979, ch. 105, § 2, p. 251.

30-1-12. Registered office and registered agent. I.C., § 30-1-12, as added by 1979, ch. 105, § 2, p. 251.

30-1-13. Change of registered office or registered agent. I.C., § 30-1-13, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 1, p. 443; am. 1985, ch. 148, § 1, p. 394.

30-1-14. Service of process on corporation. I.C., § 30-1-14, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 2, p. 433.

30-1-15. Authorized shares. I.C., § 30-1-15, as added by 1979, ch. 105, § 2, p. 251.

30-1-16. Issuance of shares of preferred or special classes in series. I.C., § 30-1-16, as added by 1979, ch. 105, § 2, p. 251.

30-1-17. Subscriptions for shares. I.C., § 30-1-17, as added by 1979, ch. 105, § 2, p. 251.

30-1-18. Consideration for shares. I.C., § 30-1-18, as added by 1979, ch. 105, § 2, p. 251.

30-1-19. Payment for shares. I.C., § 30-1-19, as added by 1979, ch. 105, § 2, p. 251.

30-1-19A. Assessment and sale of shares. I.C., § 30-1-19A, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 3, p. 433.

30-1-20. Stock rights and options. I.C., § 30-1-20, as added by 1979, ch. 105, § 2, p. 251.

30-1-21. Determination of amount of stated capital. I.C., § 30-1-21, as added by 1979, ch. 105, § 2, p. 251.

30-1-22. Expenses of organization, reorganization and financing. I.C., § 30-1-22, as added by 1979, ch. 105, § 2, p. 251.

30-1-23. Certificates representing shares. I.C., § 30-1-23, as added by 1979, ch. 105, § 2, p. 251.

30-1-23A. Restriction on transfer of shares. I.C., § 30-1-23A, as added by 1979, ch. 105, § 2, p. 251.

30-1-24. Fractional shares. I.C., § 30-1-24, as added by 1979, ch. 105, § 2, p. 251.

30-1-25. Liability of subscribers and shareholders. I.C., § 30-1-25, as added by 1979, ch. 105, § 2, p. 251.

30-1-26. Shareholders' preemptive rights. I.C., § 30-1-26, as added by 1979, ch. 105, § 2, p. 251.

30-1-27. Bylaws. I.C., § 30-1-27, as added by 1979, ch. 105, § 2, p. 251.

30-1-28. Meetings of shareholders. I.C., § 30-1-28, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 4, p. 433.

30-1-29. Notice of shareholders' meetings. I.C., § 30-1-29, as added by 1979, ch. 105, § 2, p. 251; am. 1979, ch. 282, § 1, p. 724.

30-1-30. Closing of transfer books and fixing record date. I.C., § 30-1-30, as added by 1979, ch. 105, § 2, p. 251.

30-1-31. Voting record. I.C., § 30-1-31, as added by 1979, ch. 105, § 2, p. 251.

30-1-32. Quorum and voting requirements for shareholders' meetings. I.C., § 30-1-32, as added by 1979, ch. 105, § 2, p. 251.

30-1-33. Voting of shares — Proxies. I.C., § 30-1-33, as added by 1979, ch. 105, § 2, p. 251; am. 1983, ch. 201, § 1, p. 545.

30-1-34. Voting trusts and agreements among shareholders. I.C., § 30-1-34, as added by 1979, ch. 105, § 2, p. 251.

30-1-35. Board of directors. I.C., § 30-1-35, as added by 1979, ch. 105, § 2, 251; am. 1979, ch. 282, § 2, p. 724.

30-1-36. Number and election of directors. I.C., § 30-1-36, as added by 1979, ch. 105, § 2, p. 251.

30-1-37. Classification of directors. I.C., § 30-1-37, as added by 1983, ch. 166, § 2, p. 472.

30-1-38. Vacancies. I.C., § 30-1-38, as added by 1979, ch. 105, § 2, p. 251.

30-1-39. Removal of directors. I.C., § 30-1-39, as added by 1979, ch. 105, § 2, p. 251.

30-1-40. Quorum and voting requirements for directors' meetings. I.C., § 30-1-40, as added by 1979, ch. 105, § 2, p. 251.

30-1-41. Director conflicts of interest. I.C., § 30-1-41, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 5, p. 433.

30-1-42. Executive and other committees. I.C., § 30-1-42, as added by 1979, ch. 105, § 2, p. 251.

30-1-43. Place and notice of directors' meetings — Committee meetings. I.C., § 30-1-43, as added by 1979, ch. 105, § 2, p. 251.

30-1-44. Action by directors without a meeting. I.C., § 30-1-44, as added by 1979, ch. 105, § 2, p. 251.

30-1-45. Dividends. I.C., § 30-1-45, as added by 1979, ch. 105, § 2, p. 251.

30-1-46. Distributions from capital surplus. I.C., § 30-1-46, as added by 1979, ch. 105, § 2, p. 251.

30-1-47. Loans to employees and directors. I.C., § 30-1-47, as added by 1979, ch. 105, § 2, p. 251; am. 1979, ch. 282, § 3, p. 724.

30-1-48. Liability of directors in certain cases. I.C., § 30-1-48, as added by 1979, ch. 105, § 2, p. 251.

30-1-49. Provisions relating to actions by shareholders. I.C., § 30-1-49, as added by 1979, ch. 105, § 2, p. 251.

30-1-50. Officers. I.C., § 30-1-50, as added by 1979, ch. 105, § 2, p. 251.

30-1-51. Removal of officers. I.C., § 30-1-51, as added by 1979, ch. 105, § 2, p. 251.

30-1-52. Books and records. I.C., § 30-1-52, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 6, p. 433.

30-1-53. Incorporators. I.C., § 30-1-53, as added by 1979, ch. 105, § 2, p. 251.

30-1-54. Articles of incorporation. I.C., § 30-1-54, as added by 1979, ch. 105, § 2, p. 251; am. 1987, ch. 221, § 2, p. 471; am. 1995, ch. 126, § 1, p. 542.

30-1-55. Filing of articles of incorporation. I.C., § 30-1-55, as added by 1979, ch. 105, § 2, p. 251.

30-1-56. Effect of issuance of certificate of incorporation. I.C., § 30-1-56, as added by 1979, ch. 105, § 2, p. 251.

30-1-57. Organization meeting of directors. I.C., § 30-1-57, as added by 1979, ch. 105, § 2, p. 251.

30-1-58. Right to amend articles of incorporation. I.C., § 30-1-58, as added by 1979, ch. 105, § 2, p. 251.

30-1-59. Procedure to amend articles of incorporation. I.C., § 30-1-59, as added by 1979, ch. 105, § 2, p. 251; am. 1983, ch. 201, § 2, p. 545.

30-1-60. Class voting on amendments. I.C., § 30-1-60, as added by 1979, ch. 105, § 2, p. 251.

30-1-61. Articles of amendment. I.C., § 30-1-61, as added by 1979, ch. 105, § 2, p. 251; am. 1995, ch. 126, § 2, p. 542.

30-1-62. Filing of articles of amendment. I.C., § 30-1-62, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 3, p. 117.

30-1-63. Effect of certificate of amendment. I.C., § 30-1-63, as added by 1979, ch. 105, § 2, p. 251.

30-1-64. Restated articles of incorporation. I.C., § 30-1-64, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 4, p. 117; am. 1995, ch. 126, § 3, p. 542.

30-1-65. Amendment of articles of incorporation in reorganization proceedings. I.C., § 30-1-65, as added by 1979, ch. 105, § 2, p. 251; am.

1980, ch. 197, § 7, p. 433; am. 1984, ch. 67, § 5, p. 117; am. 1995, ch. 126, § 4, p. 542.

30-1-66. Restriction on redemption or repurchase of redeemable shares. I.C., § 30-1-66, as added by 1979, ch. 105, § 2, p. 251.

30-1-67. Cancellation of redeemable shares by redemption or purchase. I.C., § 30-1-67, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 6, p. 117; am. 1995, ch. 126, § 5, p. 542.

30-1-68. Cancellation of other reacquired shares. I.C., § 30-1-68, as added by 1979, ch. 105, § 2, p. 251.

30-1-69. Reduction of stated capital in certain cases. I.C., § 30-1-69, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 7, p. 117; am. 1995, ch. 126, § 6, p. 542.

30-1-70. Special provisions relating to surplus and reserves. I.C., § 30-1-70, as added by 1979, ch. 105, § 2, p. 251.

30-1-71. Procedure for merger. I.C., § 30-1-71, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 293, § 1, p. 916.

30-1-72. Procedure for consolidation. I.C., § 30-1-72, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 293, § 2, p. 916.

30-1-72A. Procedure for share exchange. I.C., § 30-1-72A, as added by 1979, ch. 105, § 2, p. 251.

30-1-73. Approval by shareholders. I.C., § 30-1-73, as added by 1979, ch. 105, § 2, p. 251.

30-1-74. Articles of merger — Consolidation or exchange. I.C., § 30-1-74, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 8, p. 117; am. 1995, ch. 126, § 7, p. 542.

30-1-75. Merger of subsidiary corporation. I.C., § 30-1-75, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 9, p. 117; am. 1995, ch. 126, § 8, p. 542.

30-1-76. Effect of merger, consolidation or exchange. I.C., § 30-1-76, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 293, § 3, p. 916.

30-1-77. Merger, consolidation or exchange of shares between domestic and foreign corporations and/or limited liability companies. I.C., § 30-1-77, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 8, p. 433; am. 1994, ch. 293, § 4, p. 916.

30-1-78. Sale of assets in regular course of business and mortgage or pledge of assets. I.C., § 30-1-78, as added by 1979, ch. 105, § 2, p. 251.

30-1-79. Sale of assets other than in regular course of business. I.C., § 30-1-79, as added by 1979, ch. 105, § 2, p. 251.

30-1-80. Right of shareholders to dissent and obtain payment for shares. I.C., § 30-1-80, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 2, p. 443.

30-1-81. Procedures for protection of dissenters' rights. I.C., § 30-1-81, as added by 1979, ch. 105, § 2, p. 251.

30-1-82. Voluntary dissolution by incorporators or initial directors. I.C., § 30-1-82, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 9, p. 433; am. 1984, ch. 67, § 10, p. 117; am. 1995, ch. 126, § 9, p. 542.

30-1-83. Voluntary dissolution by consent of shareholders. I.C., § 30-1-83, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 21, p. 433.

30-1-84. Voluntary dissolution by act of corporation. I.C., § 30-1-84, as added by 1979, ch. 105, § 2, p. 251.

30-1-85 — 30-1-86. [Reserved.]

30-1-87. Procedure after approval of dissolution. I.C., § 30-1-87, as added by 1979, ch. 105, § 2, p. 251.

30-1-88. Revocation of voluntary dissolution proceedings. I.C., § 30-1-88, as added by 1979, ch. 105, § 2, p. 251.

30-1-89 — 30-1-91. [Reserved.]

30-1-92. Articles of dissolution. I.C., § 30-1-92, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 22, p. 433; am. 1995, ch. 126, § 10, p. 542.

30-1-93. Filing of articles of dissolution. I.C., § 30-1-93, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 11, p. 117.

30-1-94. Involuntary dissolution. I.C., § 30-1-94, as added by 1979, ch. 105, § 2, p. 251.

30-1-95. Notification to Attorney General. I.C., § 30-1-95, as added by 1979, ch. 105, § 2, p. 251.

30-1-96. Venue and process. I.C., § 30-1-96, as added by 1979, ch. 105, § 2, p. 251.

30-1-97. Jurisdiction of court to liquidate assets and business of corporation. I.C., § 30-1-97, as added by 1979, ch. 105, § 2, p. 251.

30-1-98. Procedure in liquidation of corporation by court. I.C., § 30-1-98, as added by 1979, ch. 105, § 2, p. 251.

30-1-99. Qualifications of receivers. I.C., § 30-1-99, as added by 1979, ch. 105, § 2, p. 251.

30-1-100. Filing of claims in liquidation proceedings. I.C., § 30-1-100, as added by 1979, ch. 105, § 2, p. 251.

30-1-101. Discontinuance of liquidation proceedings. I.C., § 30-1-101, as added by 1979, ch. 105, § 2, p. 251.

30-1-102. Decree of involuntary dissolution. I.C., § 30-1-102, as added by 1979, ch. 105, § 2, p. 251.

30-1-103. Filing of decree of dissolution. I.C., § 30-1-103, as added by 1979, ch. 105, § 2, p. 251.

30-1-104. Deposit with state tax commission of amount due certain shareholders. I.C., § 30-1-104, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 36, § 2, p. 60.

30-1-105. Survival of remedy after dissolution. I.C., § 30-1-105, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 10, p. 433; am. 1988, ch. 9, § 1, p. 11.

30-1-106. Admission of foreign corporation. I.C., § 30-1-106, as added by 1979, ch. 105, § 2, p. 251; am. 1979, ch. 282, § 4, p. 724.

30-1-107. Powers of foreign corporation. I.C., § 30-1-107, as added by 1979, ch. 105, § 2, p. 251.

30-1-108. Corporate name of foreign corporation. I.C., § 30-1-108, as added by 1979, ch. 105, § 2, p. 251.

30-1-109. Change of name by foreign corporation. I.C., § 30-1-109, as added by 1979, ch. 105, § 2, p. 251.

30-1-110. Application for certificate of authority. I.C., § 30-1-110, as added by 1979, ch. 105, § 2, p. 251; am. 1985, ch. 148, § 2, p. 394; am. 1995, ch. 126, § 11, p. 542.

30-1-111. Filing of application for certificate of authority. I.C., § 30-1-111, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 12, p. 117.

30-1-112. Effect of certificate of authority. I.C., § 30-1-112, as added by 1979, ch. 105, § 2, p. 251.

30-1-113. Registered office and registered agent of foreign corporation. I.C., § 30-1-113, as added by 1979, ch. 105, § 2, p. 251.

30-1-114. Change of registered office or registered agent of foreign corporation. I.C., § 30-1-114, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 3, p. 443; am. 1985, ch. 148, § 3, p. 394.

30-1-115. Service of process on foreign corporation. I.C., § 30-1-115, as added by 1979, ch. 105, § 2, p. 251.

30-1-116, 30-1-117. Foreign corporation — Amendment of articles, merger. [Repealed.] These sections, which comprised I.C., §§ 30-1-116, 30-1-117, as added by 1979, ch. 105, § 2, p. 251, were repealed by S.L. 1984, ch. 67, § 13.

30-1-118. Amended certificate of authority. I.C., § 30-1-118, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 14, p. 117.

30-1-119. Withdrawal of foreign corporation. I.C., § 30-1-119, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 15, p. 117; am. 1995, ch. 126, § 12, p. 542.

30-1-120. Filing of application for withdrawal. I.C., § 30-1-120, as added by 1979, ch. 105, § 2, p. 251; am. 1984, ch. 67, § 16, p. 117.

30-1-121. Revocation of certificate of authority. I.C., § 30-1-121, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 11, p. 433.

30-1-122. Issuance of certificate of revocation. I.C., § 30-1-122, as added by 1979, ch. 105, § 2, p. 251.

30-1-123. Application to corporations heretofore authorized to transact business in this state. I.C., § 30-1-123, as added by 1979, ch. 105, § 2, p. 251.

30-1-124. Transacting business without certificate of authority. I.C., § 30-1-124, as added by 1979, ch. 105, § 2, p. 251.

30-1-125. Annual report of domestic and foreign corporations. I.C., § 30-1-125, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 4, p. 443; am. 1985, ch. 148, § 4, p. 394; am. 1995, ch. 126, § 13, p. 542.

30-1-126. Filing of annual report of domestic and foreign corporations. I.C., § 30-1-126, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 12, p. 433; am. 1982, ch. 233, § 1, p. 614; am. 1995, ch. 126, § 14, p. 542.

30-1-127. Fees and charges to be collected by Secretary of State. I.C., § 30-1-127, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 13, p. 433.

30-1-128. Fees for filing documents and issuing certificates. I.C., § 30-1-128, as added by 1979, ch. 105, § 2, p. 251; am. 1980, ch. 197, § 14, p. 433; am. 1983, ch. 191, § 1, p. 520; am. 1984, ch. 67, § 17, p. 117; am. 1985, ch. 148, § 5, p. 394; am. 1993, ch. 338, § 1, p. 1268.

30-1-129. Miscellaneous charges. I.C., § 30-1-129, as added by 1979, ch. 105, § 2, p. 251; am. 1994, ch. 405, § 3, p. 1272.

30-1-129A. Corporation defined. [Repealed.] This section, which comprised I.C., § 30-1-129A, as added by 1980, ch. 197, § 15, p. 433, was repealed by S.L. 1982, ch. 203, § 3, effective July 1, 1983.

30-1-130. Franchise tax payable by domestic and foreign corporations. [Repealed.] This section, which comprised I.C., § 30-1-130, as added by 1979, ch. 105, § 2, p. 251, was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-131. Collection of franchise tax — Priority over income tax. [Repealed.] This section, which comprised I.C., § 30-1-131, as added by 1979, ch. 105, § 2, p. 251, was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-132. Exempt corporations. [Repealed.] This section, which comprised I.C., § 30-1-132, as added by 1979, ch. 105, § 2, p. 251, was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-133. New corporations — Proration of minimum tax — Notice to tax commission. [Repealed.] This section, which comprised I.C., § 30-1-133, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 10, p. 443, was repealed by S.L. 1982, ch. 203, § 3, effective July 1, 1983.

30-1-134. Forfeiture of corporations. I.C., § 30-1-134, as added by 1979, ch. 105, § 2, p. 251; am. 1982, ch. 203, § 4, p. 533.

30-1-135. Consequences of forfeiture. I.C., § 30-1-135, as added by 1979, ch. 105, § 2, p. 251.

30-1-136. Trustees for forfeited corporations — Continuation of actions. I.C., § 30-1-136, as added by 1979, ch. 105, § 2, p. 251.

30-1-137. Reinstatement of corporations. I.C., § 30-1-137, as added by 1979, ch. 105, § 2, p. 251; am. 1982, ch. 203, § 5, p. 533.

30-1-137A. Limitation on amount of taxes and penalties on foreign corporations. [Repealed.] This section, which comprised I.C., § 30-1-137A, as added by 1982, ch. 203, § 6, p. 533, was repealed by S.L. 1982, ch. 203, § 3, effective July 1, 1983.

30-1-138. Dissolution of corporations ten years after forfeiture. I.C., § 30-1-138, as added by 1979, ch. 105, § 2, p. 251; am. 1981, ch. 226, § 11, p. 443.

30-1-139. Refund on franchise tax — When permitted. [Repealed.] This section, which comprised I.C., § 30-1-139, as added by 1979, ch. 105, § 2, p. 251 was repealed by S.L. 1982, ch. 203, § 1, effective for corporation taxable years ending on and after July 1, 1983.

30-1-140. [Reserved.]

30-1-141. Certificates and certified copies to be received in evidence. I.C., § 30-1-141, as added by 1979, ch. 105, § 2, p. 251.

30-1-142. Forms to be furnished by Secretary of State. I.C., § 30-1-142, as added by 1979, ch. 105, § 2, p. 251.

30-1-143. Greater voting requirements. I.C., § 30-1-143, as added by 1979, ch. 105, § 2, p. 251.

30-1-144. Waiver of notice. I.C., § 30-1-144, as added by 1979, ch. 105, § 2, p. 251.

30-1-145. Action by shareholders without a meeting. I.C., § 30-1-145, as added by 1979, ch. 105, § 2, p. 251.

30-1-146. Unauthorized assumption of corporate powers. I.C., § 30-1-146, as added by 1979, ch. 105, § 2, p. 251.

30-1-147. Application. I.C., § 30-1-147, as added by 1979, ch. 105, § 2, p. 251.

30-1-148. Application to foreign and interstate commerce. I.C., § 30-1-148, as added by 1979, ch. 105, § 2, p. 251.

30-1-149. Reservation of power. I.C., § 30-1-149, as added by 1979, ch. 105, § 2, p. 251.

30-1-150. Effect of repeal of prior acts. I.C., § 30-1-150, as added by 1979, ch. 105, § 2, p. 251.

30-1-151. Effect of invalidity of part of this act. I.C., § 30-1-151, as added by 1979, ch. 105, § 2, p. 251.

30-1-152. References to repealed laws. I.C., § 30-1-152, as added by 1979, ch. 105, § 2, p. 251.

30-1-153. Liability for false statement. I.C., § 30-1-153, as added by 1995, ch. 126, § 15, p. 542.

Compiler's Notes.

Title 30, Chapter 1, Part 1, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-101. Short title. [I.C., § 30-1-101, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-102. Reservation of power to amend or repeal. [I.C., § 30-1-102, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-120. Requirements for documents — Extrinsic facts. [I.C., § 30-1-120, as added by 1997, ch. 366, § 2, p. 1080; am. 1998, ch. 222, § 1, p. 764;

am. 2004, ch. 324, § 1, p. 907; am. 2007, ch. 314, § 2, p. 887.]

30-1-121. Forms. [I.C., § 30-1-121, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-122. Filing, service, and copying fees. [I.C., § 30-1-122, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 3, p. 887.]

30-1-123. Effective time and date of document. [I.C., § 30-1-123, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-124. Correcting filed document. [I.C., § 30-1-124, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-125. Filing duty of secretary of state. [I.C., § 30-1-125, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 4, p. 887.]

30-1-126. Appeal from secretary of state's refusal to file document. [I.C., § 30-1-126, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-127. Evidentiary effect of copy of filed document. [I.C., § 30-1-127, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-128. Certificate of existence. [I.C., § 30-1-128, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-129. Penalty for signing false document. [I.C., § 30-1-129, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-130. Powers of secretary of state. [I.C., § 30-1-130, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-140. Chapter definitions. [I.C., § 30-1-140, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 2, p. 907.]

30-1-141. Notice. [I.C., § 30-1-141, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 5, p. 887.]

Part 2
Incorporation

§ 30-1-201 — 30-1-207. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-201 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 2, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-201. Incorporators. [I.C., § 30-1-201, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-202. Articles of incorporation. [I.C., § 30-1-202, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 3, p. 907; am. 2007, ch. 314, § 6, p. 887.]

30-1-203. Incorporation. [I.C., § 30-1-203, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-204. Liability for preincorporation transactions. [I.C., § 30-1-204, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-205. Organization of corporation. [I.C., § 30-1-205, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-206. Bylaws. [I.C., § 30-1-206, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-207. Emergency bylaws. [I.C., § 30-1-207, as added by 1997, ch. 366, § 2, p. 1080.]

Part 3
Purposes and Powers

§ 30-1-301 — 30-1-304. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-301 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 3, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-301. Purposes. [I.C., § 30-1-301, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-302. General powers. [I.C., § 30-1-302, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-303. Emergency powers. [I.C., § 30-1-303, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-304. Ultra vires. [I.C., § 30-1-304, as added by 1997, ch. 366, § 2, p. 1080.]

Part 4
Name

§ 30-1-401 — 30-1-403. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-301 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 4, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-401. Corporate name. [I.C., § 30-1-401, as added by 1997, ch. 366, § 2, p. 1080; am. 1999, ch. 212, § 1, p. 563; am. 2005, ch. 272, § 1, p. 836; am. 2006, ch. 144, § 3, p. 407; am. 2008, ch. 176, § 2, p. 518.]

30-1-402. Reserved name. [I.C., § 30-1-402, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-403. Registered name. [I.C., § 30-1-403, as added by 1997, ch. 366, § 2, p. 1080; am. 1999, ch. 212, § 2, p. 563.]

Part 5
Office and Agent

Idaho Code § 30-1-501—30-1-504

§ 30-1-501 — 30-1-504. [Repealed.]

Repealed by S.L. 2007, ch. 314, § 7, effective July 1, 2007.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 5, which comprised the following sections, was repealed by S.L. 2007, ch. 314, § 7, effective July 1, 2007.

30-1-501. Registered office and registered agent. [I.C., § 30-1-501, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.] For present comparable provisions, see § 30-21-401 et seq.

30-1-502. Change of registered office or registered agent. [I.C., § 30-1-502, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.] For present comparable provisions, see § 30-21-401 et seq.

30-1-503. Resignation of registered agent. [I.C., § 30-1-503, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.] For present comparable provisions, see § 30-21-410.

30-1-504. Service on corporation. [I.C., § 30-1-504, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 7.] For present comparable provisions, see § 30-21-412.

Part 6
Shares and Distributions

§ 30-1-601 — 30-1-640. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-601 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 6, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-601. Authorized shares. [I.C., § 30-1-601, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 4, p. 907.]

30-1-602. Terms of class or series determined by board of directors. [I.C., § 30-1-602, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 5, p. 907.]

30-1-603. Issued and outstanding shares. [I.C., § 30-1-603, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-604. Fractional shares. [I.C., § 30-1-604, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-620. Subscription for shares before incorporation. [I.C., § 30-1-620, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-621. Issuance of shares. [I.C., § 30-1-621, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 6, p. 907.]

30-1-622. Liability of shareholders. [I.C., § 30-1-622, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-623. Share dividends. [I.C., § 30-1-623, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-624. Share options. [I.C., § 30-1-624, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 7, p. 907.]

30-1-625. Form and content of certificates. [I.C., § 30-1-625, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-626. Shares without certificates. [I.C., § 30-1-626, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-627. Restriction on transfer of shares and other securities. [I.C., § 30-1-627, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-628. Expense of issue. [I.C., § 30-1-628, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-630. Shareholders' preemptive rights. [I.C., § 30-1-630, as added by 1997, ch. 366, § 2, p. 1080; am. 2014, ch. 97, § 14, p. 265.]

30-1-631. Corporation's acquisition of its own shares. [I.C., § 30-1-631, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 8, p. 907.]

30-1-640. Distributions to shareholders. [I.C., § 30-1-640, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 9, p. 907.]

Part 7
Shareholders

§ 30-1-701 — 30-1-747. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-701 et seq.

STATUTORY NOTES

Prior Laws.

Another former § 30-1-740, which comprised I.C., § 30-1-740, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 1998, ch. 223, § 1

Compiler's Notes.

Title 30, Chapter 1, Part 7, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-701. Annual meeting. [I.C., § 30-1-701, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-702. Special meeting. [I.C., § 30-1-702, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 10, p. 907.]

30-1-703. Court-ordered meeting. [I.C., § 30-1-703, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 8, p. 887.]

30-1-704. Action without meeting. [I.C., § 30-1-704, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 11, p. 907.]

30-1-705. Notice of meeting. [I.C., § 30-1-705, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-706. Waiver of notice. [I.C., § 30-1-706, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-707. Record date. [I.C., § 30-1-707, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-708. Conduct of the meeting. [I.C., § 30-1-708, as added by 2004, ch. 324, § 12, p. 907.]

30-1-720. Shareholders' list for meeting. [I.C., § 30-1-720, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 9, p. 887.]

30-1-721. Voting entitlement of shares. [I.C., § 30-1-721, as added by 1998, ch. 222, § 2, p. 764.]

30-1-722. Proxies. [I.C., § 30-1-722, as added by 1997, ch. 366, § 2, p. 1080; am. 2001, ch. 62, § 1, p. 119; am. 2004, ch. 324, § 13, p. 907.]

30-1-723. Shares held by nominees. [I.C., § 30-1-723, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-724. Corporation's acceptance of votes. [I.C., § 30-1-724, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 14, p. 907.]

30-1-725. Quorum and voting requirements for voting groups. [I.C., § 30-1-725, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-726. Action by single and multiple voting groups. [I.C., § 30-1-726, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-727. Greater quorum or voting requirements. [I.C., § 30-1-727, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-728. Voting for directors — Cumulative voting. [I.C., § 30-1-728, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-729. Inspectors of election. [I.C., § 30-1-729, as added by 2004, ch. 324, § 15, p. 907.]

30-1-730. Voting trusts. [I.C., § 30-1-730, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-731. Voting agreements. [I.C., § 30-1-731, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-732. Shareholder agreements. [I.C., § 30-1-732, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-740. Definitions. [I.C., § 30-1-740, as added by 1998, ch. 223, § 2, p. 766.]

30-1-741. Standing. [I.C., § 30-1-741, as added by 1998, ch. 223, § 3, p. 766.]

30-1-742. Demand. [I.C., § 30-1-742, as added by 1998, ch. 223, § 4, p. 766.]

30-1-743. Stay of proceedings. [I.C., § 30-1-743, as added by 1998, ch. 223, § 5, p. 766.]

30-1-744. Dismissal. [I.C., § 30-1-744, as added by 1998, ch. 223, § 6, p. 766.]

30-1-745. Discontinuance or settlement. [I.C., § 30-1-745, as added by 1998, ch. 223, § 7, p. 766.]

30-1-746. Payment of expenses. [I.C., § 30-1-746, as added by 1998, ch. 223, § 8, p. 766.]

30-1-747. Applicability to foreign corporations. [I.C., § 30-1-747, as added by 1998, ch. 223, § 9, p. 766.]

Part 8
Directors and Officers

§ 30-1-801 — 30-1-863. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-801 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 8, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-801. Requirement for and duties of board of directors. [I.C., § 30-1-801, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 16, p. 907.]

30-1-802. Qualifications of directors. [I.C., § 30-1-802, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-803. Number and election of directors. [I.C., § 30-1-803, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 17, p. 907.]

30-1-804. Election of directors by certain classes of shareholders. [I.C., § 30-1-804, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-805. Terms of directors generally. [I.C., § 30-1-805, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-806. Staggered terms for directors. [I.C., § 30-1-806, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 18, p. 907.]

30-1-807. Resignation of directors. [I.C., § 30-1-807, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-808. Removal of directors by shareholders. [I.C., § 30-1-808, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-809. Removal of directors by judicial proceeding. [I.C., § 30-1-809, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 19, p. 907; am. 2007, ch. 314, § 10, p. 887.]

30-1-810. Vacancy on board. [I.C., § 30-1-810, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-811. Compensation of directors. [I.C., § 30-1-811, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-820. Meetings. [I.C., § 30-1-820, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-821. Action without meeting. [I.C., § 30-1-821, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 20, p. 907.]

30-1-822. Notice of meeting. [I.C., § 30-1-822, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-823. Waiver of notice. [I.C., § 30-1-823, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-824. Quorum and voting. [I.C., § 30-1-824, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-825. Committees. [I.C., § 30-1-825, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 21, p. 907.]

30-1-830. Standards for directors. [I.C., § 30-1-830, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 22, p. 907.]

30-1-831. Standards of liability for directors. [I.C., § 30-1-831, as added by 2004, ch. 324, § 23, p. 907.]

30-1-833. Directors' liability for unlawful distributions. [I.C., § 30-1-833, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 24, p. 907.]

30-1-840. Required offices. [I.C., § 30-1-840, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 25, p. 907.]

30-1-841. Duties of officers. [I.C., § 30-1-841, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-842. Standards of conduct for officers. [I.C., § 30-1-842, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 26, p. 907.]

30-1-843. Resignation and removal of officers. [I.C., § 30-1-843, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 27, p. 907.]

30-1-844. Contract rights of officers. [I.C., § 30-1-844, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-850. Definitions. [I.C., § 30-1-850, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-851. Permissible indemnification. [I.C., § 30-1-851, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-852. Mandatory indemnification. [I.C., § 30-1-852, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-853. Advance for expenses. [I.C., § 30-1-853, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-854. Court-ordered indemnification and advance for expenses. [I.C., § 30-1-854, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-855. Determination and authorization of indemnification. [I.C., § 30-1-855, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-856. Officers. [I.C., § 30-1-856, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-857. Insurance. [I.C., § 30-1-857, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-858. Variation by corporate action — Application of indemnification provisions. [I.C., § 30-1-858, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 28, p. 907; am. 2007, ch. 116, § 2, p. 333.]

30-1-859. Exclusivity. [I.C., § 30-1-859, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-860. Definitions. [I.C., § 30-1-860, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-861. Judicial action. [I.C., § 30-1-861, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-862. Directors' action. [I.C., § 30-1-862, as added by 1997, ch. 366, § 2, p. 1080.] Annotations 30-1-863. Shareholders' action. [I.C., § 30-1-863, as added by 1997, ch. 366, § 2, p. 1080.]

Part 9
Domestication

§ 30-1-901 — 30-1-924. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

The following sections were previously repealed:

30-1-901. Excluded transactions, which comprised I.C., § 30-1-901, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. For present comparable provisions, see § 30-22-101 et seq.

30-1-902. Required approvals, which comprised I.C., § 30-1-901, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. For present comparable provisions, see § 30-22-101 et seq.

30-1-920. Domestication, which comprised I.C., § 30-1-901, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. For present comparable provisions, see § 30-22-101 et seq.

30-1-922. Articles of domestication, which comprised I.C., § 30-1-901, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. For present comparable provisions, see § 30-22-101 et seq.

30-1-924. Effect of domestication, which comprised I.C., § 30-1-901, as added by 2004, ch. 324, § 29, p. 907, was repealed by S.L. 2008, ch. 36, § 1, conforming Idaho law to the revised Model Entity Transactions Act. For present comparable provisions, see § 30-22-101 et seq.

Part 10
Amendment of Articles of Incorporation and Bylaws

§ 30-1-1001 — 30-1-1022. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-1001 et seq.

STATUTORY NOTES

Prior Laws.

Another former § 30-1-1021, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2004, ch. 324, § 40.

Compiler's Notes.

Title 30, Chapter 1, Part 10, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1001. Authority to amend articles of incorporation. [I.C., § 30-1-1001, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 30, p. 907.]

30-1-1002. Amendment before issuance of shares. [I.C., § 30-1-1005, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 34, p. 907.]

30-1-1003. Amendment by board of directors and shareholders. [I.C., § 30-1-1003, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 32, p. 907.]

30-1-1004. Voting on amendments by voting groups. [I.C., § 30-1-1004, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 33, p. 907.]

30-1-1005. Amendment by board of directors. [I.C., § 30-1-1005, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 31, p. 907; am. 2007, ch. 314, § 11, p. 887.]

30-1-1006. Articles of amendment. [I.C., § 30-1-1005, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 31, p. 907; am. 2007, ch. 314, § 11, p. 887.]

30-1-1007. Restated articles of incorporation. [I.C., § 30-1-1007, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 36, p. 907.]

30-1-1008. Amendment pursuant to reorganization. [I.C., § 30-1-1008, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 37, p. 907.]

30-1-1009. Effect of amendment. [I.C., § 30-1-1009, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 38, p. 907.]

30-1-1020. Amendment by board of directors or shareholders. [I.C., § 30-1-1020, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 39, p. 907.]

30-1-1021. Bylaw increasing quorum or voting requirement for directors. [I.C., § 30-1-1022, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 41, p. 907.]

Former § 30-1-1022 was amended and redesignated as § 30-1-1021 by S.L. 2004, ch. 324, § 41 and then repealed by S.L. 2015, ch. 243, § 1.

Part 11
Merger and Share Exchange

Idaho Code § 30-1-1100—30-1-1108

§ 30-1-1100 — 30-1-1108. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-1101 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 11, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1100. Applicability of Idaho entity transactions act. [I.C., § 30-1-1100, as added by 2007, ch. 116, § 3, p. 333.]

30-1-1101. Definitions. [I.C., § 30-1-1101, as added by 2004, ch. 324, § 42, p. 907.]

30-1-1102. Merger. [I.C., § 30-1-1101, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 43, p. 907.]

30-1-1103. Share exchange. [I.C., § 30-1-1102, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 44, p. 907.]

30-1-1104. Action on a plan of merger or share exchange. [I.C., § 30-1-1103, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 45, p. 907.]

30-1-1105. Merger between parent and subsidiary or between subsidiaries. [I.C., § 30-1-1104, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 46, p. 907.]

30-1-1106. Articles of merger or share exchange. [I.C., § 30-1-1105, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 47, p. 907.]

30-1-1107. Effect of merger or share exchange. [I.C., § 30-1-1106, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 48, p. 907; am. 2007, ch. 314, § 12, p. 887.]

30-1-1108. Abandonment of a merger or share exchange. [I.C., § 30-1-1108, as added by 2004, ch. 324, § 50, p. 907.]

Another former § 30-1-1101 was amended and redesignated as § 30-1-1102 in 2004.

Part 12
Disposition of Assets

§ 30-1-1201, 30-1-1202. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-1201 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 12, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1201. Disposition of assets not requiring shareholder approval. [I.C., § 30-1-1201, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 52, p. 907.]

30-1-1202. Shareholder approval of certain dispositions. [I.C., § 30-1-1202, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 53, p. 907.]

Part 13
Appraisal Rights

Idaho Code § 30-1-1301—30-1-1331

§ 30-1-1301 — 30-1-1331. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-1301 et seq.

STATUTORY NOTES

Prior Laws.

Another former § 30-1-1324, as added by S.L. 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2004, ch. 324, § 62.

Another former § 30-1-1326, as added by S.L. 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2004, ch. 324, § 64.

Compiler's Notes.

Title 30, Chapter 1, Part 13, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1301. Definitions. [I.C., § 30-1-1301, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 55, p. 907.]

30-1-1302. Right to appraisal. [I.C., § 30-1-1302, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 56, p. 907; am. 2014, ch. 97, § 15, p. 265.]

30-1-1303. Assertion of rights by nominees and beneficial owners. [I.C., § 30-1-1303, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 57, p. 907.]

30-1-1320. Notice of appraisal rights. [I.C., § 30-1-1320, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 58, p. 907.]

30-1-1321. Notice of intent to demand payment. [I.C., § 30-1-1321, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 59, p. 907.]

30-1-1322. Appraisal notice and form. [I.C., § 30-1-1322, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 60, p. 907.]

30-1-1323. Perfection of rights — Right to withdraw. [I.C., § 30-1-1323, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 61, p. 907.]

30-1-1324. Payment. [I.C., § 30-1-1325, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 63, p. 907.]

30-1-1325. After-acquired shares. [I.C., § 30-1-1327, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 65, p. 907.]

30-1-1326. Procedure if shareholder dissatisfied with payment or offer. [I.C., § 30-1-1328, as added by 1997, ch. 366, § 2, p. 1080; am. and redesig. 2004, ch. 324, § 66, p. 907.]

Former §§ 30-1-1327 and 30-1-1328 were amended and redesignated as §§ 30-1-1325 and 30-1-1326 by S.L. 2004, ch. 324, § 65 and later repealed by S.L. 2015, ch. 243, § 1.

30-1-1330. Court action. [I.C., § 30-1-1330, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 67, p. 907; am. 2007, ch. 314, § 13, p. 887.]

30-1-1331. Court costs and counsel fees. [I.C., § 30-1-1331, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 68, p. 907.]

Part 14
Dissolution

§ 30-1-1401 — 30-1-1440. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-1401 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 14, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1401. Dissolution by incorporators or initial directors. [I.C., § 30-1-1401, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1402. Dissolution by board of directors and shareholders. [I.C., § 30-1-1402, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 69, p. 907.]

30-1-1403. Articles of dissolution. [I.C., § 30-1-1403, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 70, p. 907.]

30-1-1404. Revocation of dissolution. [I.C., § 30-1-1404, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 71, p. 907.]

30-1-1405. Effect of dissolution. [I.C., § 30-1-1405, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1406. Known claims against dissolved corporation. [I.C., § 30-1-1406, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 72, p. 907.]

30-1-1407. Other claims against dissolved corporation. [I.C., § 30-1-1407, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 73, p. 907; am. 2007, ch. 314, § 14, p. 887.]

30-1-1408. Court proceeding. [I.C., § 30-1-1408, as added by 2004, ch. 324, § 74, p. 907; am. 2007, ch. 314, § 15, p. 887.]

30-1-1409. Director duties. [I.C., § 30-1-1409, as added by 2004, ch. 324, § 75, p. 907.]

30-1-1420. Grounds for administrative dissolution. [I.C., § 30-1-1420, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 16, p. 887.]

30-1-1421. Procedure for and effect of administrative dissolution. [I.C., § 30-1-1421, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 17, p. 887.]

30-1-1422. Reinstatement following administrative dissolution. [I.C., § 30-1-1422, as added by 1997, ch. 366, § 2, p. 1080; am. 2000, ch. 325, § 1, p. 1095.]

30-1-1423. Appeal from denial of reinstatement. [I.C., § 30-1-1423, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1430. Grounds for judicial dissolution. [I.C., § 30-1-1430, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1431. Procedure for judicial dissolution. [I.C., § 30-1-1431, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 18, p. 887.]

30-1-1432. Receivership or custodianship. [I.C., § 30-1-1432, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1433. Decree of dissolution. [I.C., § 30-1-1433, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1434. Election to purchase in lieu of dissolution. [I.C., § 30-1-1434, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1440. Deposit with state treasurer. [I.C., § 30-1-1440, as added by 1997, ch. 366, § 2, p. 1080.]

Part 15
Foreign Corporations

§ 30-1-1501 — 30-1-1532. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-501 et seq.

STATUTORY NOTES

Prior Laws.

Former § 30-1-1507, which comprised I.C., § 30-1-1507, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 21. For present comparable provisions, see § 30-21-401 et seq Former § 30-1-1508, which comprised I.C., § 30-1-1508, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 21. For present comparable provisions, see § 30-21-401 et seq.

Former § 30-1-1509, which comprised I.C., § 30-1-1509, as added by 1997, ch. 366, § 2, p. 1080, was repealed by S.L. 2007, ch. 314, § 21. For present comparable provisions, see § 30-21-401 et seq.

Compiler's Notes.

Title 30, Chapter 1, Part 15, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1501. Authority to transact business required. [I.C., § 30-1-1501, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1502. Consequences of transacting business without authority. [I.C., § 30-1-1502, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1503. Application for certificate of authority. [I.C., § 30-1-1503, as added by 1997, ch. 366, § 2, p. 1080; am. 2000, ch. 124, § 1, p. 291; am. 2007, ch. 314, § 19, p. 887.]

30-1-1504. Amended certificate of authority. [I.C., § 30-1-1504, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 20, p. 887.]

30-1-1505. Effect of certificate of authority. [I.C., § 30-1-1505, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1506. Corporate name of foreign corporation. [I.C., § 30-1-1506, as added by 1997, ch. 366, § 2, p. 1080; am. 2000, ch. 325, § 2, p. 1095.]

30-1-1510. Service on foreign corporation. [I.C., § 30-1-1510, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1520. Withdrawal of foreign corporation. [I.C., § 30-1-1520, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1530. Grounds for revocation of certificate of authority. [I.C., § 30-1-1530, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 22, p. 887.]

30-1-1531. Procedure for and effect of revocation. [I.C., § 30-1-1531, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1532. Appeal from revocation. [I.C., § 30-1-1532, as added by 1997, ch. 366, § 2, p. 1080.]

Part 16
Records and Reports

§ 30-1-1601 — 30-1-1622. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-1601 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 16, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1601. Corporate records. [I.C., § 30-1-1601, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 76, p. 907.]

30-1-1602. Inspection of records by shareholders. [I.C., § 30-1-1602, as added by 1997, ch. 366, § 2, p. 1080.]@t 30-1-1603. Scope of inspection right. [I.C., § 30-1-1603, as added by 1997, ch. 366, § 2, p. 1080; am. 2004, ch. 324, § 77, p. 907.]

30-1-1604. Court-ordered inspection. [I.C., § 30-1-1604, as added by 1997, ch. 366, § 2, p. 1080; am. 2007, ch. 314, § 23, p. 887.]

30-1-1605. Inspection of records by directors. [I.C., § 30-1-1605, as added by 2004, ch. 324, § 78, p. 907; am. 2007, ch. 314, § 24, p. 887.]

30-1-1606. Exception to notice requirement. [I.C., § 30-1-1606, as added by 2004, ch. 324, § 79, p. 907.]

30-1-1620. Financial statements for shareholders. [I.C., § 30-1-1620, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1621. Other reports to shareholders. [I.C., § 30-1-1621, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1622. Annual report for secretary of state. [I.C., § 30-1-1622, as added by 1997, ch. 366, § 2, p. 1080; am. 1998, ch. 222, § 3, p. 744; am.

1999, ch. 210, § 1, p. 562; am. 2003, ch. 207, § 1, p. 550; am. 2005, ch. 274, § 1, p. 842; am. 2007, ch. 314, § 25, p. 887.]

Part 17
Transition Provisions

§ 30-1-1701 — 30-1-1704. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015. For present comparable provisions, see § 30-29-1701 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 1, Part 17, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 1, effective July 1, 2015.

30-1-1701. Application of chapter to existing domestic corporations. [I.C., § 30-1-1701, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1702. Application to qualified foreign corporations. [I.C., § 30-1-1702, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1703. Saving provisions. [I.C., § 30-1-1703, as added by 1997, ch. 366, § 2, p. 1080.]

30-1-1704. Severability. [I.C., § 30-1-1704, as added by 1997, ch. 366, § 2, p. 1080.]

Chapter 2
SALE OF FRANCHISE ON EXECUTION

Sec.

§ 30-201. Franchise may be levied upon. — For the satisfaction of any judgment against a person, firm, association, company, or corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property.

History.

R.S., § 2642; reen. R.C. & C.L., § 2778; C.S., § 4761; I.C.A., § 29-201; am. 1941, ch. 102, § 1, p. 183.

STATUTORY NOTES

Cross References.

Levy and sale under execution, § 11-301 et seq.

§ 30-202. Purchaser to conduct business. — The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof, and must thereafter conduct the business of such person, firm, association, company or corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same as hereinafter provided.

History.

R.S., § 2643; reen. R.C. & C.L., § 2779; C.S., § 4762; I.C.A., § 29-202; am. 1941, ch. 102, § 2, p. 183.

§ 30-203. Actions by purchaser. — The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the person, firm, association, company or corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same and may use the name of the person, firm, association, company, or corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalties thus had, is a bar to any subsequent action by or on behalf of the person, firm, association, company, or corporation for the same.

History.

R.S., § 2644; reen. R.C. & C.L., § 2780; C.S., § 4763; I.C.A., § 29-203; am. 1941, ch. 102, § 3, p. 183.

§ 30-204. Effect of sale. — The person, firm, association, company, or corporation whose franchise is sold, as in this chapter provided, in all other respects retains the same powers, is bound to discharge the same duties, and is liable to the same penalties and forfeitures as before such sale.

History.

R.S., § 2645; reen. R.C. & C.L., § 2781; C.S., § 4764; I.C.A., § 29-204; am. 1941, ch. 102, § 4, p. 183.

§ 30-205. Redemption from sale. — The person, firm, association, company, or corporation may, at any time within one (1) year after such sale, redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor, with ten per cent (10%) interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof revert and belong to the person, firm, association, company, or corporation, as if no such sale had been made.

History.

R.S., § 2646; reen. R.C. & C.L., § 2782; C.S., § 4765; I.C.A., § 29-205; am. 1941, ch. 102, § 5, p. 183.

§ 30-206. Place of sale. — The sale of any franchise under execution must be made in the county in which the person, firm, association, company, or corporation has its principal place of business.

History.

R.S., § 2647; reen. R.C. & C.L., § 2783; C.S., § 4766; I.C.A., § 29-206; am. 1941, ch. 102, § 6, p. 183.

Chapter 3
IDAHO NONPROFIT CORPORATION ACT

Sec.

30-3-1 — 30-3-145. [Repealed.]

§ 30-3-1 — 30-3-145. [Repealed.]

Repealed by S.L. 2015, ch. 337, § 3, effective July 1, 2015. For present comparable provisions, see § 30-30-101 et seq.

STATUTORY NOTES

Prior Laws.

The following former sections were repealed by S.L. 1993, ch. 220, § 1, effective July 1, 1993:

30-301. (I.C., § 30-301, as added by 1979, ch. 159, § 3, p. 486.)

30-302. (I.C., § 30-302, as added by 1979, ch. 159, § 3, p. 486.)

30-303. (I.C., § 30-303, as added by 1979, ch. 159, § 3, p. 486.)

30-304. (I.C., § 30-304, as added by 1979, ch. 159, § 3, p. 486.)

30-305. (I.C., § 30-305, as added by 1979, ch. 159, § 3, p. 486.)

30-306. (I.C., § 30-306, as added by 1979, ch. 159, § 3, p. 486; am. 1989, ch. 240, § 1, p. 586.)

30-307. (I.C., § 30-307, as added by 1979, ch. 159, § 3, p. 486.)

30-308. (I.C., § 30-308, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 16, p. 433.)

30-308A. (I.C., § 30-308A, as added by 1980, ch. 197, § 23, p. 433.)

30-309. (I.C., § 30-309, as added by 1979, ch. 159, § 3, p. 486.)

30-310. (I.C., § 30-310, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 33, p. 433.)

30-311. (I.C., § 30-311, as added by 1979, ch. 159, § 3, p. 486.)

30-312. (I.C., § 30-312, as added by 1979, ch. 159, § 3, p. 486.)

30-313. (I.C., § 30-313, as added by 1979, ch. 159, § 3, p. 486; am. 1982, ch. 233, § 2, p. 614.)

30-314. (I.C., § 30-314, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 17, p. 433; am. 1981, ch. 226, § 5, p. 443; am. 1982, ch. 233, § 3, p. 614.) 30-315. (I.C., § 30-315, as added by 1979, ch. 159, § 3, p. 486.)

30-316. (I.C., § 30-316, as added by 1979, ch. 159, § 3, p. 486; am. 1986, ch. 178, § 1, p. 468.)

30-317. (I.C., § 30-317, as added by 1979, ch. 159, § 3, p. 486.)

30-318. (I.C., § 30-318, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 18, p. 433.)

30-319. (I.C., § 30-319, as added by 1979, ch. 159, § 3, p. 486.)

30-320. (I.C., § 30-320, as added by 1979, ch. 159, § 3, p. 486.)

30-321. (I.C., § 30-321, as added by 1979, ch. 159, § 3, p. 486.)

30-322. (I.C., § 30-322, as added by 1979, ch. 159, § 3, p. 486.)

30-323. (I.C., § 30-323, as added by 1979, ch. 159, § 3, p. 486; am. 1980, ch. 197, § 19, p. 433; am. 1981, ch. 226, § 6, p. 433; am. 1982, ch. 233, § 4, p. 614.) 30-324. (I.C., § 30-324, as added by 1979, ch. 159, § 3, p. 486.)

30-325. (I.C., § 30-325, as added by 1979, ch. 159, § 3, p. 486.)

30-326. (I.C., § 30-326, as added by 1979, ch. 159, § 3, p. 486.)

30-327. (I.C., § 30-327, as added by 1979, ch. 159, § 3, p. 486.)

30-328. (I.C., § 30-328, as added by 1979, ch. 159, § 3, p. 486.)

30-329. (I.C., § 30-329, as added by 1979, ch. 159, § 3, p. 486; am. 1981, ch. 49, § 3, p. 72; am. 1993, ch. 338, § 2.) 30-330. (I.C., § 30-330, as added by 1979, ch. 159, § 3, p. 486.)

30-331. (I.C., § 30-331, as added by 1979, ch. 159, § 3, p. 486.)

30-332. (I.C., § 30-332, as added by 1979, ch. 159, § 3, p. 486.)

A former version of §§ 30-301 to 30-307, which comprised C.C.P. 1881, §§ 844to 850, R.S., R.C. & C.L., §§ 5185 to 5191; C.S., §§ 7397 to 7403; I.C.A., §§ 29-301 to 29-307; am. 1945, ch. 31, §§ 1, 2, p. 38; am. 1977, ch. 252, § 6, p. 738, were repealed by S.L. 1978, ch. 60, § 1.

Another former version of §§ 30-301 to 30-306, which comprised I.C., §§ 30-301 to 30-306, as added by 1978, ch. 60, § 2, p. 118, were repealed

by S.L. 1979, ch. 105, § 1.

Another former version of § 30-3-127, as added by 1993, ch. 220, § 2, was repealed by S.L. 1998, ch. 267, § 9.

Compiler's Notes.

Chapter 3 of Title 30, which comprised the following sections, was repealed by S.L. 2015, ch. 337, § 3, effective July 1, 2015.

30-3-1. Short title. [I.C., § 30-3-1, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 1, p. 854.]

30-3-2. Filing requirements. [I.C., § 30-3-2, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 1, p. 878; am. 2007, ch. 314, § 26, p. 887.]

30-3-3. Forms. [I.C., § 30-3-3, as added by 1993, ch. 220, § 2, p. 685.]

30-3-4. Filing, service and copying fees. [I.C., § 30-3-4, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 2, p. 878; am. 1999, ch. 211, § 1, p. 563; am. 2007, ch. 314, § 27, p. 887.]

30-3-5. Effective date of document. [I.C., § 30-3-5, as added by 1993, ch. 220, § 2, p. 685.]

30-3-6. Correcting filed document. [I.C., § 30-3-6, as added by 1993, ch. 220, § 2, p. 685.]

30-3-7. Filing duty of secretary of state. [I.C., § 30-3-7, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 28, p. 887.]

30-3-8. Appeal from secretary of state's refusal to file document. [I.C., § 30-3-8, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 29, p. 887.]

30-3-9. Evidentiary effect of copy of filed document. [I.C., § 30-3-9, as added by 1993, ch. 220, § 2, p. 685.]

30-3-10. Certificate of existence. [I.C., § 30-3-10, as added by 1993, ch. 220, § 2, p. 685.]

30-3-11. Definitions. [I.C., § 30-3-11, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 2, p. 854.]

30-3-12. Notice. [I.C., § 30-3-12, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 3, p. 878.]

30-3-13. Private foundation. [I.C., § 30-3-13, as added by 1993, ch. 220, § 2, p. 685; am. 1994, ch. 190, § 8, p. 617.]

30-3-14. Judicial relief. [I.C., § 30-3-14, as added by 1993, ch. 220, § 2, p. 685; am. 2001, ch. 29, § 14, p. 35.]

30-3-15. Religious corporations — Constitutional protections. [I.C., § 30-3-15, as added by 1993, ch. 220, § 2, p. 685.]

30-3-16. Incorporators. [I.C., § 30-3-16, as added by 1993, ch. 220, § 2, p. 685.]

30-3-17. Articles of incorporation. [I.C., § 30-3-17, as added by 1993, ch. 220, § 2, p. 685; am. 1994, ch. 295, § 1, p. 932; am. 1997, ch. 282, § 3, p. 854; am. 2007, ch. 314, § 30, p. 887.]

30-3-18. Incorporation. [I.C., § 30-3-18, as added by 1993, ch. 220, § 2, p. 685.]

30-3-19. Liability for preincorporation transactions. [I.C., § 30-3-19, as added by 1993, ch. 220, § 2, p. 685.]

30-3-20. Organization of corporation. [I.C., § 30-3-20, as added by 1993, ch. 220, § 2, p. 685; am. 2014, ch. 97, § 16, p. 265.]

30-3-21. Bylaws. [I.C., § 30-3-21, as added by 1993, ch. 220, § 2, p. 685.]

30-3-22. Emergency bylaws and powers. [I.C., § 30-3-22, as added by 1993, ch. 220, § 2, p. 685.]

30-3-23. Purposes. [I.C., § 30-3-23, as added by 1993, ch. 220, § 2, p. 685.]

30-3-24. General powers. [I.C., § 30-3-24, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 4, p. 854.]

30-3-25. Emergency powers. [I.C., § 30-3-25, as added by 1993, ch. 220, § 2, p. 685.]

30-3-26. Ultra vires. [I.C., § 30-3-26, as added by 1993, ch. 220, § 2, p. 685.]

30-3-27. Corporate name. [I.C., § 30-3-27, as added by 1993, ch. 220, § 2, p. 685; am. 1999, ch. 212, § 3, p. 568; am. 2005, ch. 272, § 2, p. 836.]

30-3-28. Reserved name. [I.C., § 30-3-28, as added by 1993, ch. 220, § 2, p. 685.]

30-3-29. Registered name. [I.C., § 30-3-29, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 4, p. 878; am. 1999, ch. 212, § 4, p. 563.]

30-3-34. Admission of members. [I.C., § 30-3-34, as added by 1993, ch. 220, § 2, p. 685.]

30-3-35. Consideration. [I.C., § 30-3-35, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 5, p. 854.]

30-3-36. No requirement of members. [I.C., § 30-3-36, as added by 1993, ch. 220, § 2, p. 685.]

30-3-37. Differences in rights and obligations of members. [I.C., § 30-3-37, as added by 1993, ch. 220, § 2, p. 685.]

30-3-38. Transfers. [I.C., § 30-3-38, as added by 1993, ch. 220, § 2, p. 685.]

30-3-39. Member's liability to third parties. [I.C., § 30-3-39, as added by 1993, ch. 220, § 2, p. 685.]

30-3-40. Member's liability for dues, assessments and fees. [I.C., § 30-3-40, as added by 1993, ch. 220, § 2, p. 685; am. 1994, ch. 295, § 2, p. 932.]

30-3-41. Resignation. [I.C., § 30-3-41, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 6, p. 854.]

30-3-42. Termination, expulsion and suspension. [I.C., § 30-3-42, as added by 1993, ch. 220, § 2, p. 685.]

30-3-43. Purchase of memberships. [I.C., § 30-3-43, as added by 1993, ch. 220, § 2, p. 685.]

30-3-44. Derivative suits. [I.C., § 30-3-44, as added by 1993, ch. 220, § 2, p. 685.]

30-3-45. Delegates. [I.C., § 30-3-45, as added by 1993, ch. 220, § 2, p. 685.]

30-3-46. Annual and regular meetings. [I.C., § 30-3-46, as added by 1993, ch. 220, § 2, p. 685.]

30-3-47. Special meeting. [I.C., § 30-3-47, as added by 1993, ch. 220, § 2, p. 685.]

30-3-48. Court-ordered meetings. [I.C., § 30-3-48, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 32, p. 887.]

30-3-49. Action by written consent. [I.C., § 30-3-49, as added by 1993, ch. 220, § 2, p. 685.]

30-3-50. Notice of meeting. [I.C., § 30-3-50, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 116, § 4, p. 333.]

30-3-51. Waiver of notice. [I.C., § 30-3-51, as added by 1993, ch. 220, § 2, p. 685.]

30-3-52. Record date — Determining members entitled to notice and vote. [I.C., § 30-3-52, as added by 1993, ch. 220, § 2, p. 685.]

30-3-53. Action by mailed written ballot or absentee ballot. [I.C., § 30-3-53, as added by 1993, ch. 220, § 2, p. 685.]

30-3-54. Members' list for meeting. [I.C., § 30-3-54, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 33, p. 887.]

30-3-55. Voting entitlement generally. [I.C., § 30-3-55, as added by 1993, ch. 220, § 2, p. 685; am. 1997, ch. 282, § 7, p. 854.]

30-3-56. Quorum requirements. [I.C., § 30-3-56, as added by 1993, ch. 220, § 2, p. 685.]

30-3-57. Voting requirements. [I.C., § 30-3-57, as added by 1993, ch. 220, § 2, p. 685.]

30-3-58. Proxies. [I.C., § 30-3-58, as added by 1993, ch. 220, § 2, p. 685.]

30-3-59. Cumulative voting for directors. [I.C., § 30-3-59, as added by 1993, ch. 220, § 2, p. 685.]

30-3-60. Other methods of electing directors. [I.C., § 30-3-60, as added by 1993, ch. 220, § 2, p. 685.]

30-3-61. Corporation's acceptance of votes. [I.C., § 30-3-61, as added by 1993, ch. 220, § 2, p. 685.]

30-3-62. Voting agreements. [I.C., § 30-3-62, as added by 1993, ch. 220, § 2, p. 685.]

30-3-63. Requirement for and duties of board. [I.C., § 30-3-63, as added by 1993, ch. 220, § 2, p. 685.]

30-3-64. Qualifications of directors. [I.C., § 30-3-64, as added by 1993, ch. 220, § 2, p. 685.]

30-3-65. Number of directors. [I.C., § 30-3-65, as added by 1993, ch. 220, § 2, p. 685.]

30-3-66. Election, designation and appointment of directors. [I.C., § 30-3-66, as added by 1993, ch. 220, § 2, p. 685.]

30-3-67. Terms of directors generally. [I.C., § 30-3-67, as added by 1993, ch. 220, § 2, p. 685.]

30-3-68. Staggered terms for directors. [I.C., § 30-3-68, as added by 1993, ch. 220, § 2, p. 685.]

30-3-69. Resignation of directors. [I.C., § 30-3-69, as added by 1993, ch. 220, § 2, p. 685.]

30-3-70. Removal of directors elected by members or directors. [I.C., § 30-3-70, as added by 1993, ch. 220, § 2, p. 685.]

30-3-71. Removal of designated or appointed directors. [I.C., § 30-3-71, as added by 1993, ch. 220, § 2, p. 685.]

30-3-72. Vacancy on board. [I.C., § 30-3-72, as added by 1993, ch. 220, § 2, p. 685.]

30-3-73. Compensation of directors. [I.C., § 30-3-73, as added by 1993, ch. 220, § 2, p. 685.]

30-3-74. Regular and special meetings. [I.C., § 30-3-74, as added by 1993, ch. 220, § 2, p. 685.]

30-3-75. Action without meeting. [I.C., § 30-3-75, as added by 1993, ch. 220, § 2, p. 685.]

30-3-76. Call and notice of meetings. [I.C., § 30-3-76, as added by 1993, ch. 220, § 2, p. 685.]

30-3-77. Waiver of notice. [I.C., § 30-3-77, as added by 1993, ch. 220, § 2, p. 685.]

30-3-78. Quorum and voting. [I.C., § 30-3-78, as added by 1993, ch. 220, § 2, p. 685.]

30-3-79. Committees of the board. [I.C., § 30-3-79, as added by 1993, ch. 220, § 2, p. 685.]

30-3-80. General standards for directors. [I.C., § 30-3-80, as added by 1993, ch. 220, § 2, p. 685.]

30-3-81. Director — Conflict of interest. [I.C., § 30-3-81, as added by 1993, ch. 220, § 2, p. 685.]

30-3-82. Loans to or guarantees for directors and officers. [I.C., § 30-3-82, as added by 1993, ch. 220, § 2, p. 685.]

30-3-83. Required officers. [I.C., § 30-3-83, as added by 1993, ch. 220, § 2, p. 685.]

30-3-84. Duties and authority of officers. [I.C., § 30-3-84, as added by 1993, ch. 220, § 2, p. 685.]

30-3-85. Standards of conduct for officers. [I.C., § 30-3-85, as added by 1993, ch. 220, § 2, p. 685.]

30-3-86. Resignation and removal of officers. [I.C., § 30-3-86, as added by 1993, ch. 220, § 2, p. 685.]

30-3-87. Officers' authority to execute documents. [I.C., § 30-3-87, as added by 1993, ch. 220, § 2, p. 685.]

30-3-88. Indemnification of officers, directors, employees and agents. [I.C., § 30-3-88, as added by 1993, ch. 220, § 2, p. 685.]

30-3-89. Authority to amend articles. [I.C., § 30-3-89, as added by 1993, ch. 220, § 2, p. 685.]

30-3-90. Amendment of articles by directors. [I.C., § 30-3-90, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 34, p. 887.]

30-3-91. Amendment of articles by directors and members. [I.C., § 30-3-91, as added by 1993, ch. 220, § 2, p. 685.]

30-3-92. Class voting by members on amendments to articles. [I.C., § 30-3-92, as added by 1993, ch. 220, § 2, p. 685.]

30-3-93. Articles of amendment. [I.C., § 30-3-93, as added by 1993, ch. 220, § 2, p. 685.]

30-3-94. Restated articles of incorporation. [I.C., § 30-3-94, as added by 1993, ch. 220, § 2, p. 685.]

30-3-95. Effect of amendment and restatement of articles. [I.C., § 30-3-95, as added by 1993, ch. 220, § 2, p. 685.]

30-3-96. Amendment of bylaws by directors. [I.C., § 30-3-96, as added by 1993, ch. 220, § 2, p. 685.]

30-3-97. Amendment of bylaws by directors and members. [I.C., § 30-3-96, as added by 1993, ch. 220, § 2, p. 685.]

30-3-98. Class voting by members on amendments to bylaws. [I.C., § 30-3-98, as added by 1993, ch. 220, § 2, p. 685.]

30-3-99. Approval by third persons. [I.C., § 30-3-99, as added by 1993, ch. 220, § 2, p. 685.]

30-3-100. Approval of plan of merger. [I.C., § 30-3-100, as added by 1993, ch. 220, § 2, p. 685.]

30-3-100A. Applicability of Idaho entity transactions act. [I.C., § 30-3-100A, as added by 2007, ch. 116, § 5, p. 333.]

30-3-101. Action on plan by board, members and third persons. [I.C., § 30-3-101, as added by 1993, ch. 220, § 2, p. 685.]

30-3-102. Articles of merger. [I.C., § 30-3-102, as added by 1993, ch. 220, § 2, p. 685.]

30-3-103. Effect of merger. [I.C., § 30-3-102, as added by 1993, ch. 220, § 2, p. 685.]

30-3-104. Merger with foreign corporation. [I.C., § 30-3-104, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 35, p. 887.]

30-3-105. Bequests, devises and gifts. [I.C., § 30-3-105, as added by 1993, ch. 220, § 2, p. 685.]

30-3-106. Sale of assets in regular course of activities and mortgage of assets. [I.C., § 30-3-106, as added by 1993, ch. 220, § 2, p. 685.]

30-3-107. Sale of assets other than in regular course of activities. [I.C., § 30-3-107, as added by 1993, ch. 220, § 2, p. 685.]

30-3-108. Prohibited distributions. [I.C., § 30-3-108, as added by 1993, ch. 220, § 2, p. 685.]

30-3-109. Authorized distributions. [I.C., § 30-3-109, as added by 1993, ch. 220, § 2, p. 685.]

30-3-110. Dissolution by incorporators or directors and third persons. [I.C., § 30-3-110, as added by 1993, ch. 220, § 2, p. 685.]

30-3-111. Dissolution by directors, members and third persons. [I.C., § 30-3-111, as added by 1993, ch. 220, § 2, p. 685.]

30-3-112. Articles of dissolution. [I.C., § 30-3-112, as added by 1993, ch. 220, § 2, p. 685.]

30-3-113. Effect of dissolution. [I.C., § 30-3-113, as added by 1993, ch. 220, § 2, p. 685.]

30-3-114. Known claims against dissolved corporation. [I.C., § 30-3-114, as added by 1993, ch. 220, § 2, p. 685.]

30-3-115. Unknown claims against dissolved corporation. [I.C., § 30-3-115, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 36, p. 887.]

30-3-115A. Grounds for administrative dissolution. [I.C., § 30-3-115A, as added by 1998, ch. 267, § 5, p. 878; am. 2007, ch. 314, § 37, p. 887.]

30-3-115B. Procedure for and effect of administrative dissolution. [I.C., § 30-3-115B, as added by 1998, ch. 267, § 6, p. 878; am. 2007, ch. 314, § 38, p. 887.]

30-3-115C. Reinstatement following administrative dissolution. [I.C., § 30-3-115C, as added by 1998, ch. 267, § 7, p. 878; am. 2007, ch. 314, § 39, p. 887.]

30-3-115D. Appeal from denial of reinstatement. [I.C., § 30-3-115D, as added by 1998, ch. 267, § 8, p. 878.]

30-3-116. Authority to transact business required by foreign corporation. [I.C., § 30-3-116, as added by 1993, ch. 220, § 2, p. 685.]

30-3-117. Consequences to foreign corporation of transacting business without authority. [I.C., § 30-3-117, as added by 1993, ch. 220, § 2, p. 685.]

30-3-118. Application of foreign corporation for certificate of authority. [I.C., § 30-3-118, as added by 1993, ch. 220, § 2, p. 685; am. 2000, ch. 124, § 2, p. 291; am. 2007, ch. 314, § 40, p. 887.]

30-3-119. Foreign corporation amended certificate of authority. [I.C., § 30-3-119, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 41, p. 887.]

30-3-120. Effect of issuance of certificate of authority to foreign corporation. [I.C., § 30-3-120, as added by 1993, ch. 220, § 2, p. 685.]

30-3-121. Corporate name of foreign corporation. [I.C., § 30-3-121, as added by 1993, ch. 220, § 2, p. 685; am. 2000, ch. 325, § 3, p. 1095.]

30-3-126. Withdrawal of foreign corporation. [I.C., § 30-3-126, as added by 1993, ch. 220, § 2, p. 685; am. 2007, ch. 314, § 43, p. 887.]

30-3-127. Grounds for revocation of certificate of authority. [I.C., § 30-3-127, as added by 1998, ch. 267, § 10, p. 878; am. 2007, ch. 314, § 44, p. 887.]

30-3-128. Procedure and effect of revocation of authority of foreign corporation. [I.C., § 30-3-128, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 11, p. 878; am. 2007, ch. 314, § 45, p. 887.]

30-3-129. Appeal from revocation of certificate of authority of foreign corporation. [I.C., § 30-3-129, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 12, p. 878.]

30-3-130. Corporate records. [I.C., § 30-3-130, as added by 1993, ch. 220, § 2, p. 685.]

30-3-131. Inspection of records by members. [I.C., § 30-3-131, as added by 1993, ch. 220, § 2, p. 685.]

30-3-132. Scope of inspection rights. [I.C., § 30-3-132, as added by 1993, ch. 220, § 2, p. 685.]

30-3-133. Limitations on use of membership list. [I.C., § 30-3-133, as added by 1993, ch. 220, § 2, p. 685.]

30-3-134. Financial statements for members. [I.C., § 30-3-134, as added by 1993, ch. 220, § 2, p. 685.]

30-3-135. Report of indemnification to members. [I.C., § 30-3-135, as added by 1993, ch. 220, § 2, p. 685.]

30-3-136. Annual report for secretary of state. [I.C., § 30-3-136, as added by 1993, ch. 220, § 2, p. 685; am. 1998, ch. 267, § 13, p. 878; am. 1999, ch. 210, § 2, p. 559; am. 2003, ch. 207, § 2, p. 550; am. 2005, ch. 274, § 2, p. 842.]

30-3-142. Application to existing domestic corporations. [I.C., § 30-3-142, as added by 1993, ch. 220, § 2, p. 685.]

30-3-143. Application to qualified foreign corporation. [I.C., § 30-3-143, as added by 1993, ch. 220, § 2, p. 685.]

30-3-143A. Application to canal companies and carey act companies. [I.C., § 30-3-143A, as added by 1997, ch. 282, § 8, p. 854.]

30-3-144. Saving provisions. [I.C., § 30-3-144, as added by 1993, ch. 220, § 2, p. 685.]

30-3-145. Severability. [I.C., § 30-3-145, as added by 1993, ch. 220, § 2, p. 685.]

The following sections were previously repealed:

30-3-30. Registered office and registered agent. [I.C., § 30-3-30, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31.] For present comparable provisions, see § 30-21-401 et seq.

30-3-31. Change of registered office or registered agent. [I.C., § 30-3-31, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31.] For present comparable provisions, see § 30-21-401 et seq.

30-3-32. Resignation of registered agent. [I.C., § 30-3-32, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31.] For present comparable provisions, see § 30-21-401 et seq.

30-3-33. Service on corporation. [I.C., § 30-3-33, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 31.] For present comparable provisions, see § 30-21-401 et seq.

30-3-122. Registered office and registered agent of foreign corporation. [I.C., § 30-3-122, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42.] For present comparable provisions, see § 30-21-401 et seq.

30-3-123. Change of registered office or registered agent of foreign corporation. [I.C., § 30-3-123, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42.] For present comparable provisions, see § 30-21-401 et seq.

30-3-124. Resignation of registered agent of foreign corporation [I.C., § 30-3-124, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42.] For present comparable provisions, see § 30-21-401 et seq.

30-3-125. Service on foreign corporation. [I.C., § 30-3-125, as added by 1993, ch. 220, § 2, p. 685, was repealed by S.L. 2007, ch. 314, § 42.] For present comparable provisions, see § 30-21-401 et seq.

30-3-137 to 30-3-141. Forfeiture of corporations — Reinstatement. [I.C., § § 30-3-137 to 30-3-141, as added by 1993, ch. 220, § 2, p. 685, were repealed by S.L. 1998, ch. 267, § 14.]

Chapter 4
IDAHO REGISTERED AGENTS ACT

Sec.

§ 30-401. Short title. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015.

History.

I.C., § 30-401, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former Chapter 4 of Title 30, (§§ 30-401 to 30-426), the uniform stock transfer law, which comprised S.L. 1927, ch. 88, §§ 1 to 23, 25 to 27, p. 107; I.C.A., §§ 29-401 to 29-426 was repealed by S.L. 1967, ch. 161, § 10-102. For present comparable provisions, see § 28-8-101 et seq.

Compiler's Notes.

Chapter 4 of Title 30, which comprised the following sections, was repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-401 et seq.

30-401. Short title. [I.C., § 30-401, as added by 2007, ch. 314, § 1, p. 887.]

30-402. Definitions. [I.C., § 30-402, as added by 2007, ch. 314, § 1, p. 887.]

30-403. Fees. [I.C., § 30-403, as added by 2007, ch. 314, § 1, p. 887.]

30-404. Addresses in filings. [I.C., § 30-404, as added by 2007, ch. 314, § 1, p. 887.]

30-405. Appointment of registered agent. [I.C., § 30-405, as added by 2007, ch. 314, § 1, p. 887.]

30-406. Listing of commercial registered agent. [I.C., § 30-406, as added by 2007, ch. 314, § 1, p. 887.]

30-407. Termination of listing of commercial registered agent. [I.C., § 30-407, as added by 2007, ch. 314, § 1, p. 887.]

30-408. Change of registered agent by entity. [I.C., § 30-407, as added by 2007, ch. 314, § 1, p. 887.]

30-409. Change of name or address by noncommercial registered agent. [I.C., § 30-409, as added by 2007, ch. 314, § 1, p. 887.]

30-410. Change of name, address, or type of organization by commercial registered agent. [I.C., § 30-410, as added by 2007, ch. 314, § 1, p. 887.]

30-411. Resignation of registered agent. [I.C., § 30-411, as added by 2007, ch. 314, § 1, p. 887.]

30-412. Appointment of agent by nonfiling or nonqualified foreign entity. [I.C., § 30-412, as added by 2007, ch. 314, § 1, p. 887.]

30-413. Service of process on entities. [I.C., § 30-413, as added by 2007, ch. 314, § 1, p. 887.]

30-414. Duties of registered agent. [I.C., § 30-414, as added by 2007, ch. 314, § 1, p. 887.]

30-415. Jurisdiction and venue. [I.C., § 30-415, as added by 2007, ch. 314, § 1, p. 887.]

30-416. Consistency of application. [I.C., § 30-416, as added by 2007, ch. 314, § 1, p. 887.]

30-417. Relation to electronic signatures in global and national commerce act. [I.C., § 30-417, as added by 2007, ch. 314, § 1, p. 887.]

30-418. Savings clause. [I.C., § 30-418, as added by 2007, ch. 314, § 1, p. 887.]

§ 30-402. Definitions. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-401.

History.

I.C., § 30-402, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-402 was repealed. See Prior Laws, § 30-401.

§ 30-403. Fees. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-214.

History.

I.C., § 30-403, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-403 was repealed. See Prior Laws, § 30-401.

§ 30-404. Addresses in filings. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-403.

History.

I.C., § 30-404, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-404 was repealed. See Prior Laws, § 30-401.

§ 30-405. Appointment of registered agent. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-404.

History.

I.C., § 30-405, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-405 was repealed. See Prior Laws, § 30-401.

§ 30-406. Listing of commercial registered agent. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-405.

History.

I.C., § 30-406, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-406 was repealed. See Prior Laws, § 30-401.

§ 30-407. Termination of listing of commercial registered agent. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-406.

History.

I.C., § 30-407, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-407 was repealed. See Prior Laws, § 30-401.

§ 30-408. Change of registered agent by entity. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-407.

History.

I.C., § 30-408, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-408 was repealed. See Prior Laws, § 30-401.

§ 30-409. Change of name or address by noncommercial registered agent. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-408.

History.

I.C., § 30-409, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-409 was repealed. See Prior Laws, § 30-401.

§ 30-410. Change of name, address, or type of organization by commercial registered agent. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-409.

History.

I.C., § 30-410, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-410 was repealed. See Prior Laws, § 30-401.

§ 30-411. Resignation of registered agent. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-410.

History.

I.C., § 30-411, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-411 was repealed. See Prior Laws, § 30-401.

§ 30-412. Appointment of agent by nonfiling or nonqualified foreign entity. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-411.

History.

I.C., § 30-412, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-412 was repealed. See Prior Laws, § 30-401.

§ 30-413. Service of process on entities. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-412.

History.

I.C., § 30-413, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-413 was repealed. See Prior Laws, § 30-401.

§ 30-414. Duties of registered agent. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-413.

History.

I.C., § 30-414, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-414 was repealed. See Prior Laws, § 30-401.

§ 30-415. Jurisdiction and venue. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-414.

History.

I.C., § 30-415, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-415 was repealed. See Prior Laws, § 30-401.

§ 30-416. Consistency of application. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-703.

History.

I.C., § 30-416, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-416 was repealed. See Prior Laws, § 30-401.

§ 30-417. Relation to electronic signatures in global and national commerce act. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-704.

History.

I.C., § 30-417, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-417 was repealed. See Prior Laws, § 30-401.

§ 30-418. Savings clause. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 1, effective July 1, 2015. For present comparable provisions, see § 30-21-705.

History.

I.C., § 30-418, as added by 2007, ch. 314, § 1, p. 887.

STATUTORY NOTES

Prior Laws.

Former § 30-418 was repealed. See Prior Laws, § 30-401.

Chapter 5
CORPORATIONS

Sec.

§ 30-501. Corporations — Constitution of the state of Idaho. — Every corporation organized for any lawful purpose or purposes, whether a general business corporation or a designated class of corporation, shall, by the act of filing incorporation documents with the state of Idaho, acknowledge and accept the provisions of the constitution of the state of Idaho as binding upon that corporation.

History.

I.C., § 30-501, as added by 1996, ch. 354, § 1, p. 1182.

STATUTORY NOTES

Prior Laws.

Former § 30-501, which comprised R.S., § 2653; am. 1903, p. 49, § 1; am. R.C., § 2792; reen. 1915, ch. 124, § 1, p. 270; reen. C.L., § 2792a; C.S., § 4772; am. 1925, ch. 82, § 1, p. 116; am. 1929, ch. 282, § 1, p. 678; I.C.A., § 29-501; am. 1947, ch. 43, § 1, p. 48; am. 1955, ch. 2, § 1, p. 4; am. 1965, ch. 100, § 1, p. 186; am. 1978, ch. 308, § 11, p. 771, was repealed by S.L. 1979, ch. 105, § 1.

§ 30-502 — 30-515. Foreign corporations — Filing requirements, liability, *etc*. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1879, p. 3, § 5; R.S., § 2653; am. 1903, p. 49, § 1; am. R.C., § 2792; reen. 1915, ch. 124, § 1, p. 270; reen. C.L., §§ 2792b to 2792h; C.S., §§ 4772 to 4779; 1923, ch. 44, §§ 1, 2, p. 48; am. 1929, ch. 282, §§ 2, 3, p. 678; I.C.A., §§ 29-502 to 29-510; 1937, ch. 66, §§ 1, 2, p. 88; 1937, ch. 133, §§ 1, 2, p. 214; 1939, ch. 121, § 1, p. 218; am. 1959, ch. 173, § 3, p. 394; am. 1959, ch. 175, § 1, p. 407; am. 1971, ch. 111, §§ 24, 25, p. 233; am. 1977, ch. 252, §§ 7, 8, p. 738, were repealed by S.L. 1979, ch. 105, § 1.

§ 30-516, 30-517. Mortgage or deed of trust on real property. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised S.L. 1957, ch. 163, §§ 1, 2, p. 296, were repealed by S.L. 1959, ch. 173, § 4, p. 394.

§ 30-518 — 30-521. Purpose of act — Doing business — Mergers. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised 1959, ch. 173, §§ 1, 2, p. 394; am. 1963, ch. 330, § 1, p. 945; I.C., § 30-520, as added by 1977, ch. 252, § 9, p. 738; I.C., § 30-521, as added by 1978, ch. 308, § 12, p. 771, were repealed by S.L. 1979, ch. 105, § 1.

Chapter 6
IDAHO UNIFORM LIMITED LIABILITY COMPANY ACT

Part 1. General Provisions

Sec.

30-6-101 — 30-6-114. [Repealed.]

Part 2. Formation — Certificate of Organization and Other Filings

30-6-201 — 30-6-210. [Repealed.]

Part 3. Relations of Members and Managers to Persons Dealing with Limited Liability Company

30-6-301 — 30-6-304. [Repealed.]

Part 4. Relations of Members to Each Other and to Limited Liability Company

30-6-401 — 30-6-410. [Repealed.]

Part 5. Transferable Interests and Rights of Transferees and Creditors

30-6-501 — 30-6-504. [Repealed.]

Part 6. Member's Dissociation

30-6-601 — 30-6-603. [Repealed.]

Part 7. Dissolution and Winding Up

30-6-701 — 36-6-708. [Repealed.]

Part 8. Foreign Limited Liability Companies

30-6-801 — 30-6-809. [Repealed.]

STATUTORY NOTES

Prior Laws.

Former Chapter 6, relating to the annual statement and license fees, was made up of the following: Former §§ 30-601 to 30-604, which comprised S.L. 1907, p. 235, §§ 1, 2; reen. R.C. §§ 2784, 2785; am. 1909, p. 8, H.B. 15; am. 1912, ch. 6, §§ 1 to 4, p. 14 to 16; reen. C.L. 207:1 to 207:4; C.S. §§ 4780 to 4783; am. 1925, ch. 36, § 1, p. 49; I.C.A., §§ 29-601 to 29-604; am. 1939, ch. 180, § 1, p. 336; am. 1945, ch. 35, § 1, p. 46; am. 1945, ch. 150, § 1, p. 227; am. 1951, ch. 251, § 5, p. 540; am. 1955, ch. 104, § 1, p. 228; am. 1955, ch. 169, § 1, p. 342; am. 1959, ch. 72, § 5, p. 157; 1971, ch. 18, § 1, p. 31; am. 1972, ch. 244, § 1, p. 634; am. 1972, ch. 394, § 1, p. 1138; am. 1977, ch. 252, §§ 10 to 12, p. 738; am. 1978, ch. 308, § 13, p. 771, were repealed by S.L. 1979, ch. 105, § 7, effective July 1, 1981.

Former §§ 30-605 and 30-606, comprising 1912, ch. 6, §§ 5, 6, pp. 16, 17; reen. C.L. 207:5. 207:6; C.S., §§ 4784. 4785; I.C.A., §§ 29-605, 29-606; am. 1947, ch. 173, § 1, p. 430; am. 1951, ch. 17, § 1, p. 26, were repealed by S.L. 1972, ch. 244, § 2.

Former §§ 30-607 to 30-614, which comprised 1907, p. 235, § 3; reen. R.C. § 2786; 1912, ch. 6, §§ 7 to 11, p. 17 to 19; reen. C.L. 207:7 to 207:13; C.S., §§ 4786 to 4792; am. 1925, ch. 37, § 1, p. 150; am. 1929, ch. 60, § 1, p. 86; I.C.A., §§ 29-607 to 29-613; am. 1947, ch. 173, § 2, p. 430; am.

1947, ch. 205, § 1, p. 481; am. 1967, ch. 2, § 1, p. 4; am. 1978, ch. 14, §§ 1, 2, p. 26, were repealed by S.L. 1979, ch. 105, § 7, effective July 1, 1981.

Part 1
General Provisions

§ 30-6-101 — 30-6-114. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-101 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 1, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-101. Short title. [I.C., § 30-6-101, as added by 2008, ch. 176, § 1, p. 480.]

30-6-102. Definitions. [I.C., § 30-6-102, as added by 2008, ch. 176, § 1, p. 480.]

30-6-103. Knowledge — Notice. [I.C., § 30-6-103, as added by 2008, ch. 176, § 1, p. 482.]

30-6-104. Nature, purpose and duration of limited liability company. [I.C., § 30-6-104, as added by 2008, ch. 176, § 1, p. 483.]

30-6-105. Powers. [I.C., § 30-6-105, as added by 2008, ch. 176, § 1, p. 483.]

30-6-106. Governing law. [I.C., § 30-6-106, as added by 2008, ch. 176, § 1, p. 483.]

30-6-107. Supplemental principles of law. [I.C., § 30-6-107, as added by 2008, ch. 176, § 1, p. 483.]

30-6-108. Name. [I.C., § 30-6-108, as added by 2008, ch. 176, § 1, p. 483; am. 2012, ch. 184, § 1, p. 487.]

30-6-109. Reservation of name. [I.C., § 30-6-109, as added by 2008, ch. 176, § 1, p. 484.]

30-6-110. Operating agreement — Scope, function and limitations. [I.C., § 30-6-110, as added by 2008, ch. 176, § 1, p. 484.]

30-6-111. Operating agreement — Effect on limited liability company and persons becoming members — Preformation agreement. [I.C., § 30-6-111, as added by 2008, ch. 176, § 1, p. 486.]

30-6-112. Operating agreement — Effect on third parties and relationship to records effective on behalf of limited liability company. [I.C., § 30-6-112, as added by 2008, ch. 176, § 1, p. 486.]

30-6-113. Designated office and registered agent. [I.C., § 30-6-113, as added by 2008, ch. 176, § 1, p. 487.]

30-6-114. Change of designated office. [I.C., § 30-6-114, as added by 2008, ch. 176, § 1, p. 487.]

Part 2
Formation — Certificate of Organization and Other Filings

§ 30-6-201 — 30-6-210. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-201 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 2, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-201. Formation of limited liability company — Certificate of organization. [I.C., § 30-6-201, as added by 2008, ch. 176, § 1, p. 487.]

30-6-201A. Professional company. [I.C., § 30-6-201A, as added by 2008, ch. 176, § 1, p. 488.]

30-6-202. Amendment or restatement of certificate of organization. [I.C., § 30-6-202, as added by 2008, ch. 176, § 1, p. 489.]

30-6-203. Signing of records to be delivered for filing to secretary of state. [I.C., § 30-6-203, as added by 2008, ch. 176, § 1, p. 490.]

30-6-204. Signing and filing pursuant to judicial order. [I.C., § 30-6-204, as added by 2008, ch. 176, § 1, p. 491.]

30-6-205. Delivery to and filing of records by secretary of state — Effective time and date. [I.C., § 30-6-205, as added by 2008, ch. 176, § 1, p. 491.]

30-6-206. Correcting filed record. [I.C., § 30-6-206, as added by 2008, ch. 176, § 1, p. 492.]

30-6-207. Liability for inaccurate information in filed record. [I.C., § 30-6-207, as added by 2008, ch. 176, § 1, p. 492.]

30-6-208. Certificate of existence or authorization. [I.C., § 30-6-208, as added by 2008, ch. 176, § 1, p. 493.]

30-6-209. Annual report for secretary of state. [I.C., § 30-6-209, as added by 2008, ch. 176, § 1, p. 494.]

30-6-210. Filing, service and copying fees. [I.C., § 30-6-210, as added by 2008, ch. 176, § 1, p. 494.]

Part 3
Relations of Members and Managers to Persons Dealing with Limited Liability Company

§ 30-6-301 — 30-6-304. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-301 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 3, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-301. No agency power of member as member. [I.C., § 30-6-301, as added by 2008, ch. 176, § 1, p. 495.]

30-6-302. Statement of authority. [I.C., § 30-6-302, as added by 2008, ch. 176, § 1, p. 495.]

30-6-303. Statement of denial. [I.C., § 30-6-303, as added by 2008, ch. 176, § 1, p. 496.]

30-6-304. Liability of members and managers. [I.C., § 30-6-304, as added by 2008, ch. 176, § 1, p. 497.]

Part 4
Relations of Members to Each Other and to Limited Liability Company

Idaho Code § 30-6-401—30-6-410

§ 30-6-401 — 30-6-410. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-401 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 4, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-401. Becoming a member. [I.C., § 30-6-401, as added by 2008, ch. 176, § 1, p. 497.]

30-6-402. Form of contribution. [I.C., § 30-6-402, as added by 2008, ch. 176, § 1, p. 497.]

30-6-403. Liability for contributions. [I.C., § 30-6-403, as added by 2008, ch. 176, § 1, p. 497.]

30-6-404. Sharing of and right to distributions before dissolution. [I.C., § 30-6-404, as added by 2008, ch. 176, § 1, p. 498.]

30-6-405. Limitations on distribution. [I.C., § 30-6-405, as added by 2008, ch. 176, § 1, p. 498.]

30-6-406. Liability for improper distributions. [I.C., § 30-6-406, as added by 2008, ch. 176, § 1, p. 499.]

30-6-407. Management of limited liability company. [I.C., § 30-6-407, as added by 2008, ch. 176, § 1, p. 500.]

30-6-408. Indemnification and insurance. [I.C., § 30-6-408, as added by 2008, ch. 176, § 1, p. 501.]

30-6-409. Standards of conduct for members and managers. [I.C., § 30-6-409, as added by 2008, ch. 176, § 1, p. 501.]

30-6-410. Right of members, managers and dissociated members to information. [I.C., § 30-6-410, as added by 2008, ch. 176, § 1, p. 502.]

Part 5
Transferable Interests and Rights of Transferees and Creditors

§ 30-6-501 — 30-6-504. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-501 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 5, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-501. Nature of transferable interest. [I.C., § 30-6-501, as added by 2008, ch. 176, § 1, p. 504.]

30-6-502. Transfer of transferable interest. [I.C., § 30-6-502, as added by 2008, ch. 176, § 1, p. 504.]

30-6-503. Charging order. [I.C., § 30-6-503, as added by 2008, ch. 176, § 1, p. 505.]

30-6-504. Power of personal representative of deceased member. [I.C., § 30-6-504, as added by 2008, ch. 176, § 1, p. 505.]

Part 6
Member's Dissociation

§ 30-6-601 — 30-6-603. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-601 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 6, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-601. Member's power to dissociate — Wrongful dissociation. [I.C., § 30-6-601, as added by 2008, ch. 176, § 1, p. 505.]

30-6-602. Events causing dissociation. [I.C., § 30-6-602, as added by 2008, ch. 176, § 1, p. 506.]

30-6-603. Effect of person's dissociation as member. [I.C., § 30-6-603, as added by 2008, ch. 176, § 1, p. 507.]

Part 7
Dissolution and Winding Up

§ 30-6-701 — 36-6-708. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-701 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 7, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-701. Events causing dissolution. [I.C., § 30-6-701, as added by 2008, ch. 176, § 1, p. 508.]

30-6-702. Winding up. [I.C., § 30-6-702, as added by 2008, ch. 176, § 1, p. 508.]

30-6-703. Known claims against dissolved limited liability company. [I.C., § 30-6-703, as added by 2008, ch. 176, § 1, p. 509.]

30-6-704. Other claims against dissolved limited liability company. [I.C., § 30-6-704, as added by 2008, ch. 176, § 1, p. 510.]

30-6-705. Grounds for administrative dissolution, procedure and effect. [I.C., § 30-6-705, as added by 2008, ch. 176, § 1, p. 510.]

30-6-706. Reinstatement following administrative dissolution. [I.C., § 30-6-706, as added by 2008, ch. 176, § 1, p. 511.]

30-6-707. Appeal from rejection of reinstatement. [I.C., § 30-6-707, as added by 2008, ch. 176, § 1, p. 512.]

30-6-708. Distribution of assets in winding up limited liability company's activities. [I.C., § 30-6-708, as added by 2008, ch. 176, § 1, p. 512.]

Part 8
Foreign Limited Liability Companies

§ 30-6-801 — 30-6-809. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-501 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 8, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-801. Governing law. [I.C., § 30-6-801, as added by 2008, ch. 176, § 1, p. 512.]

30-6-802. Application for certificate of authority. [I.C., § 30-6-802, as added by 2008, ch. 176, § 1, p. 513.]

30-6-803. Activities not constituting transacting business. [I.C., § 30-6-803, as added by 2008, ch. 176, § 1, p. 513.]

30-6-804. Filing of certificate of authority. [I.C., § 30-6-804, as added by 2008, ch. 176, § 1, p. 514.]

30-6-805. Noncomplying name of foreign limited liability company. [I.C., § 30-6-805, as added by 2008, ch. 176, § 1, p. 514.]

30-6-806. Revocation of certificate of authority. [I.C., § 30-6-806, as added by 2008, ch. 176, § 1, p. 514.]

30-6-807. Cancellation of certificate of authority. [I.C., § 30-6-807, as added by 2008, ch. 176, § 1, p. 515.]

30-6-808. Effect of failure to have certificate of authority. [I.C., § 30-6-808, as added by 2008, ch. 176, § 1, p. 515.]

30-6-809. Action by attorney general. [I.C., § 30-6-809, as added by 2008, ch. 176, § 1, p. 515.]

Part 9
Actions By Members

§ 30-6-901 — 36-9-906. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-25-801 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 9, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-901. Direct action by member. [I.C., § 30-6-901, as added by 2008, ch. 176, § 1, p. 515.]

30-6-902. Derivative action. [I.C., § 30-6-902, as added by 2008, ch. 176, § 1, p. 515.]

30-6-903. Proper plaintiff. [I.C., § 30-6-903, as added by 2008, ch. 176, § 1, p. 516.]

30-6-904. Pleading. [I.C., § 30-6-904, as added by 2008, ch. 176, § 1, p. 516.]

30-6-905. Special litigation committee. [I.C., § 30-6-905, as added by 2008, ch. 176, § 1, p. 516.]

30-6-906. Proceeds and expenses. [I.C., § 30-6-906, as added by 2008, ch. 176, § 1, p. 517.]

Idaho Code Pt. 10

Part 10
Merger, Interest Exchange, Conversion and Domestication

Idaho Code § 30-6-1001, 1002

§ 30-6-1001, 1002. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-22-101 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 10, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-1001. Applicability of Idaho entity transactions act. [I.C., § 30-6-1001, as added by 2008, ch. 176, § 1, p. 517.]

30-6-1002. Restrictions on approval of mergers, interest exchanges, conversions and domestications. [I.C., § 30-6-1002, as added by 2008, ch. 176, § 1, p. 517.]

Part 11
Miscellaneous Provisions

§ 30-6-1101 — 30-6-1104. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017. For present comparable provisions, see § 30-21-701 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 6, Part 11, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, § 4, effective July 1, 2017.

30-6-1101. Uniformity of application and construction. [I.C., § 30-6-1101, as added by 2008, ch. 176, § 1, p. 518.]

30-6-1102. Relation to electronic signatures in global and national commerce act. [I.C., § 30-6-1102, as added by 2008, ch. 176, § 1, p. 518.]

30-6-1103. Savings clause. [I.C., § 30-6-1103, as added by 2008, ch. 176, § 1, p. 518.]

30-6-1104. Application to existing relationships. [I.C., § 30-6-1104, as added by 2008, ch. 176, § 1, p. 518.]

Chapter 7
BRIDGE, FERRY, FLUME, AND BOOM CORPORATIONS

Sec.

§ 30-701. License to take tolls. — When a corporation is formed for the construction and maintenance of a bridge, ferry, flume or boom, or for two (2) or more of said purposes, it must not take tolls on or for the same until authority is granted therefor by the boards of county commissioners of the county or counties where its flume or abutments, landings or anchorages are situate. But after such authority is granted it may demand and receive such tolls as it is so authorized to take, and may, when necessary, secure the right of way for its flume, and the necessary chutes, raceways, landings, abutments and anchorages under the provisions of the Code of Civil Procedure.

History.

R.S. § 2694; reen. R.C. & C.L., § 2830; C.S., § 4829; I.C.A., § 29-701.

STATUTORY NOTES

Compiler's Notes.

The Code of Civil Procedure, referred to at the end of the section, is an archaic division of the Idaho Code, consisting of Titles 1 through 13.

CASE NOTES

Cited Falls Creek Timber Co. v. Day, 39 Idaho 495, 228 P. 313 (1924).

§ 30-702. When franchise ceases. — Every such corporation hereafter organized ceases to be a body corporate:

1. If, within two (2) years from filing its articles of incorporation it has not commenced the construction of its bridge, flume or boom, as the case may be, and if within three (3) years from such filing its bridge or boom is not completed.

2. If, when the bridge or boom of such corporation is destroyed, it is not reconstructed and ready for use within two (2) years thereafter.

3. If the ferry of any such corporation is not in running order within four (4) months after authority to take tolls thereon is obtained, or if at any time thereafter it ceases, for a like term consecutively, to perform the duties imposed by law.

History.

R.S., § 2695; reen. R.C. & C.L., § 2831; C.S., § 4830; am. 1925, ch. 165, § 1, p. 302; I.C.A., § 29-702.

§ 30-703. Application to individuals. — When a bridge, ferry, flume or boom is operated or owned by a natural person, this chapter is applicable to such person in like manner as it is applicable to corporations.

History.

R.S., § 2696; reen. R.C. & C.L., § 2832; C.S., § 4831; I.C.A., § 29-703.

Chapter 8
WATER AND CANAL CORPORATIONS AND WATER USERS' ASSOCIATIONS

Sec.

§ 30-801. Contracts for municipal water supply. — No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but an exclusive right must not be granted. No contract or grant must be made for a term exceeding fifty (50) years.

History.

R.S., § 2710; reen. R.C., § 2838; compiled and reen. C.L., § 2838; C.S., § 4842; I.C.A., § 29-801.

STATUTORY NOTES

Cross References.

Certificate of convenience and necessity required from public utilities commission before exercising right or obtaining franchise, § 61-527.

Determination of rates by public utilities commission, § 61-502.

Public utilities commission, jurisdiction over public utilities, § 61-501.

CASE NOTES

Application to Corporations Only.

This law applies only to corporations furnishing water to cities, etc., and has no application to contract between individual and city for furnishing such water. Jack v. Village of Grangeville, 9 Idaho 291, 74 P. 969 (1903).

Grant for Indefinite Term.

Municipal grant to individuals, for indefinite term, of the right to lay pipes in city streets and to repair pipes of a water distributing system, if affected at all by this section, is not rendered thereby ineffective, but at most is limited to a term of fifty years. Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913).

Irrigation.

This law, applicable to water corporations, furnishing water to cities and towns, was not intended to apply to corporations furnishing water for irrigation purposes. MacCammelly v. Pioneer Irrigation Dist., 17 Idaho 415, 105 P. 1076 (1909).

Pleading.

In action to compel water company to furnish city with free water in case of fire, complaint must set forth the ordinance and contract by which company is authorized to supply water to city. City of Boise City v. Artesian Hot & Cold Water Co., 4 Idaho 351, 39 P. 562 (1895).

Cited Cox v. City of Pocatello, 77 Idaho 225, 291 P.2d 282 (1955).

§ 30-802. Right of way granted. — Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable rules and directions of the city or town authorities as to the mode or manner of using such right of way within the city or town, and subject to the reasonable rules and directions of the board of county commissioners as to the mode and manner of using any right of way outside the corporate limits of such city or town, may use so much of the streets, alleys and ways in any city or town, or the public roads and highways within the county, as may be necessary for the laying of pipes for conducting water to its consumers, or the building and maintaining of ditches, canals, pipes, flumes and aqueducts in conducting water from outside points to the corporate limits of said city or town.

History.

R.S., § 2712; am. 1905, p. 192, § 2; reen. R.C. & C.L., § 2840; C.S., § 4843; I.C.A., § 29-802.

CASE NOTES

Compensation.

Rights of way under this section are granted without requiring any compensation whatever. City of Pocatello v. Murray, 21 Idaho 180, 120 P. 812, aff'd, 226 U.S. 318, 33 S. Ct. 107, 57 L. Ed. 239 (1912).

Nature of Grant.

Municipal grant of right to occupy city streets with pipes of a water distributing system is, when accepted by grantee, not a mere revocable license, but a substantial property right. Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913).

Pipes in Street.

All the mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of company to construct same at its own expense and connect with the pipes of a property owner at the line of his property and the limit of its franchise. Bothwell v. Consumers' Co., 13 Idaho 568, 92 P. 533 (1907).

It is the duty of water company to supply and lay the laterals from its main pipeline to line of consumer's property abutting on the street, and such laterals are the property of company. Hatch v. Consumers' Co., 17 Idaho 204, 104 P. 670 (1909), aff'd, 224 U.S. 148, 32 S. Ct. 465, 56 L. Ed. 703 (1912).

Rental for Use of Streets.

Obligation of municipal ordinance granting an irrevocable easement to lay pipes in city streets and repair pipes of a water distributing system is unconstitutionally impaired by a subsequent ordinance requiring payment to city of a monthly rental for such use and occupation of streets. Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U.S. 84, 33 S. Ct. 997, 57 L. Ed. 1400 (1913).

Cited City of Boise City v. Artesian Hot & Cold Water Co., 4 Idaho 351, 39 P. 562 (1895); Jack v. Village of Grangeville, 9 Idaho 291, 74 P. 969 (1905); MacCammelly v. Pioneer Irrigation Dist., 17 Idaho 415, 105 P. 1076 (1909).

§ 30-803. Works not to obstruct highways. — All waterworks must be so laid and constructed as not to obstruct public highways.

History.

R.S., § 2713; am. R.C. & C.L., § 2841; C.S., § 4844; I.C.A., § 29-803.

STATUTORY NOTES

Cross References.

Bridges over ditches and canals, §§ 42-1205, 43-906.

CASE NOTES

Cited Jack v. Village of Grangeville, 9 Idaho 291, 74 P. 969 (1903); MacCammelly v. Pioneer Irrigation Dist., 17 Idaho 415, 105 P. 1076 (1909); Nampa v. Nampa & Meridian Irrigation Dist., 23 Idaho 422, 131 P. 8 (1913).

§ 30-804. Water users' associations — Exemptions from taxes. — Any water users' association which is organized in conformity with the requirements of the United States under the Reclamation Act of June 17, 1902, and which, under its articles of incorporation, is authorized to furnish water only to its stockholders, shall be governed by the provisions of the Idaho Nonprofit Corporation Act.

History.

1905, p. 373, § 3; reen. R.C. & C.L., § 2842; C.S., § 4845; I.C.A., § 29-804; am. 1979, ch. 159, § 4, p. 486.

STATUTORY NOTES

Cross References.

Lateral ditch water users' associations, § 42-1301 et seq.

Federal References.

The Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, is generally compiled as 43 USCS § 371 et seq.

Compiler's Notes.

The Idaho Nonprofit Corporation Act, referred to in this section, is compiled as chapter 30, title 30, Idaho Code.

§ 30-805. Water users' associations — Record of articles and subscriptions. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised S.L. 1905, p. 373, § 4; reen. R.C. & C.L. § 2843; C.S. § 4846; I.C.A., § 29-805, was repealed by S.L. 1979, ch. 159, § 5.

§ 30-806. Annual report of irrigation companies. [Repealed.]

Repealed by S.L. 2019, ch. 190, § 9, effective July 1, 2019.

History.

1899, p. 380, § 35; reen. R.C. & C.L., § 2844; C.S., § 4847; I.C.A., § 29-806.

Chapter 9
IDAHO ESCROW ACT

Sec.

§ 30-901. Short title. — (1) This chapter shall be known and may be cited as the "Idaho Escrow Act."

(2) It is the intent of the legislature that the escrow industry be supervised and regulated by the department of finance in order to protect the citizens of the state and to provide that the business practices of the escrow industry are fair and orderly, with due regard to the ultimate consumers in this important area of property protection.

History.

I.C., § 30-901, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Department of finance, § 67-2701 et seq.

Prior Laws.

Former § 30-901, which comprised 1901, p. 26, § 1; am. 1907, p. 545, § 1; am. R.C. & C.L., § 2961; C.S., § 4858; I.C.A., § 29-901; am. 1951, ch. 139, § 1, p. 324, was repealed by S.L. 2005, ch. 236, § 1.

§ 30-902. Definitions. — As used in this chapter and in rules promulgated pursuant to this chapter:

(1) "Act" means the "Idaho Escrow Act," chapter 9, title 30, Idaho Code.

(2) "Department" means the Idaho department of finance.

(3) "Director" means the director of the Idaho department of finance.

(4) "Escrow" means any transaction in which any person, for the purpose of effecting the sale, transfer, encumbrance, or lease of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when the instrument, money, evidence of title or thing of value is then to be delivered by the third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter, pursuant to written instructions.

(5) "Escrow agency" means any person engaged in the business of accepting or receiving escrows for deposit or delivery by any means, including over the internet, or by any other electronic means.

(6) "Escrow agent" means any person engaged in the business of accepting or receiving escrows for deposit or delivery on behalf of an escrow agency.

(7) "License" means a license issued pursuant to this chapter.

(8) "Licensee" means a person holding a valid license as an escrow agency under this chapter.

(9) "Person" means an individual, cooperative, association, company, firm, partnership, corporation, limited liability company, or other legal entity, or the plural thereof, whether or not resident, nonresident or citizen.

History.

I.C., § 30-902, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

Prior Laws.

Former § 30-902, which comprised 1901, p. 26; am. 1907, p. 545, § 2; reen. R.C. & C.L., § 2962; C.S., § 4859; I.C.A., § 29-902, was repealed by S.L. 1979, ch. 105, § 1.

§ 30-903. License required. — (1) It shall be unlawful for any person to directly or indirectly engage in or carry on, or purport to engage in or carry on, the business of, or act in the capacity of, an escrow agency in or from Idaho without first obtaining a license under this chapter.

(2) The requirements of this chapter shall also apply to any escrow transaction effecting the sale, transfer, encumbrance or lease to another person of any real or personal property located in Idaho.

History.

I.C., § 30-903, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.

Former § 30-903, which comprised 1901, p. 26, § 2; reen. R.C. & C.L., § 2963; C.S., § 4860; I.C.A., § 29-903, was repealed by S.L. 2005, ch. 236, § 1.

§ 30-904. Place of business. — No licensee under this chapter shall engage in the escrow business at any place of business for which it does not hold a license, nor shall it engage in business under any other name than that on the license. Every escrow agency licensed under this chapter shall maintain a home office as its principal location for the transaction of escrow business. The director may, on application, issue additional branch licenses to the same escrow agency licensee upon compliance with all the provisions of this chapter governing the issuance of a single escrow agency license.

History.

I.C., § 30-904, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

Prior Laws.

Former § 30-904, which comprised 1901, p. 26, § 3; reen. R.C. & C.L., § 2964; C.S., § 4861; I.C.A., § 29-904; am. 1935, ch. 77, § 1, p. 131; am. 1951, ch. 139, § 2, p. 324, was repealed by S.L. 2005, ch. 236, § 1.

§ 30-905. Exempt persons and transactions. — The requirements of this chapter do not apply to:

(1) Any person licensed to practice law in this state while engaged in the performance of his professional duties, except an attorney or law firm actively engaging in a separate business as an escrow agency;

(2) Any person licensed or chartered under the laws of any state or of the United States as a bank, savings and loan association, credit union or industrial loan company as well as wholly-owned subsidiaries and affiliates of such organizations;

(3) Title insurance companies having a valid certificate of authority, and title insurance agents having a valid license as a title insurance agent, issued by the Idaho department of insurance;

(4) Any real estate company, broker or salesperson licensed by and subject to the jurisdiction of the Idaho real estate commission, while performing acts in the course of or incidental to sales or purchases of real or personal property handled or negotiated by such real estate company, broker or salesperson;

(5) Any receiver, trustee in bankruptcy, executor, administrator, guardian or other person acting under the supervision or order of any court of this state or of any federal court;

(6) A person licensed in this state as a certified public accountant while engaged in the performance of his professional duties who is not actively engaged in a separate business as an escrow agency;

(7) Any state or federally chartered nondepository financial institution;

(8) Regulated lenders subject to the requirements of the Idaho credit code, chapters 41 through 46, title 28, Idaho Code, to the extent not engaged in a separate business as an escrow agency;

(9) Agencies of the United States and agencies of this state and their political subdivisions;

(10) Mortgage brokers and mortgage lenders subject to the requirements of the Idaho residential mortgage practices act, chapter 31, title 26, Idaho Code, to the extent not engaged in a separate business as an escrow agency; or

(11) A mortgage company to the extent that such mortgage company is regularly engaged in the business of a mortgage company as defined in the mortgage company act, chapter 28, title 26, Idaho Code.

History.

I.C., § 30-905, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Department of insurance, § 41-201 et seq.

Real estate commission, § 54-2005.

Prior Laws.

Former § 30-905, which comprised 1935, ch. 150, § 1, p. 368, was repealed by S.L. 2005, ch. 236, § 1.

§ 30-906. Exemption — Burden of proof. — In any proceeding or action under this chapter, the burden of proving an exemption from the requirements of this chapter is upon the person claiming the exemption.

History.

I.C., § 30-906, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.

Former § 30-906, which comprised 1901, p. 26, § 4; reen. R.C. & C.L., § 2965; C.S., § 4862; I.C.A., § 29-905, was repealed by S.L. 2005, ch. 236, § 1.

§ 30-907. Director's issuance or denial of license. — (1) The director shall receive and act upon all applications for licenses to engage in business as an escrow agency under this chapter. If the director finds that all requirements of statute and rule have been met and all applicable fees paid, and the applicant is not otherwise unqualified for licensure, the director shall issue a license to the applicant.

(2) An application for a license as an escrow agency shall be in writing and filed with the director in such form as is prescribed by the director, shall include such information as the director may reasonably require, and shall be verified on oath by the applicant. Such information shall be updated and filed with the director as necessary to keep the information current. The application for licensure shall be accompanied by an application fee of three hundred fifty dollars ($350). When an application for licensure is denied or withdrawn, the director shall retain all fees paid by the applicant.

(3) An application for an escrow agency license under this chapter may be denied if the director finds that:

(a) The escrow agency's business was or will be formed for any business other than legitimate escrow services, or proposes to use a name that is misleading or in conflict with the name of an existing licensee;

(b) Any incorporator, officer, director, member, general partner, employee, or agent of the escrow agency applicant has been convicted of, or received a withheld judgment for any crime or act involving dishonesty, fraud or deceit, which crime or act is substantially related to the qualifications, functions, or duties of a person engaged in an escrow business or which crime is otherwise deemed relevant in accordance with section 67-9411(1), Idaho Code;

(c) There is no natural person possessing a minimum of three (3) years of supervisory experience in relation to an escrow business supervising each escrow agency office;

(d) The applicant or any officer, director, member, general partner, employee or agent of the applicant has demonstrated lack of fitness to transact escrow business;

(e) The applicant has made any false statement of a material fact in the application for a license; or

(f) The applicant, any officer, director, member, general partner or any person owning or controlling, directly or indirectly, ten percent (10%) or more of the outstanding equity securities of the applicant has violated any provision of this chapter or rules promulgated thereunder, or any similar regulatory scheme in this state or in any foreign jurisdiction.

History.

I.C., § 30-907, as added by 2005, ch. 236, § 2, p. 717; am. 2008, ch. 311, § 1, p. 858; am. 2020, ch. 175, § 3, p. 500.

STATUTORY NOTES

Prior Laws.

Former § 30-907, which comprised 1901, p. 26, § 5; reen. R.C. & C.L., § 2966; C.S., § 4863; I.C.A., § 29-906, was repealed by S.L. 2005, ch. 236, § 1.

Amendments.

The 2008 amendment, by ch. 311, in paragraph (3)(b)(i), deleted "or a misdemeanor involving dishonesty or moral turpitude" from the end; added paragraph (3)(b)(ii) and redesignated former paragraph (3)(b)(ii) as paragraph (3)(b)(iii).

The 2020 amendment, by ch. 175, rewrote paragraph (3)(b), which formerly read: "Any incorporator, officer, director, member, general partner, employee or agent of the escrow agency applicant has been: (i) Convicted of, or received a withheld judgment for, any felony; or (ii) Convicted of, or received a withheld judgment for, a misdemeanor involving dishonesty or moral turpitude; or (iii) Committed any crime or act involving dishonesty, fraud or deceit, which crime or act is substantially related to the qualifications, functions or duties of a person engaged in an escrow business."

§ 30-908. Renewal of license. — (1) On or before April 30 of each year, every licensee under this chapter shall pay an annual license renewal fee of one hundred fifty dollars ($150), and shall file with the director a renewal form containing such information as the director may require.

(2) As a condition of renewal, each licensee shall file with the director a statement of its financial condition and status of its escrow transactions as of the preceding December 31. The financial statement must be in a form and contain the information prescribed by the director.

(3) Each license under this chapter shall remain in full force and effect unless the licensee fails to timely satisfy the renewal requirements of this section, or the license is relinquished, suspended or revoked; provided however, branch licenses shall be terminated upon the relinquishment or revocation of a home office license. Any licensee may relinquish the license by notifying the director of its relinquishment, but this relinquishment shall not affect the licensee's liability for acts previously committed, and may not occur after the filing of a complaint for revocation or suspension of the license.

(4) Following the failure of a licensee to satisfy the renewal requirements of this section, a person previously licensed as an escrow agency may, for an additional nonrefundable fee of two hundred dollars ($200), apply for the reinstatement of its previous license provided that he satisfies the renewal requirements of this section no later than the last business day of May immediately following expiration of such license.

History.

I.C., § 30-908, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.

Former § 30-908, which comprised 1901, p. 26, § 6; reen. R.C. & C.L., § 2967; C.S., § 4864; I.C.A., § 29-907, was repealed by S.L. 2005, ch. 236, § 1.

§ 30-909. Financial responsibility — Fidelity bond — Errors and omissions policy — Surety bond. — At the time of filing an application for an escrow agency license, and at the time of any renewal or reinstatement of such license, the applicant or licensee shall provide satisfactory evidence to the director of having obtained the following as evidence of financial responsibility:

(1) A fidelity bond providing coverage in the aggregate amount of two hundred thousand dollars ($200,000) with a deductible no greater than ten thousand dollars ($10,000) covering the applicant or licensee, as well as each corporate officer, partner, managing member, escrow agent and employee of the applicant or licensee;

(2) An errors and omissions policy issued to the escrow agency providing coverage in the minimum aggregate amount of fifty thousand dollars ($50,000) or, alternatively, cash or securities in such amount deposited in a depository approved by the director on condition that they be available for payment of any claim payable under an equivalent errors and omissions policy in such amount; and

(3) A surety bond in an amount as set forth in paragraphs (a) through (f) of this subsection. The surety bond shall be in a form provided by the director and the applicant shall be named as principal. The bond shall be executed by the applicant as obligor and by a company authorized to do a surety business in Idaho. The bond shall be conditioned that the obligor as licensee will faithfully conform to and abide by this chapter and all rules adopted thereunder, and shall be liable for reimbursement to all persons who suffer loss by reason of a violation of this chapter or rules adopted thereunder. The surety bond provided shall be in an amount based upon the average month-end balance of the escrow trust accounts of the applicant or licensee for the preceding calendar year, in increments as described in the following subsections [paragraphs]:

(a) For average month-end escrow trust account balances of fifty thousand dollars ($50,000) or less, a surety bond in the amount of twenty thousand dollars ($20,000) is required;

(b) For average month-end escrow trust account balances of more than fifty thousand dollars ($50,000) but not more than two hundred fifty thousand dollars ($250,000), a surety bond in the amount of fifty thousand dollars ($50,000) is required;

(c) For average month-end escrow trust account balances of more than two hundred fifty thousand dollars ($250,000) but not more than five hundred thousand dollars ($500,000), a surety bond in the amount of one hundred thousand dollars ($100,000) is required;

(d) For average month-end escrow trust account balances of more than five hundred thousand dollars ($500,000) but not more than seven hundred fifty thousand dollars ($750,000), a surety bond in the amount of one hundred fifty thousand dollars ($150,000) is required;

(e) For average month-end escrow trust account balances of more than seven hundred fifty thousand dollars ($750,000) but not more than one million dollars ($1,000,000), a surety bond in the amount of two hundred thousand dollars ($200,000) is required;

(f) For average month-end escrow trust account balances of more than one million dollars ($1,000,000), a surety bond in the amount of two hundred fifty thousand dollars ($250,000) is required.

(4) The escrow agency licensee shall place on file with the director the surety bond and proof of its errors and omissions coverage and its fidelity bond, which bonds and insurance coverage shall be continuous during the period of licensure of the licensee whether or not the bond is renewed, continued, reinstated, reissued, or otherwise extended, replaced or modified, including increases or decreases in the penal sum. The surety upon the bond shall not be liable in an aggregate amount exceeding the penal sum set forth on the face of the bond.

(5) The surety bond shall name as beneficiaries:

(a) The state, for payment of any costs incurred and charges made in connection with any escrow agency's insolvency or default, including costs and charges relating to an examination and receivership of any escrow agency; and

(b) Any person who has a claim against the surety on the bonds based on any default or violation of any duty or obligation of the escrow agency.

(6) In lieu of the bonds required by this section, a certificate of deposit issued by a financial institution authorized to conduct business in Idaho and made payable to the director may be provided to the director in the same principal amount as required for the bonds. The interest on the certificate of deposit shall be payable to the escrow agency licensee. The certificate of deposit shall be maintained at all times during which the licensee is authorized to engage in business as an escrow agency under this chapter, and must provide that it will remain in effect for at least three (3) years following discontinuance of operations unless released earlier by the director.

(7) The director may, in the public interest and for good cause shown, waive or modify any requirements of this section.

History.

I.C., § 30-909, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Prior Laws.

Former § 30-909, which comprised I.C., § 30-909, as added by 1973, ch. 135, § 11, p. 252, was repealed by S.L. 2005, ch. 236, § 1.

Compiler's Notes.

The bracketed insertion at the end of the introductory paragraph in subsection (3) was added by the compiler to correct the enacting legislation.

§ 30-910. Cancellation of fidelity bond, surety bond, or both — New bond required. — Prior to cancellation of either the fidelity bond or the surety bond required by section 30-909, Idaho Code, or both, the escrow agency licensee shall file with the director satisfactory evidence of a new bond in the appropriate amount with no lapse in coverage from the canceled bond. Failure to do so shall be grounds for the suspension or revocation of the escrow agency's license.

History.

I.C., § 30-910, as added by 2005, ch. 236, § 2, p. 717.

§ 30-911. Limitation of actions on bond. — No action may be brought on an escrow agency licensee's bond by any person after the expiration of three (3) years from the time when the act or default complained of becomes known or should have become known.

History.

I.C., § 30-911, as added by 2005, ch. 236, § 2, p. 717.

§ 30-912. Transferability. — A license issued under this chapter is not transferable or assignable, and control of a license shall not be acquired through stock purchase or other device without the prior written consent of the director.

History.

I.C., § 30-912, as added by 2005, ch. 236, § 2, p. 717.

§ 30-913. Unlawful acts. — Any person, except a person exempt under section 30-905, Idaho Code, who engages in activity as an escrow agency without first obtaining a license in accordance with this chapter, shall be guilty of a felony. Such person is also subject to a civil penalty in an amount no greater than five thousand dollars ($5,000) for each violation of this chapter or rule or order thereunder, in addition to other sanctions allowed by law.

History.

I.C., § 30-913, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Penalty for felony when not otherwise provided, § 18-112.

§ 30-914. Accounts to be maintained — Records open to inspection — Retention of records — Trust account — Interest on escrow accounts. — (1) Each licensee shall maintain sufficient books, accounts and records readily accessible to the department for the department to determine at any time the licensee's financial condition, what duties and responsibilities the licensee has undertaken to perform and whether it is properly performing all such duties, and any other information considered necessary by the director to determine whether the licensee is operating in a safe, competent and lawful manner. The books, records and accounts shall be maintained in accordance with generally accepted accounting principles and sound business practice.

(2) For each individual escrow account, the licensee shall maintain the escrow agreement and all amendments, all instructions affecting the agreement, all related correspondence, and an individual ledger reflecting all activity pertinent to that account.

(3) Each licensee shall continuously maintain the following general accounts:

(a) A general ledger reflecting assets, liabilities, income, expenses and equity accounts;

(b) An escrow liability control ledger for all escrow accounts;

(c) A cash receipts and disbursements journal; and

(d) Copies of all receipts and disbursements used as a medium of posting to individual escrow accounts.

(4)(a) Every licensee shall keep a separate escrow trust fund account established at a financial institution approved by the director, in which shall be kept separate, distinct and apart and segregated from the licensee's own funds, all funds or moneys of clients which are being held in trust by the licensee pending the closing of an escrow transaction or the full performance of the escrow agreement. All trust funds shall be deposited not later than the first banking day following receipt thereof. Such funds, when deposited, shall be designated as "escrow accounts" or

given some other appropriate designation indicating that the funds are not the funds of the licensee.

(b) Every licensee shall maintain all other assets or property received pursuant to an escrow in accordance with a written escrow agreement in a manner which will reasonably preserve and protect the property from loss, theft or damage, and which will otherwise comply with all duties and responsibilities of a fiduciary or bailee generally.

(5) The records referenced in this section shall be reconciled at least monthly.

(6) All records referenced in this section shall be maintained by the licensee for seven (7) years following the close of each account.

(7) Any interest received on funds deposited with an escrow agency in connection with an escrow must be paid over to the depositing party to the escrow and may not be transferred to an account of the escrow agency. This section shall not limit the right of the escrow agency to contract with the depositing party with respect to the interest received on the deposits by independent agreement.

History.

I.C., § 30-914, as added by 2005, ch. 236, § 2, p. 717; am. 2008, ch. 311, § 2, p. 859.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 311, substituted "financial institution approved by the director" for "financial institution located in Idaho" in the first sentence in paragraph (4)(a).

§ 30-915. Notice of conflict of interest — Closing statement. — (1) An escrow agency licensee shall act without partiality to any of the parties to the escrow. An escrow agency may not close a transaction where it has, directly or indirectly, a monetary interest in the subject property either as buyer or seller. If an escrow agency has a business interest in the escrow transaction other than as the escrow agency licensee, the relationship or interest must be disclosed in the written escrow instructions. After noting such interest, an additional statement shall appear as follows: "We call this interest to your attention for disclosure purposes. This interest will not, in our opinion, prevent us from being a fair and impartial escrow agency in this transaction, but you are, nevertheless, free to request the transaction be handled by some other escrow agency."

(2) On completion of an escrow transaction, the escrow agency licensee shall deliver to each principal a signed written closing statement. The closing statement shall show all receipts and disbursements relating to the escrow transaction. Any charges by, or disbursements to, the escrow agency shall be clearly noted.

History.

I.C., § 30-915, as added by 2005, ch. 236, § 2, p. 717.

§ 30-916. Attachment. — Funds or other value received by a licensee under this chapter pursuant to an escrow or trust funds are not subject to execution or attachment in any claim against the licensee.

History.

I.C., § 30-916, as added by 2005, ch. 236, § 2, p. 717.

§ 30-917. Examination and investigations. — (1) The director shall examine the books, records and accounts of each licensee, within or without the state of Idaho, at intervals he deems necessary for the protection of the public. The licensee so examined shall pay a fee for the examination at the rate fixed annually by the director, not to exceed fifty dollars ($50.00) per examination hour. If it is necessary for the examination to be conducted outside of Idaho, the actual cost of travel for the examiners shall be reimbursed to the department of finance by the licensee so examined. The director, upon his prior written approval, may accept an equivalent examination of a licensee by another state or federal agency as a substitute for the examination pursuant to this section.

(2) The director may make necessary public or private investigations within or outside of Idaho to determine whether any person has violated or is about to violate this chapter or any rule or order under this chapter.

(3) For the purpose of any investigation or other proceeding under this chapter, the director or any officer designated by the director may administer oaths or affirmations, and upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, and require the production of any matter which is relevant to the investigation or other proceeding, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge or relevant facts, or any other matter reasonably calculated to lead to the discovery of material evidence. Upon failure to obey a subpoena or to answer questions proposed by the investigating officer and upon reasonable notice to all persons affected thereby, the director may apply to any district court for an order compelling compliance.

(4) Except as otherwise provided in this chapter, all proceedings under this chapter shall be conducted in accordance with the administrative procedure act, chapter 52, title 67, Idaho Code.

History.

I.C., § 30-917, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Cross References.

Department of finance, § 67-2701 et seq.

§ 30-918. Powers and duties of the director. — (1) In addition to any other powers and duties of the director authorized by law, the director may issue orders and promulgate rules that, in the opinion of the director, are necessary to execute, enforce and effectuate the purposes of this chapter.

(2) The director shall also:

(a) Administer and enforce the provisions and requirements of this chapter; and

(b) Require that all funds collected by the department under this chapter be deposited into the finance administrative account pursuant to section 67-2702, Idaho Code.

History.

I.C., § 30-918, as added by 2005, ch. 236, § 2, p. 717.

§ 30-919. Prohibited practices. — No escrow agency licensee or person required to be licensed under this chapter, or any of its officers, directors, members, general partners, employees or agents shall:

(1) Issue, circulate, make use of, publish or advertise, by any means of communication, that a person is engaged in accepting or receiving escrows if that person is not licensed under this chapter;

(2) Solicit or accept an escrow instruction or amended or supplemental escrow instruction containing any blank to be filled in after signing or initialing of the escrow instruction or permitting any person to make any addition to, deletion from, or alteration of an escrow instruction or amended or supplemental escrow instruction unless the addition, deletion or alteration is signed or initialed by any affected party who signed or initialed the escrow instruction or amended or supplemental escrow instruction prior to the addition, deletion or alteration;

(3) Fail to carry out an escrow transaction pursuant to the written escrow instructions unless amended by the written agreement of all parties to the escrow agreement or their assigns;

(4) Accept funds or papers in escrow without a dated, written instruction signed by the parties, or their authorized representatives, adequate to administer the escrow account and to provide for sufficient funds and documents to carry out the terms of the escrow instructions. Funds and documents deposited shall be used only in accordance with such written instruction; provided that if additional specific instructions are needed, the escrow agency shall obtain the consent of both parties or such representatives to the escrow or an order of a court of competent jurisdiction at the expense of the escrow parties;

(5) Fail to promptly distribute funds, deeds or other personal property or instruments pursuant to escrow instructions;

(6) Fail to submit to an examination by the department of its books, records and accounts, or refuse to provide to the department, within a reasonable time, all information requested by the department pursuant to this chapter;

(7) Fail to deliver, without reasonable cause, within a reasonable time after the close of an escrow, to the respective parties of an escrow transaction, any money, documents or other properties held in escrow in violation of the provisions of the escrow instructions;

(8) Directly or indirectly employ any scheme, device or artifice to defraud or mislead any person or engage in any unfair or deceptive practice toward any person;

(9) Fail to supervise diligently and control the escrow-related activities of its agents, employees and independent contractors;

(10) Engage in fraudulent or dishonest abstraction or misappropriation or embezzlement of funds or other property held in trust;

(11) Pay a fee or give any portion of its fees or charges, including fees for escrow services or other consideration, to any person as an inducement or as compensation for the referral of any escrow business; or

(12) Disburse funds or deliver documents from an escrow for recording or otherwise unless the escrow contains a credit balance consisting of collected funds, other than funds of the escrow agency or its affiliates, sufficient to discharge all monetary conditions of the escrow. This requirement does not apply to escrows established for the purpose of receiving two (2) or more periodic payments over a total period of time after establishment in excess of thirty (30) days.

History.

I.C., § 30-919, as added by 2005, ch. 236, § 2, p. 717.

§ 30-920. Remedies. — (1) Whenever it appears to the director that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order thereunder, is conducting its business in an unsafe and injurious manner, or that its capital or assets are impaired, the director may in his discretion:

(a) Order the person to cease and desist from the violation of any provision of this chapter, rule or order thereunder;

(b) Issue an order revoking or suspending the licensee's escrow agency license;

(c) After notice and the opportunity for a hearing, except as otherwise provided in this chapter, issue an order imposing a civil penalty not to exceed five thousand dollars ($5,000) for each violation of this chapter or any rule or order thereunder;

(d) After notice and the opportunity for a hearing, issue an order of restitution to any person for loss of money or property resulting from a violation of this chapter; and

(e) Issue an order, pursuant to section 67-5247, Idaho Code, impounding the accounts, including all operating and trust accounts, of any licensee or person required to be licensed under this chapter.

(2) In addition to such remedies, the director may bring an action in the fourth district court in and for Ada county or in such other court as the director deems appropriate. Upon a proper showing, the court may:

(a) Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

(b) Order other appropriate or ancillary relief, which may include:

(i) An asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the director, for the defendant or the defendant's assets;

(ii) Ordering the director to take charge and control of a defendant's property, including investment accounts and accounts in a financial

institution, rents and profits; to collect debts; and to acquire and dispose of property;

(c) Issue an order of restitution to any person for loss of money or property resulting from a violation of this chapter; and

(d) Except as otherwise provided by this chapter, impose a civil penalty not to exceed five thousand dollars ($5,000) for each violation.

(3) The court may not require the director to post a bond.

History.

I.C., § 30-920, as added by 2005, ch. 236, § 2, p. 717; am. 2008, ch. 311, § 3, p. 860.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 311, added paragraphs (1)(d) and (1)(e); rewrote paragraph (2)(a), which formerly read: "Grant a temporary restraining order, followed by a preliminary injunction and a permanent injunction for the department or receiver to exercise control of, operate or liquidate an escrow agency's business in this state, or such other injunctive relief as appropriate; and"; and added paragraphs (2)(b) and (2)(c), and redesignated former paragraph (2)(b) as paragraph (2)(d).

§ 30-921 — 30-930. [Reserved.]

§ 30-931. No impairment of other remedies. — Nothing in this chapter shall be construed so as to impair or affect any statutory or common law right of any person to bring an action in any court having jurisdiction for any act involved in the transaction of an escrow business or the right of the state of Idaho to sanction any person for any violation of any provision of this chapter.

History.

I.C., § 30-931, as added by 2005, ch. 236, § 2, p. 717.

§ 30-932. Continuing jurisdiction. — If a license under this chapter is surrendered, suspended or revoked, the former licensee shall continue to be subject to the provisions of this chapter and to the duties previously undertaken for so long as it acts as a fiduciary with respect to any escrow previously undertaken.

History.

I.C., § 30-932, as added by 2005, ch. 236, § 2, p. 717.

§ 30-933. Status of preexisting escrows. — Nothing contained in this chapter shall be so construed as to impair or affect the obligation of any escrow agreement that was lawfully entered into prior to the effective date of this act.

History.

I.C., § 30-933, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Compiler's Notes.

The phrase "effective date of this act" in this section refers to the effective date of S.L. 2005, Chapter 236, which was effective July 1, 2005.

§ 30-934. Severability. — The provisions of this act are hereby declared to be severable, and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

History.

I.C., § 30-934, as added by 2005, ch. 236, § 2, p. 717.

STATUTORY NOTES

Compiler's Notes.

The term "this act", referred to in this section, means S.L. 2005, chapter 236, which is codified as §§ 30-901 to 30-934 and 45-1504.

§ 30-935. Initial licensing and compliance. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

This section, which comprised I.C., § 30-935, as added by 2005, ch. 236, § 2, p. 717, was repealed by S.L. 2008, ch. 311, § 4.

Chapter 10
GENERAL NONPROFIT CORPORATIONS

Sec.

§ 30-1001. Nonprofit corporations authorized. [Repealed.]

STATUTORY NOTES

Prior Laws.

A former § 30-1000, which comprised S.L. 1913, ch. 54, § 1, p. 164; reen. C.L. 214:1; C.S., § 4865; I.C.A., § 29-100,1 was repealed by S.L. 1978, ch. 308, § 14.

Compiler's Notes.

This section, which was compiled from I.C., § 30-1001 as added by 1978, ch. 308, § 15, was repealed by S.L. 1979, ch. 159, § 1. For present comparable provisions, see 30-30-101 et seq.

§ 30-1002, 30-1003. Application of corporation law — Membership. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised S.L. 1913, ch. 54, §§ 2, 3, p. 164; C.L., §§ 214:2, 214:3; C.S., §§ 4866, 4867; I.C.A., §§ 29-1002, 29-1003; am. 1977, ch. 252, § 13, p. 738; am. 1978, ch. 308, §§ 16, 17, p. 771, were repealed by S.L. 1979, ch. 159, § 1. For present comparable provisions, see 30-30-101 et seq.

§ 30-1004. Organization — Shares of stock or membership certificates. [Repealed.]

STATUTORY NOTES

Prior Laws.

A former § 30-1004, which comprised 1913, ch. 54, § 4, p. 164; reen. C.L., 214:4; C.S., § 4868; I.C.A., § 29-1004, was repealed by S.L. 1977, ch. 252, § 14.

Compiler's Notes.

This section, which comprised I.C., § 30-1004 as added by 1977, ch. 252, § 15, p. 738; am. 1978, ch. 308, § 18, 771, was repealed by S.L. 1979, ch. 159, § 1. For present comparable provisions, see 30-30-101 et seq.

§ 30-1005, 30-1006. Bylaws — Amendment, alteration. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised S.L. 1913, ch. 54, §§ 5, 6, p. 164; reen. C.L. § 214:5; C.S., § 4869; I.C.A., § 29-1005; I.C., § 30-1006 as added by 1951, ch. 51, § 1, p. 74; am. 1978, ch. 308, §§ 19, 20, p. 771, were repealed by S.L. 1979, ch. 159, § 1. For present comparable provisions, see 30-30-101 et seq.

Chapter 11
RELIGIOUS, SOCIAL, AND BENEVOLENT ASSOCIATIONS

§ 30-1101 — 30-1110. Formation, articles, bylaws, *etc.* of religious, social and benevolent associations. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised R.S. §§ 2760 to 2763, 2765, 2766; R.C. §§ 3011 to 3014, 3016, 3017; S.L. 1911, ch. 74, §§ 1, 2, p. 227; 1911, ch. 164, § 1, p. 561; 1911, ch. 165, §§ 1, 2, p. 562; S.L. 1913, ch. 40, §§ 1, 2, p. 143; C.L. §§ 3011 to 3014, 3016 to 3017a; S.L. 1919, ch. 131, p. 426; C.S. §§ 4870 to 4878; S.L. 1921, ch. 257, § 1, p. 570; am. 1925, ch. 196, §§ 1, 2, p. 364; am. 1929, ch. 57, § 1, p. 83; am. 1929, ch. 129, § 1, p. 211; I.C.A., §§ 29-1101 to 29-1109; am. 1939, ch. 49, § 1, p. 90; am. 1943, ch. 8, § 1, p. 10; am. 1945, ch. 6, § 1, p. 8; am. 1957, ch. 52, § 1, p. 89, were repealed by S.L. 1979, ch. 159, § 1.

Chapter 12
CORPORATIONS SOLE

Sec.

§ 30-1201 — 30-1209. Articles, powers, *etc.* of corporations sole. [Repealed.]

STATUTORY NOTES

Compiler's Notes.

These sections, which comprised S.L. 1895, §§ 1 to 7; reen. 1899, §§ 1 to 9; S.L. 1903, §§ 1 to 5; reen. R.C. & C.L. §§ 3018 to 3026; C.S. §§ 4879 to 4887; I.C.A. §§ 29-1201 to 29-1209, were repealed by S.L. 1979, ch. 159, § 1.

Chapter 13
PROFESSIONAL SERVICE CORPORATIONS

Sec.

§ 30-1301 Intent of legislature. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 1, p. 725; am. 1979, ch. 108, § 1, p. 343.

STATUTORY NOTES

Compiler's Notes.

Chapter 13 of Title 30, which comprised the following sections, was repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

30-1301. Intent of legislature. [1963, ch. 282, § 1, p. 725; am. 1979, ch. 108, § 1, p. 343.]

30-1302. Short title. [1963, ch. 282, § 2, p. 725.]

30-1303. Definitions. [1963, ch. 282, § 3, p. 725; am. 1979, ch. 108, § 2, p. 343; am. 1979, ch. 176, § 2, p. 526; am. 1982, ch. 233, § 5, p. 614; am. 1989, ch. 20, § 1, p. 23.]

30-1304. Who may incorporate. [1963, ch. 282, § 4, p. 725; am. 1979, ch. 108, § 3, p. 343.]

30-1305. Rendition of professional services. [1963, ch. 282, § 5, p. 725.]

30-1306. Professional relationship unaffected — Personal and corporate liability. [1963, ch. 282, § 6, p. 725.]

30-1307. Type of business limited — Investments. [1963, ch. 282, § 7, p. 725.]

30-1308. Shareholder qualifications — Voting. [1963, ch. 282, § 8, p. 725; am. 1981, ch. 226, § 7, p. 443.]

30-1309. Disqualification to render professional service — Severance of relationship with corporation — Effect of violation. [1963, ch. 282, § 9, p.

725; am. 1978, ch. 308, § 21, p. 771.]

30-1309A. Death or disqualification of sole shareholder. [I.C., § 30-1309A, as added by 1979, ch. 108, § 4, p. 343; am. 1987, ch. 191, § 1, p. 389; am. 2003, ch. 62, § 1, p. 209; am. 2007, ch. 116, § 6, p. 333.]

30-1310. Limitation on transfer of shares. [1963, ch. 282, § 10, p. 725.] Annotations

30-1311. Corporate name. [1963, ch. 282, § 11, p. 725; am. 1965, ch. 102, § 1, p. 188; am. 1978, ch. 308, § 22, p. 771; am. 1995, ch. 126, § 16, p. 542.]

30-1312. Application of corporation laws — Merger. [1963, ch. 282, § 12, p. 725; am. 1979, ch. 108, § 5, p. 343; am. 2007, ch. 116, § 7, p. 333.]

30-1313. Laws regulating professions unaffected. [1963, ch. 282, § 13, p. 725.]

30-1314. Admission of foreign corporations — Revocation of certificate of authority. [I.C., § 30-1314, as added by 1979, ch. 108, § 6, p. 343.]

30-1315. Officers, directors and shareholders. [I.C., § 30-1315, as added by 1981, ch. 226, § 9, p. 443.]

§ 30-1302. Short title. [Repealed.

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015.

History.

1963, ch. 282, § 2, p. 725.

§ 30-1303. Definitions. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see §§ 30-21-102 and 30-21-901.

History.

1963, ch. 282, § 3, p. 725; am. 1979, ch. 108, § 2, p. 343; am. 1979, ch. 176, § 2, p. 526; am. 1982, ch. 233, § 5, p. 614; am. 1989, ch. 20, § 1, p. 23.

§ 30-1304. Who may incorporate. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 4, p. 725; am. 1979, ch. 108, § 3, p. 343.

§ 30-1305. Rendition of professional services. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 5, p. 725.

§ 30-1306. Professional relationship unaffected — Personal and corporate liability. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 6, p. 725.

§ 30-1307. Type of business limited — Investments. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 7, p. 725.

§ 30-1308. Shareholder qualifications — Voting. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 8, p. 725; am. 1981, ch. 226, § 7, p. 443.

§ 30-1309. Disqualification to render professional service — Severance of relationship with corporation — Effect of violation. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 9, p. 725; am. 1978, ch. 308, § 21, p. 771.

§ 30-1309A. Death or disqualification of sole shareholder. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

I.C., § 30-1309A, as added by 1979, ch. 108, § 4, p. 343; am. 1987, ch. 191, § 1, p. 389; am. 2003, ch. 62, § 1, p. 209; am. 2007, ch. 116, § 6, p. 333.

§ 30-1310. Limitation on transfer of shares. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 10, p. 725.

§ 30-1311 . Corporate name. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-301 et seq.

History.

1963, ch. 282, § 11, p. 725; am. 1965, ch. 102, § 1, p. 188; am. 1978, ch. 308, § 22, p. 771; am. 1995, ch. 126, § 16, p. 542.

§ 30-1312. Application of corporation laws — Merger. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 12, p. 725; am. 1979, ch. 108, § 5, p. 343; am. 2007, ch. 116, § 7, p. 333.

§ 30-1313. Laws regulating professions unaffected. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

1963, ch. 282, § 13, p. 725.

§ 30-1314. Admission of foreign corporations — Revocation of certificate of authority. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-501 et seq.

History.

I.C., § 30-1314, as added by 1979, ch. 108, § 6, p. 343.

STATUTORY NOTES

Prior Laws.

Former § 30-1314, which comprised S.L. 1963, ch. 282, § 14, was repealed by S.L. 1978, ch. 308, § 23.

§ 30-1315. Officers, directors and shareholders. [Repealed.]

Repealed by S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-901.

History.

I.C., § 30-1315, as added by 1981, ch. 226, § 9, p. 443.

STATUTORY NOTES

Prior Laws.

Former § 30-1315, which comprised I.C., § 30-1315, as added by 1970, ch. 1, § 1, p. 3, was repealed by S.L. 1981, ch. 226, § 8.

Chapter 14
UNIFORM SECURITIES ACT (2004)

Part 1. General Provisions

Part 2. Exemptions From Registration of Securities

Part 3. Registration of Securities and Notice Filing of Federal Covered Securities

Part 1
General Provisions

§ 30-14-101. Short title. — This chapter shall be known and may be cited as the "Uniform Securities Act (2004)."

History.

I.C., § 30-14-101, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

This revision of chapter 14 of title 30 was enacted by § 2 of S.L. 2004, ch. 45, effective September 1, 2004. The previous version of chapter 14 of title 30, as enacted in 1967 and amended through 2003 and comprising §§ 30-1401 to 30-1462, was repealed by § 1 of S.L. 2004, ch. 45, effective September 1, 2004, or by an earlier act.

CASE NOTES

Attorney's Fees.

In investors' action against their brokers for securities violations where they received an arbitration award, the trial court correctly ruled the investors were not entitled to pursue fees in the award confirmation proceedings, as there was no independent cause of action for attorney's fees. Barbee v. WMA Securities, Inc., 143 Idaho 391, 146 P.3d 657 (2006).

Purpose and Validity.

State law regulating the sale of securities is not merely a revenue measure, but its real purpose is to protect public from unsubstantial

securities. Ashley & Rumelin v. Brady, 41 Idaho 160, 238 P. 314 (1925); McKinlay v. Javan Mines Co., 42 Idaho 770, 248 P. 473 (1926).

Passage of provisions of an act regulating the sale of securities is within the police power of the state. Ashley & Rumelin v. Brady, 41 Idaho 160, 238 P. 314 (1925).

§ 30-14-102. Definitions. — In this chapter, unless the context otherwise requires:

(1) "Administrator" means the director of the Idaho department of finance or his designee.

(2) "Agent" means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or who represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. A partner, officer, or director of a broker-dealer or issuer, or an individual having a similar status or performing similar functions, is an agent only if the individual otherwise comes within the term. The term does not include an individual excluded by a rule adopted or an order issued under this chapter.

(3) "Bank" means:

(a) A banking institution organized under the laws of the United States;

(b) A member bank of the federal reserve system;

(c) Any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the comptroller of the currency pursuant to section 1 of public law 87-722 (12 U.S.C. 92a), and which is supervised and examined by a state or federal agency having supervision over banks, and which is not operated for the purpose of evading this chapter; and

(d) A receiver, conservator, or other liquidating agent of any institution or firm included in subparagraph (a), (b) or (c) of this subsection.

(4) "Broker-dealer" means a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. The term does not include:

(a) An agent;

(b) An issuer;

(c) A bank, a trust company organized or chartered under the laws of this state, or a savings institution if its activities as a broker-dealer are limited to those specified in subsections 3(a)(4)(B)(i) through (vi), (viii) through (x), and (xi) if limited to unsolicited transactions; 3(a)(5)(B); and 3(a)(5)(C) of the securities exchange act of 1934 (15 U.S.C. 78c(a)(4) and (5)) or a bank that satisfies the conditions described in subsection 3(a)(4)(E) of the securities exchange act of 1934 (15 U.S.C. 78c(a)(4));

(d) An international banking institution; or

(e) A person excluded by a rule adopted or an order issued under this chapter.

(5) "Depository institution" means:

(a) A bank; or

(b) A savings institution, trust company, credit union or similar institution that is organized or chartered under the laws of a state or of the United States that is authorized to receive deposits, and that is supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund, or a successor authorized by federal law. The term does not include:

(i) An insurance company or other organization primarily engaged in the business of insurance;

(ii) A morris plan bank; or

(iii) An industrial loan company.

(6) "Federal covered investment adviser" means a person registered under the investment advisers act of 1940, as cited in section 30-14-103, Idaho Code.

(7) "Federal covered security" means a security that is, or upon completion of a transaction will be, a covered security under section 18(b) of the securities act of 1933 (15 U.S.C. 77r(b)) or rules or regulations adopted pursuant to that provision.

(8) “Filing” means the receipt under this chapter of a record by the administrator or a designee of the administrator.

(9) “Fraud,” “deceit,” and “defraud” are not limited to common law deceit.

(10) “Guaranteed” means guaranteed as to payment of all principal and all interest.

(11) “Institutional investor” means any of the following, whether acting for itself or for others in a fiduciary capacity:

(a) A depository institution, a trust company organized or chartered under the laws of this state, or an international banking institution;

(b) An insurance company;

(c) A separate account of an insurance company;

(d) An investment company as defined in the investment company act of 1940, as cited in section 30-14-103, Idaho Code;

(e) A broker-dealer registered under the securities exchange act of 1934, as cited in section 30-14-103, Idaho Code;

(f) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of ten million dollars ($10,000,000) or its investment decisions are made by a named fiduciary, as defined in the employee retirement income security act of 1974, that is a broker-dealer registered under the securities exchange act of 1934, an investment adviser registered or exempt from registration under the investment advisers act of 1940, an investment adviser registered under this chapter, a depository institution, or an insurance company;

(g) A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of ten million dollars ($10,000,000) or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the employee retirement income security act of 1974, that is a broker-dealer registered under the securities exchange act of 1934, an investment adviser registered or exempt from registration under the investment advisers act of 1940, an investment adviser

registered under this chapter, a depository institution, or an insurance company;

(h) A trust, if it has total assets in excess of ten million dollars ($10,000,000), its trustee is a depository institution, and its participants are exclusively plans of the types identified in paragraph (f) or (g) of this subsection, regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

(i) An organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), a corporation, a Massachusetts trust or similar business trust, a limited liability company, or a partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of ten million dollars ($10,000,000);

(j) A small business investment company licensed by the small business administration under section 301(c) of the small business investment act of 1958 (15 U.S.C. 681(c)) with total assets in excess of ten million dollars ($10,000,000);

(k) A private business development company as defined in section 202(a)(22) of the investment advisers act of 1940 (15 U.S.C. 80b-2(a)(22)) with total assets in excess of ten million dollars ($10,000,000);

(*l*) A federal covered investment adviser acting for its own account;

(m) A "qualified institutional buyer" as defined in rule 144A(a)(1), other than rule 144A(a)(1)(i)(H), adopted under the securities act of 1933 (17 CFR 230.144A);

(n) A "major U.S. institutional investor" as defined in rule 15a-6(b)(4)(i) adopted under the securities exchange act of 1934 (17 CFR 240.15a-6);

(o) Any other person, other than an individual, of institutional character with total assets in excess of ten million dollars ($10,000,000) not organized for the specific purpose of evading this chapter; or

(p) Any other person specified by a rule adopted or an order issued under this chapter.

(12) "Insurance company" means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks

underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state.

(13) "Insured" means insured as to payment of all principal and all interest.

(14) "International banking institution" means an international financial institution of which the United States is a member and whose securities are exempt from registration under the securities act of 1933.

(15) "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include:

(a) An investment adviser representative;

(b) A lawyer, accountant, engineer or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

(c) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(d) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;

(e) A federal covered investment adviser;

(f) A bank, a trust company organized or chartered under the laws of this state, or a savings institution;

(g) Any other person that is excluded by the investment advisers act of 1940 from the definition of investment adviser;

(h) Any person who offers accountancy services to the public and who holds a valid, unrevoked and unsuspended license under the provisions of chapter 2, title 54, Idaho Code, designating said person as a certified public accountant or a licensed public accountant; or

(i) Any other person excluded by a rule adopted or an order issued under this chapter.

(16) "Investment adviser representative" means an individual employed by or associated with an investment adviser or federal covered investment adviser who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing. The term does not include an individual who:

(a) Performs only clerical or ministerial acts;

(b) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(c) Is employed by or associated with a federal covered investment adviser, unless the individual has a "place of business" in this state as that term is defined by rule adopted under section 203A of the investment advisers act of 1940 (15 U.S.C. 80b-3a) and is:

(i) An "investment adviser representative" as that term is defined by rule adopted under section 203A of the investment advisers act of 1940 (15 U.S.C. 80b-3a); or

(ii) Not a "supervised person" as that term is defined in section 202(a)(25) of the investment advisers act of 1940 (15 U.S.C. 80b-2(a)(25)); or

(d) Is excluded by a rule adopted or an order issued under this chapter.

(17) "Issuer" means a person that issues or proposes to issue a security, subject to the following:

(a) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued.

(b) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate.

(c) The issuer of a fractional undivided interest in an oil, gas or other mineral lease or in payments out of production under a lease, right or royalty is the owner of an interest in the lease or in payments out of production under a lease, right or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale.

(18) "Nonissuer transaction" or "nonissuer distribution" means a transaction or distribution not directly or indirectly for the benefit of the issuer.

(19) "Offer to purchase" includes an attempt or offer to obtain, or solicitation of an offer to sell, a security or interest in a security for value. The term does not include a tender offer that is subject to section 14(d) of the securities exchange act of 1934 (15 U.S.C. 78n(d)).

(20) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(21) "Place of business" of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

(a) An office at which the broker-dealer, investment adviser, or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients; or

(b) Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser, or federal covered investment adviser provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients.

(22) “Predecessor act” means the act repealed by section 30-14-702, Idaho Code.

(23) “Price amendment” means the amendment to a registration statement filed under the securities act of 1933 or, if an amendment is not filed, the prospectus or prospectus supplement filed under the securities act of 1933 that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.

(24) “Principal place of business” of a broker-dealer or an investment adviser means the executive office of the broker-dealer or investment adviser from which the officers, partners or managers of the broker-dealer or investment adviser direct, control and coordinate the activities of the broker-dealer or investment adviser.

(25) “Record,” except in the phrases “of record,” “official record,” and “public record,” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(26) “Sale” includes every contract of sale, contract to sell, or disposition of, a security or interest in a security for value. “Offer to sell” includes every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value. Both “sale” and “offer to sell” include:

(a) A security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing constituting part of the subject of the purchase and having been offered and sold for value;

(b) A gift of assessable stock involving an offer and sale; and

(c) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to

convert the security into another security of the same or another issuer, including an offer of the other security.

(27) "Securities and exchange commission" means the United States securities and exchange commission.

(28) "Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas or other mineral rights; put, call, straddle, option or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security":

(a) Includes both a certificated and an uncertificated security;

(b) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or other specified period;

(c) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974;

(d) Includes as an "investment contract" an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. "Common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

(e) Includes as an "investment contract," among other contracts, an interest in a limited partnership and a limited liability company and an investment in a viatical settlement, life settlement or senior settlement or similar agreement.

(29) "Self-regulatory organization" means a national securities exchange registered under the securities exchange act of 1934, a national securities association of broker-dealers registered under the securities exchange act of 1934, a clearing agency registered under the securities exchange act of 1934, or the municipal securities rulemaking board established under the securities exchange act of 1934.

(30) "Sign" means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach or logically associate with the record an electronic symbol, sound or process.

(31) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

History.

I.C., § 30-14-102, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 1, p. 171.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

Director of department of insurance, § 41-202.

Amendments.

The 2012 amendment, by ch. 65, substituted "subsections (3)(a)(4)(B)((i) through (vi)" for "subsections (3)(a)((4)(b)(i) through (vi)" in paragraph (4)(c).

Federal References.

The references, in subsection (4)(c), to "subsections 3(a)(4)(B)(i) through (vi), (viii) through (x), and (xi)" and "3(a)(5)(B)" and "3(a)(5)(C)" are all to 15 USCS § 78c (a)(4) and (a)(5) in the securities exchange act of 1934, which section was enacted by § 3 of chapter 404 of an act of June 6, 1934.

The investment advisers act of 1940, referred to in this section, is codified as 15 USCS § 80b-1 et seq.

The investment company act of 1940, referred to in this section, is codified as 15 USCS § 80a-1 et seq.

The securities exchange act of 1934, referred to in this section, is codified as 15 USCS § 78a et seq.

The employee retirement income security act of 1974, referred to in this section, is codified as 29 USCS § 1001 et seq.

The securities act of 1933, referred to in this section, is codified as 15 USCS § 77a et seq.

Compiler's Notes.

For more on the federal deposit insurance corporation, see *http://www.fdic.gov*.

For national credit union share insurance fund, see *https://www.ncua.gov/Pages/default.aspx*.

For more on morris plan banks, see *https://eh.net/encyclopedia/morris-plan-banks/*.

The words enclosed in parentheses so appeared in the law as enacted.

CASE NOTES

Investment adviser.

Loan.

Security.

Investment Adviser.

To the extent that the definition contained in an administrative rule from the department of finance, with regard to an investment adviser transacting business, conflicts with a statutory definition in this section, this section governs. Kinsela v. State, Dep't of Fin., 117 Idaho 632, 790 P.2d 1388 (1990).

Loan.

Transactions between purported creditors and debtor were intended by parties to be loans not investments, because it did not appear that creditors could expect capital appreciation or participation in earnings generated by debtor. They expected to receive interest payments of 16% per annum, along with repayment of their principal after three years. In re Gables Mgmt., LLC, 473 B.R. 352 (Bankr. D. Idaho 2012).

Security.

Solicitation of fees from customers to enter their names in a bureau of land management lottery for gas and oil leases did not constitute marketing an investment security under Idaho law. The economic realities of the transactions did not amount to investing. State, Dep't of Fin. v. Resource Serv. Co., 130 Idaho 877, 950 P.2d 249 (1997).

Cited In re Tolman, 491 B.R. 138 (Bankr. D. Idaho 2013).

Official Comment

Prior Provisions: 1956 Act Section 401; RUSA 101.

1. Under Section 605(a) the administrator has the power to define by rule any term, whether or not used in this Act, as long as the definitions are not inconsistent with the Act.

2. All definitions include corresponding meanings. For example, "filing" would include "file" or "filed"; "sale" would include "sell."

3. Prefatory Phrase: "In this [Act], unless the context otherwise requires": Prior Provisions: 1956 Act Section 401 Preface; RUSA Section 101 Preface. This prefatory phrase which is in the counterpart provisions of the federal securities statutes, see, e.g., Securities Act of 1933 Section 2(a), provides the basis for the courts to take into account the statutory and factual context of each definition, see, e.g., *Reves v. Ernst & Young*, 494 U.S. 56 (1990); 2 Louis Loss & Joel Seligman, Securities Regulation 927-929 (3d ed. rev. 1999), and will allow the courts to harmonize this Act's definitions with the counterpart federal securities definitions to the extent appropriate. Cf. *Akin v. Q-L Inv., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992) ("Texas courts generally look to decisions of the federal courts to interpret

the Texas Securities Act because of obvious similarities between the state and federal laws"); *Koch v Koch Indus., Inc.*, 203 F.3d 1202, 1235 (10th Cir. 2000) (following federal definition of materiality); *Biales v. Young*, 432 S.E.2d 482, 484 (S.C. 1993) ("Section 35-1-1490(2) is substantially similar to Section 12(1) of the Federal Securities Act").

4. Section 102(2): Agent: Prior Provisions: 1956 Act Section 401(b); RUSA Section 101(14). Section (102)(2), in part, follows the 1956 Act definition. The 1956 Act used the term "agent" while the RUSA Section 101(14) used the term "sales representative." Given the broader enactment of the 1956 Act, this Act also uses the term "agent." Certain exclusions from the 1956 Act are exemptions in this Act. See Section 402(b).

Whether a particular individual who represents a broker-dealer or issuer is an "agent" depends upon much the same factors that create an agency relationship at common law. See, e.g., *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176, 179 (Minn. Ct. App. 1986) (following Official Comment that establishing agency under the Uniform Securities Act "depends upon much the same factors which create an agency relationship at common law"); *Shaughnessy & Co., Inc. v. Commissioner of Sec.*, 1971-1978 Blue Sky L. Rep. (CCH) ¶ 71,348 (Wis. Cir. Ct. 1977) (unlicensed person who took information relevant to securities transactions and turned it over to securities agents was himself an agent).

An individual can be an agent for a broker-dealer or issuer for a purpose other than effecting or attempting to effect purchases or sales of securities and not be a statutory agent under this Act. See, e.g., *Baker, Watts & Co. v. Miles & Stockridge*, 620 A.2d 356, 367 (Md. Ct. App. 1993) (attorney-client relationship is generally one of agency, but that alone does not bring an attorney within securities act definition of agent). An individual will not be an agent under Section 102(2) because of the person's status as a partner, officer, or director of a broker-dealer or issuer if such an individual does not effect or attempt to effect purchases or sales of securities. See, e.g., *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988).

Section 102(2) is intended to include any individual who acts as an agent, whether or not the individual is an employee or independent contractor. Cf. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. *en banc* 1990), *cert. denied,* 499 U.S. 976 (1991).

The word “individual” in the definition of the term “agent” is limited to human beings and does not include a juridical “person” such as a corporation. Cf. definition of “person” in Section 102(20). The 1956 Act Section 401(b) similarly was limited to individuals and did not include juridical persons. See, e.g., *Connecticut Nat’l Bank v. Giacomi*, 699 A.2d 101, 111-112 (Conn. 1997) (“agent” only includes natural persons when it used the term individual); *Schpok v. Fodale*, 236 N.W.2d 97, 99 (Mich. Ct. App. 1975) (agent defined to be individual and did not include a corporation).

An individual whose acts are solely clerical or ministerial would not be an agent under Section 102(2). Cf. Section 402(b)(8). Ministerial or clerical acts might include preparing written communications or responding to inquiries.

5. Section 102(3): Bank: Prior Provision: Subsection 3(a)(6) of the Securities Exchange Act of 1934. A United States branch of a foreign bank that otherwise satisfies this definition would be a bank.

6. Section 102(4): Broker-Dealer: Prior Provisions: 1956 Act Section 401(c); RUSA Section 101(2). This definition generally follows the definition of broker-dealer in the 1956 Act and RUSA. The use of the compound term is meant to include either a broker or a dealer. The recognized distinction is that a broker acts for the benefit of another while a dealer acts for itself in buying for or selling securities from its own inventory.

The distinction between “a person engaged in the business of effecting transactions in securities” and an investor, who may buy and sell with some frequency and is outside the scope of this term, has been well developed in the case law. See 6 Louis Loss & Joel Seligman, Securities Regulation 2980-2984 (3d ed. 1990).

The 1956 Act Section 401(c) excluded from the definition of broker-dealer a person who during any 12 consecutive months did not direct more than 15 offers to buy or sell in this State. In this Act exemptions from broker-dealer registration are provided in Section 401(b).

The Gramm-Leach-Bliley Act, signed into law in November 1999, rescinded the blanket exemption of banks from the definition of broker and

dealer in Sections 3(a)(4) and (5) of the Securities Exchange Act of 1934. The Gramm-Leach-Bliley Act permits a bank to avoid registration as a broker or dealer at the federal level if the bank limits its activities to those specified in the Securities Exchange Act. This Act generally adopts the activity focused exceptions for banks included in the Gramm-Leach-Bliley Act, with minor modifications relating to the private placement and *de minimis* brokerage activities of banks (15 U.S.C. 78c(a)(4)(B)(vii) and (xi)). This Act also reaches savings institutions.

A state may decide to adopt an exclusion in Section 102(4)(C) that fully conforms with the bank exceptions contained in the Gramm-Leach-Bliley Act. For states that choose this approach, the language of Section 102(4)(C) should read:

> (C) a bank or savings institution if its activities as broker-dealer are limited to those specified in Section 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78c(a)(4) and (5)), or a bank that satisfies the conditions specified in Section 3(a)(4)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

Section 102(4)(E) of this Act also permits a securities administrator to adopt additional exclusions that exclude banks and other depository institutions, in whole or in part, from the definition of "broker-dealer."

States that promptly adopt this Act should consider whether it is appropriate to provide banks a transition period to comply with the Act's new activity focused exceptions. The activity focused exceptions for banks in the Gramm-Leach-Bliley Act were originally to become effective at the federal level on May 12, 2001. However, the Securities and Exchange Commission has delayed the effective date of these activity focused exceptions and thus continued the blanket exemption for banks beyond May 12, 2001, and commenced a rulemaking designed to clarify and define the scope of the bank exceptions in the Gramm-Leach-Bliley Act. See Sec. Ex. Act Rels. 44,291, 74 SEC Dock. 2155 (2001) (proposal); 45,897, 77 SEC Dock. 1555 (2002) (proposal). To avoid disrupting the activities of banks, states should consider delaying implementation of the activity focused exceptions in this Act until these exceptions are implemented at the federal level.

Section 15(h)(1) of the Securities Exchange Act of 1934, as amended by the National Securities Markets Improvement Act of 1996, preempts state law from "[establishing] capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to the requirements in those areas established under [the Securities Exchange Act]." These preemptions are recognized in the substantive broker-dealer provisions in Article 4.

7. Section 102(5): Depository institution: No Prior Provision. A depository institution's securities are addressed by the exemption in Section 201(3). A depository institution is an institutional investor in Section 102(11)(A).

8. Section 102(6): Federal covered investment adviser: No Prior Provision. This provision is necessitated by Section 203A of the Investment Advisers Act of 1940, added by Title III of the National Securities Markets Improvement Act of 1996, which allocates to primary state regulation most advisers with assets under management of less than $25 million. SEC registration is permitted, but not required, for investment advisers having between $25 and $30 million of assets under management and is required of investment advisers having at least $30 million of assets under management. Investment Advisers Act of 1940 Rule 203A-1. Most advisers with assets under management of $25 million or more register solely under Section 203 of the Investment Advisers Act of 1940 and not state law. This division of labor is intended to eliminate duplicative regulation of investment advisers.

9. Section 102(7): Federal covered security: No Prior Provision. The National Securities Markets Improvement Act of 1996, as subsequently amended, partially preempted state law in the securities offering and reporting areas. Under Section 18(a) of the Securities Act of 1933, no state statute, rule, order, or other administrative action may apply to:

(1) The registration of a "covered" security or a security that will be a covered security upon completion of the transaction;

(2)(A) any offering document prepared by or on behalf of the issuer of a covered security;

(2)(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or its issuer that is required to be filed with the SEC or any national securities association registered under Section 15A of the Securities Exchange Act such as the National Association of Securities Dealers (NASD); or

(3) the merits of a covered security or a security that will be a covered security upon completion of the transaction.

Section 18(b) of the Securities Act of 1933 applies to four types of "covered securities":

(1) Securities listed or authorized for listing on the New York Stock Exchange (NYSE), the American Stock Exchange (Amex); the National Market System of the Nasdaq stock market; or securities exchanges registered with the Securities and Exchange Commission (SEC) (or any tier or segment of their trading) if the SEC determines by rule that their listing standards are substantially similar to those of the NYSE, Amex, or Nasdaq National Market System, which the SEC has done through Rule 146; and any security of the same issuer that is equal in seniority or senior to any security listed on the NYSE, Amex, or Nasdaq National Market System;

(2) securities issued by an investment company registered with the SEC (or one that has filed a registration statement under the Investment Company Act of 1940);

(3) securities offered or sold to "qualified purchasers." This category of covered securities will become operational when the SEC defines the term "qualified purchaser" as used in Section 18(b)(3) of the Securities Act of 1933, by rule. To date the SEC has proposed, but not adopted, Rule 146(c) of the Securities Act of 1933; and

(4) securities issued under the following specified exemptions of the Securities Act of 1933:

(A) Sections 4(1) (transactions by persons other than an issuer, underwriter or dealer), and 4(3) (dealers after specified periods of time), but only if the issuer files reports with the Commission under Sections 13 or 15(d) of the Securities Exchange Act;

(B) Section 4(4) (unsolicited brokerage transactions);

(C) Securities Act exemptions in Section 3(a) with the exception of the charitable exemption in Section 3(a)(4), the exchange exemption in Section 3(a)(10), the intrastate exemption in Section 3(a)(11), and the municipal securities exemption in Section 3(a)(2) but only with "respect to the offer or sale of such [municipal] security in the State in which the issuer of such security is located"; and

(D) securities issued in compliance with SEC rules under Section 4(2) (private placements).

Section 18(c)(1) preserves state authority "to investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions."

The National Securities Markets Improvement Act, in essence, preempts aspects of the securities registration and reporting processes for specified federal covered securities. The Act does not diminish state authority to investigate and bring enforcement actions generally with respect to securities transactions.

The States are authorized to require filings of any document filed with the SEC for notice purposes "together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee." Section 18(c)(2). However, no filing or fee may be required with respect to any listed security that is a covered security under Section 18(b)(1) (traded on specified stock markets). Section 302 of this Act addresses notice filings and fees applicable to federal covered securities.

10. Section 102(8): Filing: Prior Provision: RUSA Section 101(4). The RUSA definition was revised to recognize that records may be filed in paper form or electronically with the administrator, or designees such as the Web-CRD (Central Registration Depository) or Investment Adviser Registration Depository (IARD) or the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval System (EDGAR) or successor systems.

In the RUSA definition, the term “filed” referred to “actual delivery of a document or application.” This Act substitutes the term “record” which is defined in Section 102(25) to refer broadly to “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perishable form”. This definition requires the receipt of a record. The definition does not limit filing to any specific medium such as mail, certified mail, or a particular electronic system. The definition is intended to permit an administrator to accept filings over the Internet or through a direct modem system, both of which are now used to transmit documents to EDGAR, or through new electronic systems as they evolve.

“Receipt” refers to the actual delivery of a record to the administrator or a designee and does not refer to a subsequent examination of the record by the administrator. See, e.g., *Fehrman v. Blunt*, 825 S.W.2d 658 (Mo. Ct. App. 1992). If a deficient form was provided to a designee, but not provided to the administrator because of the deficiency, it would not be filed under this definition.

11. Section 102(9): Fraud, deceit and defraud: Prior Provisions: 1956 Act Section 401(d); RUSA Section 101(6). This definition, which is identical to the 1956 Act and RUSA, codifies the holdings that “fraud” as used in the federal and state securities statutes is not limited to common law deceit. See generally 7 Louis Loss & Joel Seligman, Securities Regulation 3421-3448 (3d ed. 1991).

12. Section 102(10): Guaranteed: Prior Provisions: 1956 Act Section 401(e); RUSA Section 401(a)(1). The 1956 Act definition of “guaranteed” applies generally to payment of “principal, interest, or dividends.” The RUSA definition of “guaranteed,” which was solely applicable to exempt securities, applied to the guarantee of “all or substantially all of principal and interest or dividends.”

Section 102(10) follows the 1956 Act approach and applies generally to the guarantee of “all principal and all interest.” Any method of guarantee that results in a guarantee of payment of all principal and all interest will suffice including, for example, an irrevocable letter of credit.

This definition does not address whether or not a guarantee, whether whole or partial, is itself a security. That issue is addressed by the definition of “security” in Section 102(28).

13. Section 102(11): Institutional investor: Prior Provisions: RUSA Section 101(5); Securities Act of 1933 Rules 144A and 501(a).

Sections 102(11)(A) through (K) are based on Rule 501(a) of the Securities Act of 1933, but do not include the paragraphs of Rule 501(a) that address individuals. Given the significant period of time since Rule 501(a) was adopted, this Act has used a $10 million minimum for several categories of institutional investor rather than $5 million minimum used in Rule 501(a).

Section 102(11)(H) concludes with an except clause meant to exclude self-directed plans for individuals from this definition.

With respect to the exclusion of Rule 144A(a)(1)(H) from Section 102(11)(M), the substance of Rule 144A(a)(1)(H) appears in Section 102(11)(I), but with a requirement of total assets in excess of $10,000,000.

Section 102(11)(O) is meant to reach persons similar to those listed in Sections 102(11)(A) through (N), but not otherwise listed. Under Section 503, if challenged in a proceeding, the burden of proving the availability of an exemption is on the person claiming it. An interpretive opinion may be sought from the administrator under Section 605(d).

14. Section 102(12): Insurance company: No Prior Provision. This definition is based on Securities Act of 1933 Section 2(a)(13).

15. Section 102(13): Insured: Prior Provision: RUSA Section 401(a)(2). The RUSA definition of "insured," which was solely applicable to exempt securities, applied to the insurance of "all or substantially all of principal, interest, or dividends." Section 102(13) is applicable generally but is limited to "payment of all principal and all interest."

16. Section 102(14): International banking institution: No Prior Provision. Securities issued or guaranteed by the International Bank for Reconstruction and Development, 22 U.S.C. Section 286k-1(a); the Inter-American Development Bank, 22 U.S.C. Section 283h(a); the Asian Development Bank, 22 U.S.C. Section 285h(a); the African Development Bank, 22 U.S.C. Section 290i-9; and the International Finance Corporation, see 22 U.S.C. Section 282k; are treated as exempt securities under Section 3(a)(2) of the Securities Act of 1933, see generally 3 Louis Loss & Joel

Seligman, Securities Regulation 1191-1194 (3d ed. rev. 1999), and are within this term.

17. Section 102(15): Investment adviser: Prior Provisions: 1956 Act Section 401(f); RUSA Section 101(7). This term generally follows the definition in Section 202(a)(11) of the Investment Advisers Act of 1940, but has been updated to take into account new media such as the Internet.

The first sentence in Section 102(15) is identical to the first sentence in the 1956 Act Section 401(f) and the counterpart language in Section 202(a)(11). The RUSA definition deleted the phrases "either directly or through publications or writings" and "regular" before business. These terms have been returned to Section 102(15) because of the intention that this definition be construed uniformly with the definition in Section 202(a)(11) of the Investment Advisers Act of 1940. This first sentence would not reach the author of a book who did not receive compensation as part of a regular business for providing investment advice.

The second sentence in the term addressing financial planners is new. The purpose of this sentence is to achieve functional regulation of financial planners who satisfy the definition of investment adviser. Cf. Investment Advisers Act Release 1092, 39 SEC Dock. 494 (1987) (similar approach in Securities and Exchange Commission interpretative Release). This reference is not intended to preclude persons who hold a formally recognized financial planning or consulting designation or certification from using this designation. The use by a person of a title, designation or certification as a financial planner or other similar title, designation, or certification alone does not require registration as an investment adviser.

Sections 102(15)(A) through (H) are exclusions from the term "investment adviser." An excluded person can be held liable for fraud in providing investment advice, see Section 502, but would not be subject to the registration and regulatory provisions in Article 4.

Sections 102(15)(A) and (E) are new and recognize that investment adviser representatives and federal covered investment advisers are separately treated in this Act. See definitions in Sections 102(6) and 102(16); registration and exemptions in Sections 404-405.

Sections 102(15)(B), (C), and (G) are substantively identical to the 1956 Act, RUSA, and the Investment Advisers Act of 1940. The Official Comment to the 1956 Act Section 401(f) quoted an opinion of the Securities and Exchange Commission General Counsel in Investment Advisers Act Release 2 on the meaning of "special compensation" included in Section 102(15)(C):

[This clause] amounts to a recognition that brokers and dealers commonly give a certain amount of advice to their customers in the course of their regular business, and that it would be inappropriate to bring them within the scope of the Investment Advisers Act merely because of this aspect of their business. On the other hand, that portion of clause [(C)] which refers to 'special compensation' amounts to an equally clear recognition that a broker or dealer who is specially compensated for the rendition of advice should be considered an investment adviser and not be excluded from the purview of the Act merely because he is also engaged in effecting market transactions in securities. . . . The essential distinction to be borne in mind in considering borderline cases . . . is the distinction between compensation for advice itself and compensation for services of another character to which advice is merely incidental.

Similarly, other broker-dealer employees such as research analysts who receive no special compensation from third parties for investment advice would not be required to register as investment advisers.

The 1956 Act definition added the word "paid" in Section 401(f)(4) to the counterpart exclusion in Section 202(a)(11) of the Investment Advisers Act "to emphasize," as the Official Comment explained, "that a person who periodically distributes a 'tipster sheet' free as a way to get paying clients is not excluded from the definition as a 'publisher.'"

After the 1956 Act was published, the United States Supreme Court construed the definition of investment adviser in *Lowe v. SEC*, 472 U.S. 181 (1985), and concluded:

> Congress did not intend to exclude publications that are distributed by investment advisers as a normal part of the business of servicing their clients. The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal

> incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.

Id. at 185.

Responsive to this language RUSA rewrote this exclusion to provide:

> a publisher, employee, or columnist of a newspaper, news magazine, or business or financial publication, or an owner, operator, or employee of a cable, radio, or television network, station, or production facility, if, in either case, the financial or business news published or disseminated is made available to the general public and the content does not consist of rendering advice on the basis of the specific investment situation of each client.

Recent experience at the federal and state levels suggest that the 1956 Act and RUSA approaches may be too broad. The retention of the Investment Advisers Act approach provides a better balance between First Amendment concerns and protection of investors from non-"bona fide" publicizing of investment advice. The exclusion in Section 102(15)(D) is intended to exclude publishers of Internet or electronic media, but only if the Internet or electronic media publication or website satisfies the "bona fide" and "publication of general and regular circulation" requirements. Cf. *SEC v. Park*, 99 F. Supp. 2d 889, 895-896 (N.D. Ill. 2000) (court declined to dismiss complaint against an Internet website when there were allegations that the website was not "bona fide" or of "general and regular circulation").

The exclusion in Section 102(15)(G) is required by the National Securities Markets Improvement Act of 1996. This exclusion will reach banks and bank holding companies as described in Investment Advisers Act Section 202(a)(11)(A) and persons whose advice solely concerns United States government securities as described in Section 202(a)(11)(E).

18. Section 102(16): Investment adviser representative: No Prior Provision. Investment adviser representatives have not been required to register under the federal Investment Advisers Act, before or after the National Securities Markets Improvement Act.

The term investment adviser representative is not intended to preclude persons who hold a formally recognized financial planning or consulting title, designation, or certification from using such a designation. The use by a person of a title, designation or certification as a financial planner, or other similar title, designation, or certification alone does not require registration as an investment adviser representative.

19. Section 102(17): Issuer: Prior Provisions: 1956 Act Section 401(g); RUSA Section 101(8). This Section generally follows the 1956 Act and RUSA.

In paragraph (B), the phrase "or that is otherwise contractually responsible for assuring payment of the certificate" is intended to address forms of payment other than leases or conditional sales contracts. It would also reach guarantors.

20. Section 102(18): Nonissuer transaction or nonissuer distribution: Prior Provisions: 1956 Act Section 401(h); RUSA Section 101(9). This definition is relevant to several exempt transactions in Section 202.

In *TechnoMedical Labs, Inc. v. Utah Sec. Div.*, 744 P.2d 320 (Utah Ct. App. 1987), the court declined to limit the term benefit to monetary benefits and instead held a spinoff transaction could provide direct or indirect benefits to an issuer. Id. at 323-324, *following SEC v. Datronics Eng'r, Inc.*, 490 F.2d 250 (4th Cir. 1973), *cert. denied,* 416 U.S. 937; *SEC v. Harwin Indus. Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971). In a similar fashion, transactions by officers, directors, promoters, and other insiders of the issuer may benefit the issuer and may not qualify as nonissuer transactions.

21. Section 102(19): Offer to purchase: No Prior Provision. A rescission offer under Section 510 would be an offer to purchase with respect to a security that earlier had been sold.

22. Section 102(20): Person: Prior Provisions: 1956 Act Section 401(i); RUSA Section 101(10). This is the standard definition used by the National Conference of Commissioners for Uniform State Laws with the addition of "limited liability company" to reflect current usage. The use of the concluding phrase "or any other legal or commercial entity" is intended to be broad enough to include other forms of business entities that may be created or popularized in the future.

23. Section 102(21): Place of business: Prior Provision: Rules 203A-3(b) and 222-1 of the Investment Advisers Act of 1940.

24. Section 102(23): Price amendment: Prior Provision: RUSA Section 101(11). A price amendment may be used in a registration coordinated with the Securities and Exchange Commission procedure in Section 303(d). In the case of noncash offerings, required information concerning such matters as the offering price and underwriting arrangements is normally filed in a "price" amendment after the rest of the registration statement has been reviewed by the Securities and Exchange Commission staff. See generally 1 Louis Loss & Joel Seligman, Securities Regulation 542-550 (3d ed. rev. 1998).

25. Section 102(24): Principal place of business: Prior Provision: Rule 222-1(b) of the Investment Advisers Act of 1940.

26. Section 102(25): Record: Prior Provision: Uniform Electronic Transactions Act Section 2(13). Cf. Section 3(a)(37) of the Securities Exchange Act of 1934. The Uniform Electronic Transactions Act §2(13) defines record in nearly identical terms. The Official Comment explains:

> This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including "writings." A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means.

This term is intended to embrace new forms of records that are created or popularized in the future. A record would include, but not be limited to, a registration statement, report, application, book, publication, account, paper, correspondence, memorandum, agreement, document, computer file, or disk, microfilm, photograph, or audio or visual tape.

27. Section 102(26): Sale: Prior Provisions: 1956 Act Section 401(j); RUSA Section 101(13). Both the 1956 Act and RUSA definition of "sale" are modeled on Section 2(a)(3) of the Securities Act of 1933.

Language in Section 401(j) of the 1956 Act addressed the now rescinded SEC "no sale" doctrine and has been eliminated. Merger transactions are

usually sales under Section 102(26), but may be exempted from the securities registration requirements by Section 202(18).

28. Section 102(28): Security: Prior Provisions: 1956 Act Section 401(1); RUSA Section 101(16). Much of the definition in Section 102(28), like the definitions in the 1956 Act Section 401(l) and RUSA Section 101(16), is identical to the definition in Section 2(a)(1) of the Securities Act. State courts interpreting the Uniform Securities Act definition of security have often looked to interpretations of the federal definition of security. See generally 2 Louis Loss & Joel Seligman, Security Regulation 923-1138.19 (3d ed. rev. 1999).

The most recent amendments to Section 2(a)(1) of the Securities Act of 1933 were added by the Commodities Futures Modernization Act of 2000 which added or revised language in the Securities Act addressing security futures and securities puts, calls, straddles, options, or privileges. Identical language has been included in Section 102(28) of this Act to harmonize interpretation of the federal and state definition of a "security." With respect to a security futures product, Section 28(a) of the Securities Exchange Act of 1934, as amended by the Commodity Futures Modernization Act of 2000, further provides: "No provision of any State law regarding the offer, sale or distribution of securities shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability."

Preorganization certificates or subscriptions are included in this term, obviating the need for a separate definition as was included in RUSA Section 402(13).

Section 102(28) uses RUSA's "fractional undivided interest in oil, gas or other mineral rights" formulation, which originated in Section 2(a)(1) of the Securities Act of 1933, rather than the 1956 Act formulation, "certificate of interest or participation in an oil, gas or mining title." In recent years, courts interpreting Section 2(a)(1) of the Securities Act of 1933 have found certain oil, gas or mineral rights to be investment contracts (that is, securities). 2 Louis Loss & Joel Seligman, Securities Regulation 979-982 (3d ed. rev. 1999).

A new sentence was added in Section 102(28)(A) referring to certificated or uncertificated securities to indicate that the term is intended to apply

whether or not a security is evidenced by a writing. Section 102(28)(A) is intended to reject *Thomas v. State of Tex.*, 65 S.W.3d 38 (Tex. Crim. App. 2001) (Under Texas law evidence of indebtedness requires a writing).

Insurance or endowment policies or endowment or annuity contracts, other than those on which an insurance company promises to make variable payments, are excluded from this term. Variable insurance products are also excluded in many states and are exempted from securities registration in others under provisions such as Section 201(4). When variable products are included in the definition of security and exempted from registration state securities administrators can bring enforcement actions concerning variable insurance sales practices.

The Drafting Committee recognized that the decision whether to exclude variable annuities from the definition of security will be made on a state-by-state basis. Those states which intend to exclude variable products from the definition of security should add the words "or variable" to Section 102(28)(B) so that it will read:

> (B) The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.

In the view of the American Council of Life Insurers:

> The brackets around the words "or variable" should be removed to follow the majority of jurisdictions. Thirty-seven jurisdictions [including Guam] currently exclude all insurance, endowment and annuity contracts from the definition of security. Removal of the brackets around the words "or variable," therefore, would incorporate the approach taken in the majority of jurisdictions. The removal of these brackets also prevents a statutory conflict with [up to] 48 jurisdictions that grant the insurance commissioner exclusive jurisdiction to regulate the issuance and sale of variable contracts. Moreover, this approach recognizes that the issuance and sale of variable contracts is comprehensively regulated by the Securities and Exchange Commission, the National Association of Securities Dealers, 50 state insurance departments, and in the case of group life and annuities, the Department of Labor. Like all other financial products, this approach imposes only one, rather than two, levels of

regulation in each state and reflects the philosophy of financial services modernization.

In the view of the North American Securities Administrators Association variable products should be exempted from registration, not excluded from the definition of securities:

> One of the goals of this Act is to align state and federal law. The United States Supreme Court ruled that a variable annuity is a security in SEC v. Variable Annuity Life Insurance Company of America, 359 U.S. 65 (1959). More recently, it has been confirmed that variable insurance products are "covered securities" as defined in the National Securities Markets Improvement Act of 1996 (NSMIA) and in the Securities Litigation Uniform Standards Act of 1998 (SLUSA), see Lander v. Hartford Life Annuity Ins., 251 F.3d 101 (2d Cir. 2001).
>
> When variable products are included in the definition of security and exempted from registration, state securities administrators can bring enforcement actions concerning variable insurance sales practices. This approach toward functional regulation is supported by the National Association of Securities Dealers as evidenced by a February 2001 letter from Mary Schapiro, President of Regulatory Policy & Oversight: "Based on our experience, we have found that variable products' sales-related problems parallel those of mutual funds and other securities . . . Because of the substantial similarities between variable contracts and other securities products, we believe it is incongruous for agents and sales practices involved in variable annuities not to be covered by state securities laws."
>
> State securities regulators support the functional regulation of agents because: 1) insurance companies are not affected since state securities regulators are preempted from requiring the registration of variable products; 2) the vast majority of broker-dealer subsidiaries of insurance companies are already registered to sell securities in most states; and 3) the vast majority of agents are already dually licensed to sell insurance and securities in most states.

Section 102(28)(C) includes the exclusion in RUSA from the 1956 definition of security for "an interest in a contributory or noncontributory

pension or welfare plan subject to the Employee Retirement Income Security Act of 1974."

The first clause in Section 102(28)(D) is derived from the leading case of *SEC v. W.J. Howey Co*., 328 U.S. 293 (1946), which has been widely followed by federal and state courts. The second clause in Section 102(28)(D) is based, in part, on the leading case of *SEC v. Glenn W. Turner Enter., Inc*., 474 F.2d 476, 482 n.7 (9th Cir. 1973), *cert. denied,* 419 U.S. 900 (1974).

The courts have divided over the interpretation of the "common enterprise" element of an investment contract. The courts generally recognize that "horizontal" commonality (for example, the pooling of an investment by two or more investors) is a common enterprise. A small minority of the federal circuits will also find a common enterprise in a "vertical" relationship when a single investor is dependent upon the expertise of a single commodities broker. Since two or more persons do not share in the profitability of an undertaking, it is difficult to argue that there is a common enterprise. Section 102(28)(D) follows a significantly larger number of federal circuits and adopts a more restrictive form of vertical commonality that occurs only when there is profit sharing between two persons even if, for example, one is a conventional investor and one is a promoter. See generally 2 Louis Loss & Joel Seligman, Securities Regulation 989-997 (3d ed. Rev. 1999).

In interpreting all elements of the investment contract, the courts have emphasized substance, not form. A conventional partnership involving two individuals who actively participate in its management and who each own 50 percent interest of its profits has consistently not been viewed as an investment contract because profits do not come from the efforts of others. On the other hand, investments in limited partnership interests which are traded on stock exchanges consistently have been held to be investment securities because profits do come substantially from the efforts of others. Indeed, interests in an entity called a general partnership may be a security when the general partnership functions like a limited partnership. See, e.g., *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981), *cert. denied,* 454 U.S. 897 (1981); see generally 2 Loss & Seligman, supra, at 1019-1033.

Section 102(28)(E) is consistent with state and federal securities laws which have recognized interests in limited liability companies and limited partnerships in some circumstances as "securities," see 2 Louis Loss & Joel Seligman, Securities Regulation 1028-1031 (3d ed. rev. 1999), when consistent with the court decisions interpreting the investment contract concept. This Act also refers to an investment in a viatical settlement or a similar agreement to make unequivocally clear that viatical settlement and similar agreements, which otherwise satisfy the definition of an investment contract, are securities. This is intended to reject the holding of one court that a viatical contract could not be a security. See *SEC v. Life Partners Inc.*, 87 F.3d 536 (D.C. Cir. 1996), *reh'g denied,* 102 F.3d 587 (D.C. Cir. 1996). A number of states have done so by statute.

Judicial construction of the term "investment contract" has been the most frequently litigated issue concerning the term "security." See Gabaldon, A Sense of Security: An Empirical Study, 25 J. Corp. L. 307 (2000), explaining that there had been 792 cases decided to that date in which the definition of a security played a prominent role. Id. at 308. Some 461 of the 792 cases (58 percent) concerned investment contracts. Id. at 322. A number of states, by statute, rule, or case law have also adopted the "risk capital" test to find a security when an investment is subject to the risks of an enterprise with the expectation of profit or other valuable benefit and the investor has no direct control over the management of the enterprise. See, e.g., 2 Loss & Seligman, supra, at 939-940 n.50.

29. Section 102(29): Self-regulatory organization: Prior Provision: RUSA Section 101(17). This definition was added by RUSA and is based on a counterpart provision in the American Law Institute Federal Securities Code. At the current time national securities exchanges are registered under Section 6 of the Securities Exchange Act of 1934; national securities associations under Section 15A; clearing agencies under Section 17A; and the Municipal Securities Rulemaking Board under Section 15B.

30. Section 102(30): Sign: No Prior Provision. This definition is intended to facilitate electronic signatures, to the extent permitted by Section 105.

31. Section 102(31): State: Prior Provisions: 1956 Act Section 401(m); RUSA Section 101(18). This is the standard definition used by the National Conference of Commissioners on Uniform State Laws. It does include

territories and possessions of the United States, as well as the District of Columbia and Puerto Rico, but does not include foreign governments, their territories, or their possessions. In this Act "foreign" always refers to activity, a government, or person outside of the United States, not a different state within the United States.

§ 30-14-103. References to federal statutes. — "Securities act of 1933" (15 U.S.C. 77a et seq.), "securities exchange act of 1934" (15 U.S.C. 78a et seq.), "public utility holding company act of 1935" (15 U.S.C. 79 et seq.), "investment company act of 1940" (15 U.S.C. 80a-1 et seq.), "investment advisers act of 1940" (15 U.S.C. 80b-1 et seq.), "employee retirement income security act of 1974" (29 U.S.C. 1001 et seq.), "national housing act" (12 U.S.C. 1701 et seq.), "commodity exchange act" (7 U.S.C. 1 et seq.), "internal revenue code" (26 U.S.C. 1 et seq.), "securities investor protection act of 1970" (15 U.S.C. 78aaa et seq.), "securities litigation uniform standards act of 1998" (112 Stat. 3227), "small business investment act of 1958" (15 U.S.C. 661 et seq.), and "electronic signatures in global and national commerce act" (15 U.S.C. 7001 et seq.) mean those statutes and the rules and regulations adopted under those statutes, as in effect on the date of enactment of this chapter.

History.

I.C., § 30-14-103, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The Securities Litigation Uniform Standards Act of 1998 is P.L. 105-353, which is compiled throughout title 15, United States Code.

Compiler's Notes.

The phrase "the date of enactment of this chapter" at the end of the section refers to the date of enactment of S.L. 2004, Chapter 45, which was effective September 1, 2004.

The words enclosed in parentheses so appeared in the law as enacted.

Official Comment

Prior Provisions: 1956 Act Section 401(k); RUSA Section 101(15).

1. There are a large number of references to other laws in this Act, particularly to the federal securities laws identified in Section 103, and to rules adopted by the Securities and Exchange Commission under those laws. One of the main objectives of this Act is to take account of those provisions in the federal laws that are preemptive, and to coordinate with other, nonpreemptive provisions of the federal laws where coordination between federal and state securities law is in the public interest.

2. Section 12(d) of the Uniform Statute and Rule Construction Act, adopted by NCCUSL in 1995, provides: "A statute or rule that incorporates by reference a statute or rule of another jurisdiction does not incorporate a later enactment or adoption or amendment of the other statute or rule." Nevertheless, it is not uncommon for States to permit later amendments to statutes and rules referenced in enacted legislation to become automatically effective. In those states the final bracketed language in this Section should be included in the Act.

3. In those states which do not permit automatic effectiveness of later amendments and that follow Section 12(d) of the Uniform Statute and Rule Construction Act, this problem has been addressed by either giving the administrator the power to update by rule or the duty to notify the legislature when amendment is necessary. When the legislature notification approach is adopted, to prevent a gap period, the administrator might be given the power to act by rule until the legislature has acted.

4. After enactment, amendments to a preemptive federal statute, to rules adopted by a federal agency under a preemptive provision of a federal statute, or to amendments to such rules should be enforced in all states under the Supremacy Clause of the United States Constitution. A number of such references are in this Act.

§ 30-14-104. References to federal agencies. — A reference in this chapter to an agency or department of the United States is also a reference to a successor agency or department.

History.

I.C., § 30-14-104, as added by 2004, ch. 45, § 2, p. 169.

§ 30-14-105. Electronic records and signatures. — This chapter modifies, limits and supersedes the federal electronic signatures in global and national commerce act, but does not modify, limit or supersede section 101(c) of that act (15 U.S.C. 7001(c)) or authorize electronic delivery of any of the notices described in section 103(b) of that act (15 U.S.C. 7003(b)). This chapter authorizes the filing of records and signatures, when specified by provisions of this chapter or by a rule adopted or an order issued under this chapter, in a manner consistent with section 104(a) of that act (15 U.S.C. 7004(a)).

History.

I.C., § 30-14-105, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The electronic signatures in global and national commerce act, referred to in this section, is codified as 15 USCS § 7001 et seq.

Official Comment

No Prior Provision.

The purpose of this Section is to permit the filing of electronic signatures and electronic records.

Part 2
Exemptions From Registration of Securities

Official Comment

Section 201 includes exempt securities and Section 202 includes exempt transactions. Both exempt securities and exempt transactions are exempt from the securities registration, notice filing requirement of Section 302, and the filing of sales literature Section 504 of this Act. Neither Section 201 nor Section 202 provides an exemption from the Act's antifraud provisions in Article 5, nor the broker-dealer, agent, investment adviser, or investment adviser registration requirements in Article 4.

A Section 201 exempt security retains its exemption when initially issued and in subsequent trading.

A Section 202 transaction exemption must be established for each transaction.

Neither the exempt security nor the transaction exemptions are meant to be mutually exclusive. A security or transaction may qualify for two or more exemptions.

Article 2 is not available to any security, transaction, or offer that, although in technical compliance with a specific section in Article 2, is part of an unlawful plan or scheme to evade the registration provisions of Article 3. In such cases registration is required. Cf. Prelim. Note 6 to Regulation D adopted under the Securities Act of 1933.

§ 30-14-201. Exempt securities. — The following securities are exempt from the requirements of sections 30-14-301 through 30-14-306, Idaho Code, and section 30-14-504, Idaho Code:

(1) A security, including a revenue obligation or a separate security as defined in rule 131 (17 CFR 230.131) adopted under the securities act of 1933, issued, insured or guaranteed by the United States; by a state; by a political subdivision of a state; by a public authority, agency, or instrumentality of one (1) or more states; by a political subdivision of one (1) or more states; or by a person controlled or supervised by and acting as an instrumentality of the United States under authority granted by congress; or a certificate of deposit for any of the foregoing;

(2) A security issued, insured or guaranteed by a foreign government with which the United States maintains diplomatic relations, or any of its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer or guarantor;

(3) A security issued by and representing, or that will represent, an interest in or a direct obligation of, or be guaranteed by:

(a) An international banking institution;

(b) A banking institution organized under the laws of the United States; a member bank of the federal reserve system; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund, or a successor authorized by federal law, or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the comptroller of currency pursuant to section 1 of public law 87-722 (12 U.S.C. 92a); or

(c) Any other depository institution, or any trust company organized or chartered under the laws of this state, unless by rule or order the administrator proceeds under section 30-14-204, Idaho Code;

(4) A security issued by and representing an interest in, or a debt of, or insured or guaranteed by, an insurance company authorized to do business in this state;

(5) A security issued or guaranteed by a railroad, other common carrier, public utility, or public utility holding company that is:

(a) Regulated in respect to its rates and charges by the United States or a state;

(b) Regulated in respect to the issuance or guarantee of the security by the United States, a state, Canada, or a Canadian province or territory; or

(c) A public utility holding company registered under the public utility holding company act of 1935 or a subsidiary of such a registered holding company within the meaning of that act;

(6) A federal covered security specified in section 18(b)(1) of the securities act of 1933 (15 U.S.C. 77r(b)(1)) or by a rule adopted under that provision or a security listed or approved for listing on another securities market specified by rule under this chapter; a put or a call option contract; a warrant; a subscription right on or with respect to such securities; or an option or similar derivative security on a security or an index of securities or foreign currencies issued by a clearing agency registered under the securities exchange act of 1934 and listed or designated for trading on a national securities exchange, a facility of a national securities exchange, or a facility of a national securities association registered under the securities exchange act of 1934 or an offer or sale, of the underlying security in connection with the offer, sale, or exercise of an option or other security that was exempt when the option or other security was written or issued; or an option or a derivative security designated by the securities and exchange commission under section 9(b) of the securities exchange act of 1934 (15 U.S.C. 78i(b));

(7) A security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic or reformatory purposes, or as a chamber of commerce, and not for pecuniary profit, no part of the net earnings of which inures to the benefit of a private stockholder or other person, or a security of a company that is excluded from the definition of an investment company under section 3(c)(10)(b) of

the investment company act of 1940 (15 U.S.C. 80a-3(c)(10)(B)); except that with respect to the offer or sale of a note, bond, debenture or other evidence of indebtedness issued by such a person, a rule may be adopted under this chapter limiting the availability of this exemption by classifying securities, persons and transactions, imposing different requirements for different classes, specifying with respect to paragraph (b) of this subsection the scope of the exemption and the grounds for denial or suspension, and requiring an issuer:

(a) To file a notice specifying the material terms of the proposed offer or sale and copies of any proposed sales and advertising literature to be used and provide that the exemption becomes effective if the administrator does not disallow the exemption within the period established by the rule;

(b) To file a request for exemption authorization for which a rule under this chapter may specify the scope of the exemption, the requirement of an offering statement, the filing of sales and advertising literature, the filing of consent to service of process complying with section 30-14-611, Idaho Code, and grounds for denial or suspension of the exemption; or

(c) To register under section 30-14-304, Idaho Code;

(8) A member's or owner's interest in, or a retention certificate or like security given in lieu of a cash patronage dividend issued by, a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a state, but not a member's or owner's interest, retention certificate, or like security sold to persons other than bona fide members of the cooperative;

(9) An equipment trust certificate with respect to equipment leased or conditionally sold to a person, if any security issued by the person would be exempt under this section or would be a federal covered security under section 18(b)(1) of the securities act of 1933 (15 U.S.C. 77r(b)(1)); and

(10) Any security issued by a domestic or foreign corporation, partnership, trust or association engaged in actual mining operations or the exploration and development of mining properties in this state, whether or not sold through a broker-dealer, provided the following conditions are met:

(a) The term "actual mining operations" within the meaning of this subsection does not include the development or production of gas or oil;

(b) The total amount of the securities to be offered and sold does not exceed five hundred thousand dollars ($500,000) in any twelve (12) month period;

(c) All sales brochures, pamphlets, advertisements and literature are filed with the director prior to being used;

(d) At least eighty percent (80%) of the gross amount paid by the purchasers of the securities is used in actual mining operations or for actual exploration and development expenses, including legal, accounting, engineering and geological expenses; and

(e) The issuer shall file a report in a form prescribed by the director and at such times that the director by rule may provide, not to exceed once every three (3) months, stating the number of shares or amount of other securities sold, the number of purchasers, the amount of money obtained by the issuer from the sales, and the manner in which the moneys have been expended.

History.

I.C., § 30-14-201, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The securities exchange act of 1934, referred to in this section, is codified as 15 USCS § 78a et seq.

The public utility holding company act of 1935, referred to in paragraph (5)(b), is codified as 15 USCS § 79 et seq.

Compiler's Notes.

For more on the federal deposit insurance corporation, see *http://www.fdic.gov*.

For national credit union share insurance fund, see *https://www.ncua.gov/Pages/default.aspx*.

The words enclosed in parentheses so appeared in the law as enacted.

Official Comment

Prior Provisions: 1956 Act Section 402(a); RUSA Section 401(b).

1. Section 201(1): United States government and municipal securities: Prior Provisions: 1956 Act Section 402(a)(1); RUSA Section 401(b)(1). This exemption generally follows the 1956 Act except that it adds securities "insured" by a specified government to those "issued" or "guaranteed." RUSA, in contrast, also addressed foreign governments, which in this Act are treated separately in Section 201(2). Rule 131 issued under the Securities Act of 1933 defines separate securities issued under governmental obligations.

A significant minority of states have excluded from the Section 201(1) exemption industrial revenue bonds. Interest on these securities is solely repayable from revenues received from a nongovernmental industrial or commercial enterprise. Typically this exclusion will not operate if (A) the payments are made or unconditionally guaranteed by a person whose securities are exempt from registration under Section 18(b)(1) of the Securities Act of 1933, or (B) in accordance with a rule under this [Act], the issuer first files a notice in a record specifying the terms of the proposed offer or sale and a copy of the offering statement and the administrator does not disallow the exemption within the time period established by the rule.

2. Section 201(2): Foreign government securities: Prior Provisions: 1956 Act Section 402(a)(2); RUSA Section 401(b)(2). The 1956 Act, as amended, and RUSA both reached foreign governments as specified in Section 201(2) and separately treated "a security issued, insured, or guaranteed by Canada, a Canadian province or territory, a political subdivision of Canada or a Canadian province or territory, an agency or corporate or other instrumentality of one or more of the foregoing." The separate treatment of Canadian securities is largely redundant and has been eliminated from this Section.

3. Section 201(3): Depository institution and international banking institution securities: Prior Provision: RUSA 401(b)(3). Section 402(a)(3) of the 1956 Act exempts specified bank and similar depository institutions; Section 402(a)(4) exempts specified savings and loan and similar thrift institution securities; and Section 402(a)(6) exempts specified credit union securities. RUSA Section 401(b)(3) combines the three types of depository institutions into a common definition (see RUSA Section 101(13)) which

are adopted in this Act as Sections 102(3) and 102(5)) and a common exemption (see RUSA Section 401(b)(3)) which is adopted in this subsection.

Banks specified in Section 3(a)(2) of the Securities Act of 1933 issue federal covered securities under Section 18(b)(4)(C) of the Securities Act of 1933. Section 201(3)(C) applies to securities issued by depository institutions without depository insurance. Under Section 204, the administrator will have the ability to revoke or limit this exemption.

4. Section 201(4): Insurance company securities: Prior Provisions: 1956 Act Section 402(a)(5); RUSA Section 401(b)(4). The issuance, insurance, or guarantee of securities by an insurance company is extensively regulated by state insurance commissions or other state agencies.

Under this Act insurance, endowment policies, or annuity contracts under which an insurance company promises to pay fixed sums are excluded from the definition of a security in Section 102(28)(B).

Unless brackets are removed from the words "or variable" in Section 102(28)(B), a variable annuity or other variable insurance product would be considered a security under this Act and under federal securities law. See *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65 (1959); *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

A variable annuity or other variable insurance product issued by an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 would be a "federal covered security," see Section 102(7). See *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101 (2d Cir. 2001).

A variable annuity or other variable insurance product not issued by a registered investment company would be exempted by Section 201(4), but would be subject to the antifraud provisions in Article 5.

5. Section 201(5): Common carrier and public utility securities: Prior Provisions: 1956 Act Section 401(a)(7); RUSA Section 401(b)(5). Both the 1956 Act and RUSA include references, omitted here, to the Interstate Commerce Commission, whose enabling legislation subsequently was repealed. Public utility holding companies covered by this exemption are

subject both to the Public Utility Holding Company Act and to state or Canadian utility regulation.

6. Section 201(6): Certain options and rights: No Prior Provision. The 1956 Act Section 402(a)(8) provided an exemption for securities listed on the New York, American, Midwest (now Chicago), or other designated stock exchanges, senior or substantially equal securities of the same issuer listed on the exchange and any security covered by listed or approved subscription rights or warrants, or any warrant or right to purchase or subscribe to any security exempted by Section 402(a)(8).

RUSA essentially retained this exemption in Section 401(b)(7) and added securities designated for inclusion in the National Market System by the National Association of Securities Dealers in Section 401(b)(8) and specified options issued by a clearing agency registered under the Securities Exchange Act of 1934 in Section 401(b)(9).

In 1996 Congress enacted the National Securities Markets Improvement Act and provided in Section 18(b)(1) that securities listed on the New York, American or Nasdaq Stock Exchange, or designated by rule of the Securities and Exchange Commission, as well as any security of the same issuer that is equal in seniority or senior to any of these securities will be a federal covered security. Under Rule 146 the SEC has designated as federal covered securities under Section 18(b)(1) Tier I of the Pacific Exchange; Tier I of the Philadelphia Stock Exchange; and The Chicago Board Options Exchange on condition that the relevant listing standards continue to be substantially similar to those of the New York, American, or Nasdaq stock markets. See Reporter's Note to Section 102(7). A federal covered security subject to Section 18(b)(1) of the Securities Act of 1933 will not be subject to the securities registration requirements of Sections 301 and 303 through 306.

The exemption in Section 201(6) addresses specified options, warrants, and rights that are not federal covered securities under Section 18(b)(1) of the Securities Act of 1933, but generally would have been exempted under RUSA. The 1956 Act, which was narrower, was drafted before the computerized Nasdaq stock market began trading the National Market List and the development of standardized options markets.

The final clause of Section 201(6) makes clear that any offer or sale of the underlying security that occurs as a result of the offer or sale of an option or other derivative security exempted under this provision or as the result of the exercise of the option or other derivative security, is covered by the exemption if the option met the terms of the exemption at the time such derivative security was written (that is, sold) or issued. The sale of the underlying security when an option is exercised would be exempt even if the underlying security is not at that time subject to any exemption under the Act. This is consistent with existing precedent under federal law suggesting that the legality of the sale of an underlying security when an option is exercised should be determined by the status of the security at the time the option was written rather than at the time of exercise. See, e.g., *H. Kook & Co., Inc. v. Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93 (2d Cir. 1969). Any transaction in an underlying security that results from the offer, sale, or exercise of any derivative security issued by a registered clearing agency and traded on a national securities exchange or association is exempt if the derivative security when written was exempt under Section 201(6).

The Securities and Exchange Commission has adopted Rule 9b-1 under Section 9(b).

7. Section 201(7): Nonprofit organization securities: Prior Provision: Section 3(a)(4) of the Securities Act of 1933. Section 402(a)(9) of the 1956 Act and Section 401(b)(10) of RUSA exempt specified nonprofit securities. Both are modeled on Section 3(a)(4) of the Securities Act, which was subsequently amended.

Securities issued under Section 3(a)(4) of the Securities Act of 1933 are not treated as federal covered securities in Section 18(b)(4)(C), although a separate Section 3(a)(13) exemption which addresses certain church plan securities are federal covered securities under Section 18(b)(4)(C).

RUSA included an optional notice and review requirement for nonprofit securities in Section 401(b)(10) "if at least ten days before a sale of the security the person has filed with the administrator a notice setting forth the material terms of the proposed sale and copies of any sales and advertising literature to be used and the administrator by order does not disallow the exemption within the next five full business days."

The nonprofit exemption is of particular concern to state securities administrators. See, e.g., State Regulators Announce Dramatic Rise in Religious Scams; Tens of Thousands Lured, 33 Sec. Reg. & L. Rep. (BNA) 1189 (2001).

Under Section 6 of the Philanthropy Protection Act, Congress preempted application of the registration provisions of state securities laws to issuance of securities covered by Section 3(c)(10) of the Investment Company Act of 1940 unless states acted within three years of enactment (December 1998) to pass special state legislation cancelling federal preemption. Ten states enacted such legislation. Those states may preserve this treatment of Section 3(c)(10) securities by deleting from Section 201(7) the phrase "or a security of a company that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of 1940."

Section 201(7) provides statutory authority for the states to adopt rules with respect to notes, bonds, debentures and other evidences of indebtedness issued by nonprofit organizations. Each state may adopt different rules tailored for various types of nonprofit debt offerings, (e.g., local church bond offerings, national church bond offerings, church extension funds, charitable gift annuities). For states that do not wish to provide an automatic exemption from registration for a particular type of nonprofit debt instrument or offering, Section 201(7) creates three categories of regulatory review that may be required by rule: (a) exemption by notice filing, (b) exemption by state authorization, and (c) registration by qualification. These categories are consistent with the manner in which many states currently review different types of nonprofit debt securities. See Horner & Makens, Securities Regulation of Religious and Other Nonprofit Organizations, 27 Stetson L. Rev. 473 (1997).

8. Section 201(8): Cooperatives: Prior Provision: RUSA Section 401(b)(13). Section 201(8) is derived from RUSA Section 401(b)(13) which was included in that act after a number of states had adopted exemptions for securities issued by cooperatives. Section 201(8) is not intended to be available if securities are offered or sold to the public generally.

The 1956 Act Section 402(a)(12) had instead provided: "insert any desired exemption for cooperatives." The Reporter for the 1956 Act had

found such sharp variation among the 18 states that then had adopted a cooperative exemption that “no common pattern can be found.” Louis Loss, Commentary on the Uniform Securities Act 118 (1976).

9. Section 201(9): Equipment trust certificates: Prior Provision: RUSA Section 401(b)(6). The Securities Act of 1933 Section 3(a)(6) includes a narrower exemption for railroad equipment trusts. Section 201(9) follows RUSA. The Official Comment to RUSA Section 401(b)(6) explained:

The new paragraph (b)(6) reflects the extensive development of equipment lease financing through leveraged leases, conditional sales, and other devices. The underlying premise is that if the securities of the person using such a financing device would be exempt under some other paragraph of Section 401, the equipment trust certificate or other security issued to acquire the property in question also is exempt.

§ 30-14-202. Exempt transactions. — The following transactions are exempt from the requirements of sections 30-14-301 through 30-14-306, Idaho Code, and section 30-14-504, Idaho Code:

(1) An isolated nonissuer transaction, whether or not effected by or through a broker-dealer;

(2) A nonissuer transaction by or through a broker-dealer registered, or exempt from registration under this chapter, and a resale transaction by a sponsor of a unit investment trust registered under the investment company act of 1940, in a security of a class that has been outstanding in the hands of the public for at least ninety (90) days, if, at the date of the transaction:

(a) The issuer of the security is engaged in business, the issuer is not in the organizational stage or in bankruptcy or receivership, and the issuer is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

(b) The security is sold at a price reasonably related to its current market price;

(c) The security does not constitute the whole or part of an unsold allotment to, or a subscription or participation by, the broker-dealer as an underwriter of the security or a redistribution;

(d) A nationally recognized securities manual or its electronic equivalent designated by any rule adopted or an order issued under this chapter or a record filed with the securities and exchange commission that is publicly available and contains:

(i) A description of the business and operations of the issuer;

(ii) The names of the issuer's executive officers and the names of the issuer's directors, if any;

(iii) An audited balance sheet of the issuer as of a date within eighteen (18) months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or

merger each had an audited balance sheet, a pro forma balance sheet for the combined organization; and

(iv) An audited income statement for each of the issuer's two (2) immediately previous fiscal years or for the period of existence of the issuer, whichever is shorter, or, in the case of a reorganization or merger when each party to the reorganization or merger had audited income statements, a pro forma income statement; and

(e) Any one (1) of the following requirements is met:

(i) The issuer of the security has a class of equity securities listed on a national securities exchange registered under section 6 of the securities exchange act of 1934 or designated for trading on the national association of securities dealers automated quotation system;

(ii) The issuer of the security is a unit investment trust registered under the investment company act of 1940;

(iii) The issuer of the security, including its predecessors, has been engaged in continuous business for at least three (3) years; or

(iv) The issuer of the security has total assets of at least two million dollars ($2,000,000) based on an audited balance sheet as of a date within eighteen (18) months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had such an audited balance sheet, a pro forma balance sheet for the combined organization;

(3) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security of a foreign issuer that is a margin security defined in regulations or rules adopted by the board of governors of the federal reserve system;

(4) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in an outstanding security if the guarantor of the security files reports with the securities and exchange commission under the reporting requirements of section 13 or 15(d) of the securities exchange act of 1934 (15 U.S.C. 78m or 78o(d));

(5) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security that:

(a) Is rated at the time of the transaction by a nationally recognized statistical rating organization in one (1) of its four (4) highest rating categories; or

(b) Has a fixed maturity or a fixed interest or dividend, if:

(i) A default has not occurred during the current fiscal year or within the three (3) previous fiscal years of the issuer or any predecessor, in the payment of principal, interest, or dividends on the security; and

(ii) The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not and has not been within the previous twelve (12) months a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

(6) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter effecting an unsolicited order or offer to purchase;

(7) A nonissuer transaction executed by a bona fide pledgee without the purpose of evading this chapter;

(8) A nonissuer transaction by a federal covered investment adviser with investments under management in excess of one hundred million dollars ($100,000,000) acting in the exercise of discretionary authority in a signed record for the account of others;

(9) A transaction in a security, whether or not the security or transaction is otherwise exempt, in exchange for one (1) or more bona fide outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, if the terms and conditions of the issuance and exchange or the delivery and exchange and the fairness of the terms and conditions have been approved by the administrator after a hearing as provided in section 30-14-202A, Idaho Code, or otherwise;

(10) A transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(11) A transaction in a note, bond, debenture or other evidence of indebtedness secured by a mortgage or other security agreement if the note,

bond, debenture or other evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit;

(12) A transaction by an executor, administrator of an estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian or conservator;

(13) A sale or offer to sell to:

(a) An institutional investor;

(b) A federal covered investment adviser; or

(c) Any other person exempted by a rule adopted or an order issued under this chapter;

(14) A sale or an offer to sell securities of an issuer, if the transaction is part of a single issue in which:

(a) Not more than ten (10) purchasers are present in this state during any twelve (12) consecutive months, other than those designated in subsection (13) of this section;

(b) A general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

(c) A commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under this chapter or an agent registered under this chapter for soliciting a prospective purchaser in this state; and

(d) The issuer reasonably believes that all the purchasers in this state, other than those designated in subsection (13) of this section, are purchasing for investment;

(15) A transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options or warrants, if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this state;

(16) An offer to sell, but not a sale, of a security not exempt from registration under the securities act of 1933 if:

(a) A registration or offering statement or similar record as required under the securities act of 1933 has been filed, but is not effective, or the offer is made in compliance with rule 165 adopted under the securities act of 1933 (17 CFR 230.165); and

(b) A stop order of which the offeror is aware has not been issued against the offeror by the administrator or the securities and exchange commission, and an audit, inspection or proceeding that is public and that may culminate in a stop order is not known by the offeror to be pending;

(17) An offer to sell, but not a sale, of a security exempt from registration under the securities act of 1933 if:

(a) A registration statement has been filed under this chapter, but is not effective;

(b) A solicitation of interest is provided in a record to offerees in compliance with a rule adopted by the administrator under this chapter; and

(c) A stop order of which the offeror is aware has not been issued by the administrator under this chapter and an audit, inspection or proceeding that may culminate in a stop order is not known by the offeror to be pending;

(18) A transaction involving the distribution of the securities of an issuer to the security holders of another person in connection with a merger, consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or subsidiary and the other person, or its parent or subsidiary, are parties;

(19) A rescission offer, sale or purchase under section 30-14-510, Idaho Code;

(20) An offer or sale of a security to a person not a resident of this state and not present in this state if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this chapter;

(21) Employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests,

and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees including offers or sales of such securities to:

(a) Directors; general partners; trustees, if the issuer is a business trust; officers; consultants; and advisers;

(b) Family members who acquire such securities from those persons through gifts or domestic relations orders;

(c) Former employees, directors, general partners, trustees, officers, consultants and advisers if those individuals were employed by or providing services to the issuer when the securities were offered; and

(d) Insurance agents who are exclusive insurance agents of the issuer, or the issuer's subsidiaries or parents, or who derive more than fifty percent (50%) of their annual income from those organizations;

(22) A transaction involving:

(a) A stock dividend or equivalent equity distribution, whether the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer or not, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property or stock;

(b) An act incident to a judicially approved reorganization in which a security is issued in exchange for one (1) or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash; or

(c) The solicitation of tenders of securities by an offeror in a tender offer in compliance with rule 162 adopted under the securities act of 1933 (17 CFR 230.162); or

(23) A nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under this chapter, if

the issuer is a reporting issuer in a foreign jurisdiction designated by this subsection or by a rule adopted or an order issued under this chapter; has been subject to continuous reporting requirements in the foreign jurisdiction for not less than one hundred eighty (180) days before the transaction; and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this subsection or by a rule adopted or an order issued under this chapter, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this subsection, Canada, together with its provinces and territories, is a designated foreign jurisdiction and the Toronto stock exchange, inc., is a designated securities exchange. After an administrative hearing in compliance with chapter 52, title 67, Idaho Code, the administrator, by rule adopted or an order issued under this chapter, may revoke the designation of a securities exchange under this subsection, if the administrator finds that revocation is necessary or appropriate in the public interest and for the protection of investors.

History.

I.C., § 30-14-202, as added by 2004, ch. 45, § 2, p. 169; am. 2008, ch. 143, § 1, p. 415; am. 2012, ch. 65, § 2, p. 171.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 143, deleted the paragraph (11)(a) designation and deleted paragraphs (11)(b) and (11)(c), which read: "(b) A general solicitation or general advertisement of the transaction is not made; and (c) A commission or other remuneration is not paid or given, directly or indirectly, to a person not registered under this chapter as a broker-dealer or as an agent".

The 2012 amendment, by ch. 65, inserted "and" preceding "contains" near the end of the introductory paragraph in (2)(d).

Federal References.

The investment company act of 1940, referred to in this section, is codified as 15 USCS § 80a-1 et seq.

Section 6 of the securities exchange act of 1934, referred to in paragraph (2)(e)(i), is codified as 15 USCS § 78f.

The securities act of 1933, referred to in this section, is codified as 15 USCS § 77a et seq.

Compiler's Notes.

For more on securities and exchange commission, referred to in paragraph (2)(d), subsection (4), and paragraph (16)(b), see *http://www.sec.gov*.

For more on the Toronto stock exchange, inc., referred to in subsection (23), see *http://www.tmx.com/en/index.html*.

The words enclosed in parentheses so appeared in the law as enacted.

CASE NOTES

Enjoining Sales.

Where defendant failed to carry his burden under the nonpublic offer and limited offering exemptions and failed to establish that a genuine issue of material fact existed on the issue of securities fraud, summary judgment was properly granted to Idaho department of finance seeking a permanent injunction to prohibit defendant from selling said securities. State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995).

Official Comment

1. Sections 202(1) through (8) are available only for nonissuer transactions. An issuer selling securities in an initial public offering or other offering may not rely on Sections 202(1) through (8). A nonissuer, however, can rely on any issuer transaction exemption such as Section 202(13), when the exemption would be applicable to a nonissuer. The term "nonissuer transaction or nonissuer distribution" is defined in Section 102(18); the term "issuer" is defined in Section 102(17).

2. Section 202(1): Isolated nonissuer transactions: Prior Provisions: 1956 Act Section 402(b)(1); RUSA Section 402(1). The term "isolated transaction" is not defined in this Act, but left to the states to develop. Historically under state law there has been somewhat varied case law

development of the term "isolated transactions." See, e.g., *Blinder, Robinson & Co., Inc. v. Goettsch*, 403 N.W.2d 772 (Iowa 1987) (isolated nonissuer transaction exemption is not unconstitutionally vague); *Allen v. Schauf*, 449 P.2d 1010 (Kan. 1969) (regulation defined isolated transactions to not exceed four persons solicited in a 12 month period); *Nelson v. State*, 355 P.2d 413, 420 (Okla. Ct. Crim. App. 1960) ("[a]n isolated sale means one standing alone, disconnected from any other"); see generally 1 Louis Loss & Joel Seligman, Securities Regulation 125-130 (3d ed. rev. 1998).

In general this subsection is intended to cover the occasional sale by a person. It would not exempt multiple or successive transactions by a person or group, whether those sales are sufficient to constitute a "distribution" as that term is used for purposes of the federal securities laws, see 2 Louis Loss & Joel Seligman, Securities Regulation 1138.50-1138.52 (3d ed. rev. 1999), or merely too frequent to be considered "isolated" under the relevant state law.

Limited issuer offering transactions are separately addressed in Section 202(14).

3. Section 202(2): Nonissuer transactions in specified outstanding securities: Prior Provisions: 1956 Act Section 402(b)(2); RUSA Sections 402(3) and (4). This Section represents a modernization of the securities manual exemption which was included in both the 1956 Act and RUSA. NASAA recommended an amendment to the 1956 Act Section 402(b) after discussion with the Securities Industry Association and others in the securities industry. This Section generally follows the NASAA amendment.

Rule 419 issued under the Securities Act of 1933 defines a "blank check company" to be a company that "is a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person." A "blind pool" is similar and would involve an investment in a blank check or other entity with no identified business plan or purpose. A "shell company" is also similar and would involve an entity which, to date, has no significant business assets, plan, or purpose.

4. Section 202(3): Nonissuer transactions in specified foreign transactions: No Prior Provision. The NASAA recommendation that was

the basis of Section 202(2) also included specified foreign nonissuer transactions subject to a manual exemption when there was disclosure of the issuer's officers and directors in the issuer's country of domicile. This subsection uses margin securities as an alternative approach to identify sufficiently seasoned foreign securities. Margin securities are required to be in compliance with Regulation T which was adopted by the Board of Governors of the Federal Reserve System.

5. Section 202(4): Nonissuer transactions in securities subject to Securities Exchange Act reporting: Prior Provision: RUSA Section 402(2). RUSA added this exemption to authorize nonissuer secondary trading in the securities of issuers that were subject to the periodic reporting requirements of the Securities Exchange Act of 1934. To bar immediate secondary trading in nonregistered initial public offerings, there was a further requirement that these securities be subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934 for not less than 90 days. Section 202(4) only covers the guarantor because if the issuer of the security is a reporting company under Sections 13 or 15(d) of the Securities Exchange Act of 1934, the transaction is preempted by Section 18(b)(4)(A) of the Securities Act of 1933.

Section 18(b)(4)(A) of the National Securities Markets Improvement Act of 1996 defines nonissuer transactions under Section 4(1) of the Securities Act of 1933 ("transactions by persons other than an issuer, underwriter, or dealer") as "federal covered securities," see Section 102(7), if the issuer files reports with the Securities and Exchange Commission under Sections 13 or 15(d) of the Securities Exchange Act of 1934. Under Section 18(a) of the Securities Act of 1933 no state statute, rule, order, or other administrative action with respect to registration of securities or reporting requirements may apply to a federal covered security. To harmonize Section 202(4) with Sections 18(a) and 18(b)(4)(A) of the Securities Act of 1933, the 90 day reporting period in RUSA Section 402(2) is not adopted in this Act.

6. Section 202(5): Nonissuer transactions in specified fixed income securities: Prior Provisions: 1956 Act Section 402(b)(2)(B); RUSA Section 402(4). The concept of a fixed income security rated by a nationally recognized statistical rating organization in one of its four highest rating categories described in Section 202(5)(A) is well established in federal

securities law in Form S-3 adopted under the Securities Act of 1933 and the net capital Rule 15c3-1(c)(2)(vi)(F) adopted under the Securities Exchange Act of 1934. See 2 Louis Loss & Joel Seligman, Securities Regulation 649-653 (3d ed. rev. 1999). Nationally recognized statistical rating organizations have been identified by the Securities and Exchange Commission and include such organizations as Moody's and Standard and Poor's. Rating categories typically begin with AAA and under this Act would include BBB as the fourth highest rating category.

Section 202(5)(B) follows the 1956 Act and RUSA, but also addresses blank check and similar offerings, which became major concerns at the state and federal levels during the past two decades. Cf. Securities Act of 1933 Rule 419. See Official Comment (3).

This subsection includes both debt securities with fixed maturity or a fixed interest rate and preferred stock with fixed dividend provisions.

7. Section 202(6): Unsolicited brokerage transactions: Prior Provisions: 1956 Act Section 402(b)(3); RUSA Section 402(5). Section 18(b)(4)(B) of the Securities Act of 1933 defines as federal covered securities those subject to Section 4(4) of the Securities Act of 1933: "brokerage transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." Section 202(6) is intended to provide exemption for nonagency transactions by dealers not within the scope of Section 4(4).

The 1956 Act Section 402(b)(3) had provided that the administrator "may by rule require that the customer acknowledge upon a specified form that the same was unsolicited, and that a signed copy of each such form be preserved by the broker-dealer for a specified period." This type of requirement is preempted by Section 18(a) of the Securities Act of 1933 for federal covered securities and is viewed as unnecessary for the limited class of dealer nonagency transactions that will be exempted by Section 202(6).

8. Section 202(7): Nonissuer transactions by pledgees: Prior Provisions: 1956 Act Section 402(b)(7); RUSA Section 402(9). This subsection is identical to the 1956 Act and substantively identical to RUSA.

9. Section 202(8): Nonissuer transactions with federal covered investment advisers: No Prior Provision. This exemption was added

because of a recognition that federal covered investment advisers are sophisticated financial professionals capable of determining the merits of a security and do not require the protections provided by requiring registration in a particular state.

10. Section 202(9): Specified exchange transactions: No Prior Provision. Section 202(9) provides a state counterpart to the exemption in Section 3(a)(10) of the Securities Act of 1933.

11. Section 202(10): Underwriter transactions: Prior Provisions: 1956 Act Section 402(b)(4); RUSA Section 402(6). This subsection is substantively identical to the 1956 Act and RUSA.

12. Section 202(11): Unit secured transactions: Prior Provisions: 1956 Act Section 402(b)(5); RUSA Section 402(7). In recent years the application of this exemption has been one of concern to state securities administrators. The conditions that conclude this exemption are new and are intended to address these concerns.

13. Section 202(12): Bankruptcy, guardian, or conservator transactions: Prior Provisions: 1956 Act Section 402(b)(6); RUSA Section 402(8). This subsection is identical to that in the 1956 Act and RUSA.

14. Section 202(13): Transactions with specified investors: Prior Provision: 1956 Act Section 402(b)(8). The 1956 Act contains similar but less inclusive language in Section 402(b)(8). If the Securities and Exchange Commission adopts a rule defining "qualified purchaser" as used in Section 18(b)(3) of the Securities Act to specify certain purchasers of federal covered securities, part or all of this exemption will be redundant. As of September 2002, the Commission has proposed, but not adopted, Rule 146(c).

Section 202(13)(B) is limited to transactions for the account of a federal covered investment adviser and is not intended to reach transactions on behalf of others by such adviser.

15. Section 202(14): Limited offering transactions: Prior Provisions: 1956 Act Section 402(b)(9); RUSA Section 402(11). The reference in the prefatory language to "a single issue" signifies that two or more issues can be "integrated" and potentially destroy the exemption. There are two general tests for integration under the federal securities laws. The states

similarly have followed generally these types of integration principles with respect to securities transaction exemptions. First, there is a six month "buffer" before and after an offer, offer to sell, or sale of a transaction exempt under Section 202(14) during which no other issue can be distributed if integration automatically is to be avoided. See Rule 147(b)(2) and Rule 502(a) of the Securities Act of 1933. Second, if two issues occur within six months, integration may occur depending upon the following factors:

(i) are the offerings part of a single plan of financing;

(ii) do the offerings involve issuance of the same class of securities;

(iii) are the offerings made at or about the same time;

(iv) is the same type of consideration to be received; and

(v) are the offerings made for the same general purpose.

See generally 3 Louis Loss & Joel Seligman, Securities Regulation 1231-1248 (3d ed. rev. 1999).

Section 402(b)(9) of the 1956 Act and Section 402(11) of the 1985 Act provide alternative limited offering transaction exemptions. The 1956 Act was limited to offers to no more than ten persons (other than institutional investors specified in Section 402(b)(8)); all purchasers in the State had to purchase for investment; and no remuneration was given for soliciting prospective purchasers in the State. RUSA, in contrast, was limited to no more than 25 purchasers (other than financial or institutional investors); no general solicitation or advertising; and no remuneration was paid to a person other than a broker-dealer for soliciting a prospective purchaser.

This Section would apply to preorganization limited offerings as well as operating company limited offerings. The Securities Act of 1933 Sections 3(b) and 4(2) also apply to both. In contrast, the 1956 Act Section 402(b)(10) and RUSA Section 402(12) used similar concepts in separate Sections to apply to preorganization limited offerings.

Section 18(b)(4)(D) of the Securities Act of 1933 defines as federal covered securities those issued under Securities and Exchange Commission rules under Section 4(2) of the Securities Act. This would include Rule 506, which uses the "accredited investor" definition in Rule 501(a). When a

transaction involves Rule 506, Section 18(b)(4)(D) further provides "that this paragraph does not prohibit a state from imposing notice filing requirements that are substantially similar to those required by rule or regulation under Section 4(2) that are in effect on September 1, 1996." These notice requirements are found in Section 302(c) of this Act.

A majority of states have adopted a Uniform Limited Offering Exemption, coordinate to varying degrees with Regulation D. The authority to adopt this and other exemptive rules is provided in Section 203.

16. Section 202(15): Transactions with existing security holders: Prior Provisions: 1956 Act Section 402(b)(11); RUSA Section 402(14). Section 3(a)(9) of the Securities Act of 1933 exempts exchange offerings with existing security holders. Under Section 18(b)(4)(C) transactions subject to Section 3(a)(9) are federal covered securities. See Section 102(7). Notice requirements in the earlier 1956 Act and RUSA accordingly would be preempted by the Securities Act of 1933. See Section 18(a) of the Securities Act of 1933. Otherwise this exemption is substantively identical to the 1956 Act and RUSA.

17. Section 202(16): Offerings registered under this [Act] and the Securities Act of 1933: Prior Provisions: 1956 Act Section 402(b)(12); RUSA Section 402(15). This exemption generally follows the 1956 Act and RUSA. Rule 165 of the Securities Act of 1933, which was adopted in 1999, allows the offeror of securities in a business combination to make written communications that offer securities for sale before a registration statement is filed as long as specified conditions are satisfied.

RUSA Section 402(15)(ii) also required that a registration statement be filed under this Act, but not yet be effective. By eliminating the filing requirement this exemption will reach the offer (but not the sale) of a security that is anticipated to be a federal covered security by applying for listing on the New York Stock Exchange or other exchange specified in Section 18(b)(1) of the Securities Act of 1933, but the listing and federal covered security status has not yet become effective.

18. Section 202(17): Offerings when registration has been filed, but is not effective under this [Act] and exempt from the Securities Act of 1933: Prior Provisions: RUSA Section 402(16). If a rule is adopted by the administrator

a solicitation of interest document must accompany a registration by qualification as specified in Section 304(b)(13).

Oral offers may be made after a registration statement has been filed, both before and after a registration statement is effective.

This exemption does not operate unless the administrator adopts a rule under 202(17)(B).

19. Section 202(18): Control transactions: Prior Provision: RUSA Section 402(17). Until 1972 mergers and similar transactions were not considered to involve sales and did not have to register under the Securities Act of 1933. In 1972 the Securities and Exchange Commission adopted Rule 145 defining many mergers and similar transactions to be sales and abandoned its earlier "no sale" doctrine. See 3 Louis Loss & Joel Seligman, Securities Regulation 1262-1280 (3d ed. rev. 1999).

Because most merger and similar transactions require shareholder approval and shareholders often have appraisal rights if they choose to dissent, the potential for abuse is less than in an offering of securities for cash. When appropriate the administrator can deny, condition, limit or revoke this exemption under Section 204. Section 202(18) does not follow the requirement in RUSA Section 402(17) that written notice of the transactions and a copy of the solicitation materials be given to the administrator 10 days before the consummation of the transaction and, that the administrator is empowered to disallow the exemption within the next 10 days.

20. Section 202(19): Rescission offers: No Prior Provision. See Section 510 for discussion of rescission offers.

21. Section 202(20): Out-of-state offers or sales: Source of law: Colo. Section 11-51-102(7). Compare *A.S. Goldmen & Co., Inc. v. New Jersey Bur. of Sec.*, 163 F.3d 780 (3d Cir. 1999), which held that under the United States Constitution's Commerce Clause a State could authorize a securities administrator to prevent a broker-dealer from selling securities from a State to purchasers in other States where purchase of the securities was authorized. The concluding phrase "and is not part of an unlawful plan or scheme to evade this [Act]" is intended to preclude reliance on this exemption by boiler rooms and others engaged in illegal activities.

Section 202(20) provides an exemption from securities registration and does not address an administrator's power to investigate and bring enforcement actions under Articles 5 and 6.

22. Section 202(21): Employee benefit plans: Prior Provision: RUSA Section 401(b)(12). The 1956 Act Section 402(a)(11) was limited to investment contracts issued in connection with specified employee benefit plans if the administrator was given 30 days written notice.

In 1979, the United States Supreme Court in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), held that a noncontributory, mandatory pension plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) was not a security within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934. The Securities and Exchange Commission staff subsequently took the position that the interests of employees in involuntary, contributory plans are not securities. Sec. Act Rel. 6188, 19 SEC Dock. 465, 473 (1980). Both contributory and noncontributory pension or welfare plans subject to ERISA are excluded from the definition of security in Section 102(28).

In this definition, the term "advisors" does not mean "investment advisers," as defined in Section 102(15).

With respect to employee benefit plans that are securities, Section 202(21) provides an exemption, but follows RUSA in not limiting the exemption to investment contracts and not requiring 30 days notice to the administrator.

Section 202(21) is modeled, in part, on Rule 701(c) adopted under the Securities Act of 1933. Compliance with Rule 701 will provide compliance with this exemption.

Both the 1956 Act and RUSA, for unstated reasons, treated employee benefit plans as exempt securities, rather than exempt securities transactions. There appears to be no appropriate reason to do so.

Resale of employee benefit plan securities can occur under appropriate section 202 transaction exemptions. Section 202(21) is not intended to provide a new method of publicly issuing securities.

The administrator, when appropriate, can deny, condition, limit, or revoke an exemption under Section 202(21). See Section 204.

23. Section 202(22): Specified dividends and tender offers and judicially recognized reorganizations: Prior Provision: 1956 Act Section 401(j)(6)(B) and (D); RUSA Section 101(13)(vi). Section 202(22)(A) and (B) generally follow exclusions from the definition of sale in the 1956 Act and RUSA. Section 202(22)(C) is new and corresponds to Rule 162, recently adopted under the Securities Act of 1933, which allows the offeror in a stock exchange offer to solicit tenders of securities before a registration statement is effective as long as no securities are purchased until the registration statement is effective and the tender offer has expired.

24. Section 202(23): Nonissuer transactions involving specified foreign issuer securities traded on designated securities exchanges. This exemption expressly covers Toronto Stock Exchange issuers that are public reporting companies under Canadian securities law and meet the 180 day continuous reporting requirement. In conformance with the North American Free Trade Agreement (NAFTA) and General Agreement on Trade in Services (GATS), the exemption separately provides authority for the administrator to designate by rule or order other specific foreign jurisdictions and their trading exchanges upon an adequate showing. The exemption also provides authority for an administrator to revoke any designation if necessary or appropriate in the public interest and for the protection of investors.

§ 30-14-202A. Fairness hearing. — (a) The administrator is expressly authorized to hold a hearing and consider the fairness of the terms and conditions of a transaction described in section 30-14-202(9), Idaho Code. This section 30-14-202A, Idaho Code, is intended to provide for a fairness hearing before the administrator with respect to transactions which, if approved by the administrator, will be exempt from the registration requirements of the federal securities laws under section 3(a)(10) of the securities act of 1933, or any section comparable thereto which may subsequently be enacted.

(b) An application for approval shall describe the proposed transaction and shall be in such form, contain such information and be accompanied by such documents as the administrator shall reasonably require by rule or otherwise. The applicant shall pay to the administrator a filing fee of three hundred dollars ($300) and shall file with the administrator an undertaking to defray the costs of a hearing officer and a stenographer for the hearing.

(c) An application for approval shall be set for hearing within thirty (30) days after the filing of an application. The applicant shall give notice of the hearing to all persons to whom securities are to be issued in the proposed transaction, and all such persons shall have the right to appear at the hearing.

(d) Within ten (10) days after the hearing, the administrator shall issue an order either granting or denying approval of the terms of conditions of the proposed plan. The order shall grant approval if the proposed transaction is fair, equitable and free from fraud. The order shall deny approval if the proposed transaction is unfair, inequitable or not free from fraud.

History.

I.C., § 30-14-202A, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

Section 3(a)(10) of the securities act of 1933, referred to in subsection (a), is codified as 15 USCS § 78c(a)(10).

§ 30-14-203. Additional exemptions and waivers. — (1) A rule adopted or an order issued under this chapter may exempt a security, transaction or offer.

(2) A rule adopted under this chapter may exempt a class of securities, transactions or offers from any or all of the requirements of sections 30-14-301 through 30-14-306, Idaho Code, and section 30-14-504, Idaho Code.

(3) An order issued under this chapter may waive, in whole or in part, any or all of the conditions for an exemption or offer under sections 30-14-201 and 30-14-202, Idaho Code.

History.

I.C., § 30-14-203, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: RUSA Section 403.

1. Under this type of authority, 50 of 53 jurisdictions through September 2002 had adopted the Uniform Limited Offering Exemption (ULOE) or a Regulation D exemption, and 32 jurisdictions had adopted a Rule 144A exemption. This Act does not incorporate ULOE or a Rule 144A exemption because of their complexity and the likelihood of periodic updating of their provisions. Rule 144A, and similar exemptions in ULOE, can be most effectively implemented by rule rather than statute.

2. Under Section 203 a state would also be authorized to adopt by rule or order new exemptions as circumstances warrant for new technologies such as the Internet. Cf. NASAA Resolution Regarding Securities Offered on Internet, NASAA Rep. ¶ 7040 (Jan. 7, 1996).

3. It is the intent of this Section that ULOE, Rule 144A, and additional exemptions or waivers be adopted uniformly by states, to the extent this is practicable.

§ 30-14-204. Denial, suspension, revocation, condition or limitation of exemptions. — (a) Enforcement related powers. Except with respect to a federal covered security or a transaction involving a federal covered security, an order under this chapter may deny, suspend application of, condition, limit, or revoke an exemption created under section 30-14-201(3)(c), (7) or (8), Idaho Code, or section 30-14-202, Idaho Code, or an exemption or waiver created pursuant to section 30-14-203, Idaho Code, with respect to a specific security, transaction or offer. An order under this section may be issued only pursuant to the procedures set forth in section 30-14-306(d) or 30-14-604, Idaho Code, and only prospectively.

(b) Knowledge of order required. A person does not violate section 30-14-301, 30-14-303 through 30-14-306, 30-14-504 or 30-14-510, Idaho Code, by an offer to sell, offer to purchase, sale, or purchase effected after the entry of an order issued under this section if the person did not know, and in the exercise of reasonable care could not have known, of the order.

History.

I.C., § 30-14-204, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provision: 1956 Act Section 402(c); RUSA Section 404.

1. Section 204 is potentially far reaching. The ability to deny, condition, limit, or revoke the exemptions specified in Sections 201(3)(C), 201(7), 201(8), 202, or 203 is adopted concomitant with the breadth of these exemptions. One or more than one security, transaction, or offer can be covered by a Section 204 order.

2. The courts have given a securities administrator's decision to deny or revoke an exemption substantial deference when there was compliance with applicable due process and statutory requirements. See, e.g., *Johnson-Bowles Co., Inc. v. Div. of Sec.*, 829 P.2d 101 (Utah Ct. App. 1992).

Part 3
Registration of Securities and Notice Filing of Federal Covered Securities

« Title 30 •, « Ch. 14 », « Pt. 3 », • § 30-14-301 »

§ 30-14-301. Securities registration requirement. — It is unlawful for a person to offer or sell a security in this state unless:

(a) The security is a federal covered security; (b) The security, transaction or offer is exempted from registration under sections 30-14-201 through 30-14-203, Idaho Code; or (c) The security is registered under this chapter.

History.

I.C., § 30-14-301, as added by 2004, ch. 45, § 2, p. 169.

CASE NOTES

Public offering.

Scienter.

Public Offering.

Where purchaser was an attorney licensed in California and had no knowledge of the intricacies of seller's business, the purchasers were of the class designed to be protected by the requirement of a prospectus and the sale was a public offering necessitating registration. Frachiseur v. Mountain View Irrigation Co., 100 Idaho 336, 597 P.2d 222 (1979).

Scienter.

Scienter is not required for violations of the securities registration and licensing requirements. State v. Montgomery, 135 Idaho 348, 17 P.3d 292 (2001).

Official Comment

Prior Provisions: 1956 Act Section 301; RUSA Section 301.

1. This Section is substantively identical to the 1956 Act and RUSA except for the addition of Section 301(1), which is necessitated by the National Securities Markets Improvement Act of 1996. See Section 102(7).

2. Except for federal covered securities, exempt securities, or securities offered or sold in exempt transactions, no sale of a security may be made in this State before the security is registered. "Sale" is defined in Section 102(26); "in this State" is addressed in Section 610; and securities registration is addressed in Sections 303 through 306.

3. The Securities Act of 1933 permits certain types of offers during the "waiting period" between the filing and effectiveness of a registration statement. The exemptive provisions of Sections 202(16) and (17) operate to permit similar offers for securities that are not federal covered securities and are in the process of registration under federal or state statutes or both.

4. Notice filings and fees applicable to federal covered securities, see Section 102(7), are addressed in Section 302.

§ 30-14-302. Notice filing. — (a) Required filing of records. With respect to a federal covered security, as defined in section 18(b)(2) of the securities act of 1933 (15 U.S.C. 77r(b)(2)), that is not otherwise exempt under sections 30-14-201 through 30-14-203, Idaho Code, a rule adopted or an order issued under this chapter may require the filing of any or all of the following records:

(1) Before the initial offer of a federal covered security in this state, all records that are part of a federal registration statement filed with the securities and exchange commission under the securities act of 1933 and a consent to service of process complying with section 30-14-611, Idaho Code, signed by the issuer and the payment of a fee of three hundred dollars ($300) for mutual funds and one hundred dollars ($100) for unit investment trusts;

(2) After the initial offer of the federal covered security in this state, all records that are part of an amendment to a federal registration statement filed with the securities and exchange commission under the securities act of 1933; and

(3) To the extent necessary or appropriate to compute fees, a report of the value of the federal covered securities sold or offered to persons present in this state, if the sales data are not included in records filed with the securities and exchange commission; and

(4) Each series or portfolio of an investment company offering shall be required to make a separate notice filing. Separate notice filings for classes of an investment company are not required as long as classes are used solely as a method of distinguishing payment plans within a series or portfolio.

(b) Notice filing effectiveness and renewal. A notice filing under subsection (a) of this section is effective for one (1) year commencing on the later of the notice filing or the effectiveness of the offering filed with the securities and exchange commission. On or before expiration, the issuer may renew a notice filing by filing a copy of those records filed by the issuer with the securities and exchange commission that are required by rule

or order under this chapter to be filed and by paying a renewal fee of three hundred dollars ($300) for mutual funds and one hundred dollars ($100) for unit investment trusts. A previously filed consent to service of process complying with section 30-14-611, Idaho Code, may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

(c) Notice filings for federal covered securities under section 18(b)(4)(D) and (F). With respect to a security that is a federal covered security under section 18(b)(4)(D) and (F) of the securities act of 1933 (15 U.S.C. 77r(b)(4)(D) and (F)), a rule or order under this chapter may require a notice filing by or on behalf of an issuer and may include a copy of form D, or other filing requirements as determined by the director of the department of finance, and the payment of a fee of fifty dollars ($50.00).

(d) Stop orders. Except with respect to a federal security under section 18(b)(1) of the securities act of 1933 (15 U.S.C. 77r(b)(1)), if the administrator finds that there is a failure to comply with a notice or fee requirement of this section, the administrator may issue a stop order suspending the offer and sale of a federal covered security in this state. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the administrator.

History.

I.C., § 30-14-302, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 3, p. 171; am. 2019, ch. 260, § 1, p. 770.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, in subsection (c), updated the federal citations near the beginning and substituted “and the payment of a fee of fifty dollars ($50.00)” for “including the appendix, as promulgated by the securities and exchange commission, and a consent to service of process complying with section 30-14-611, Idaho Code, signed by the issuer not later than fifteen (15) days after the first sale of the federal covered security in this state and the payment of a fee of fifty dollars ($50.00); and the payment of a fee of fifty dollars ($50.00) for any late filing” at the end.

The 2019 amendment, by ch. 260, in subsection (c), added “and (F)” to the three statutory references, and substituted “and may include a copy of form D, or other filing requirements as determined by the director of the department of finance” for “to include a copy of form D”.

Federal References.

The securities act of 1933, referred to in this section, is codified as 15 USCS § 77a et seq.

Compiler’s Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

For more on form D, referred to in subsection (c), see *http://www.sec.gov/answers/formd.htm*.

The words enclosed in parentheses so appeared in the law as enacted.

Official Comment

No Prior Provision.

1. The little used “registration by notification” in the 1956 Act Section 302 or “registration by filing” in RUSA Section 302 are omitted from this Act because of the notice filing approach required by Section 18(b)(2) of the Securities Act of 1933 for federal covered securities, which, in essence, replaces the need for registration by notification.

2. For Rule 506 offerings which are addressed by Section 18(d)(4)(D) of the Securities Act of 1933, the Securities and Exchange Commission requires the filing of Form D. See Rule 503. When an issuer meets the conditions of Rule 506, Section 302(c) is intended to limit required state filings to no more than a requirement of filing a copy of Form D, including the Appendix, a consent to service of process, and a fee.

3. The definition of “filing” in Section 102(8) will permit states to receive electronic filing of records under this Section. An administrator may also accept under this Section a signed consent filed electronically with a designee of the administrator. See Section 105.

4. If a State prefers to have the fees in this section established by rule, replace the phrase "a fee of $[___]" in subsections (a), (b), and (c) with the phrase "a fee established by the administrator by rule". See Comment 3 to Section 410.

§ 30-14-303. Securities registration by coordination. — (a) Registration permitted. A security for which a registration statement has been filed under the securities act of 1933 in connection with the same offering may be registered by coordination under this section.

(b) Required records. A registration statement and accompanying records under this section must contain or be accompanied by the following records in addition to the information specified in section 30-14-305, Idaho Code, and a consent to service of process complying with section 30-14-611, Idaho Code:

(1) A copy of the latest form of prospectus filed under the securities act of 1933;

(2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy or description of the security that is required by any rule adopted or an order issued under this chapter;

(3) Copies of any other information or any other records filed by the issuer under the securities act of 1933 requested by the administrator; and

(4) An undertaking to forward each amendment to the federal prospectus, other than an amendment that delays the effective date of the registration statement, promptly after it is filed with the securities and exchange commission.

(c) Conditions for effectiveness of registration statement. A registration statement under this section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

(1) A stop order issued pursuant to subsection (d) of this section or section 30-14-306, Idaho Code, or issued by the securities and exchange commission, is not in effect and a proceeding is not pending against the issuer under section 30-14-306, Idaho Code, and the administrator has not given written notice of deficiencies that are unresolved and that

would constitute grounds for a stop order under section 30-14-306, Idaho Code; and

(2) The registration statement has been on file for at least twenty (20) days or a shorter period provided by a rule adopted or an order issued under this chapter.

(d) Notice of federal registration statement effectiveness. The registrant shall promptly notify the administrator in a record of the date when the federal registration statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the administrator may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this section. The administrator shall promptly notify the registrant of an order by telegram, telephone or electronic means and shall promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this section, the stop order is void as of the date of its issuance.

(e) Effectiveness of registration statement. If the federal registration statement becomes effective before each of the conditions in this section is satisfied or is waived by the administrator, the registration statement is automatically effective under this chapter when all the conditions are satisfied or waived. If the registrant notifies the administrator of the date when the federal registration statement is expected to become effective, the administrator shall promptly notify the registrant by telegram, telephone or electronic means and shall promptly confirm this notice by a record, indicating whether all the conditions are satisfied or waived and whether the administrator intends the institution of a proceeding under section 30-14-306, Idaho Code. The notice by the administrator does not preclude the institution of such a proceeding.

History.

I.C., § 30-14-303, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The securities act of 1933, referred to in this section, is compiled as 15 USCS § 77a et seq.

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

Official Comment

Prior Provisions: 1956 Act Section 303; RUSA Section 303.

1. Registration by coordination was one of the key innovations of the 1956 Act. As in the 1956 Act, Section 303 streamlines the content of the registration statement and the procedure by which a registration statement becomes effective, but not the substantive standards governing the effectiveness of a registration statement.

2. The phrase "in connection with the same offering" in Section 303 does not require that the federal and state registration statements be filed simultaneously or become effective simultaneously. A registration by coordination can be filed in a State after the effectiveness of the federal registration statement as long as the administrator does not conclude that the interval was too long to consider the State registration statement "the same offering."

3. Section 303 is similar to the 1956 Act except that these provisions have been modernized to include electronic filing and electronic notification. Cf. Sections 102(8), 102(25), 105. It is anticipated that this will facilitate simultaneous filing with the Securities and Exchange Commission and the States which is consistent with the uniformity intended by this Act. Simultaneous or sequential filing could be administered through a designee similar to the current Web-CRD or in conjunction with the Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system or otherwise.

4. Section 303(b) is not intended to limit the administrator to requiring only the information and records filed with the Securities and Exchange Commission.

5. Sections 303(c) through (e) describe the conditions to be satisfied to achieve effectiveness of a coordinated filing. “Price amendment” is defined in Section 102(23). The administrator retains the right to test the registration statement by the substantive standards of Section 306(a) and may issue a stop or denial order if the administrator believes any of those provisions are applicable.

§ 30-14-304. Securities registration by qualification. — (a) Registration permitted. A security may be registered by qualification under this section.

(b) Required records. A registration statement under this section must contain the information or records specified in section 30-14-305, Idaho Code, a consent to service of process complying with section 30-14-611, Idaho Code, and, if required by rule adopted under this chapter, the following information or records unless waived by the administrator for good cause shown:

(1) With respect to the issuer and any significant subsidiary, its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) With respect to each director and officer of the issuer, and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five (5) years; the amount of securities of the issuer held by the person as of the thirtieth day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three (3) years or proposed to be effected;

(3) With respect to persons covered by paragraph (2) of this subsection, the aggregate sum of the remuneration paid to those persons during the previous twelve (12) months and estimated to be paid during the next twelve (12) months, directly or indirectly, by the issuer, and all predecessors, parents, subsidiaries and affiliates of the issuer;

(4) With respect to a person owning of record or owning beneficially, if known, ten percent (10%) or more of the outstanding shares of any class

of equity security of the issuer, the information specified in paragraph (2) of this subsection other than the person's occupation;

(5) With respect to a promoter, if the issuer was organized within the previous three (3) years, the information or records specified in paragraph (2) of this subsection, any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for the payment;

(6) With respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three (3) years or proposed to be effected; and a statement of the reasons for making the offering;

(7) The capitalization and long-term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two (2) years or is obligated to issue its securities;

(8) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a

copy of any underwriting or selling group agreement under which the distribution is to be made or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter;

(9) The estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition, including the cost of borrowing money to finance the acquisition;

(10) A description of any stock options or other security options outstanding, or to be created in connection with the offering, and the amount of those options held or to be held by each person required to be named in paragraph (2), (4), (5), (6) or (8) of this subsection and by any person that holds or will hold ten percent (10%) or more in the aggregate of those options;

(11) The dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two (2) years, and a copy of the contract;

(12) A description of any pending litigation, action or proceeding to which the issuer is a party and that materially affects its business or assets, and any litigation, action or proceeding known to be contemplated by governmental authorities;

(13) A copy of any prospectus, pamphlet, circular, form letter, advertisement or other sales literature intended as of the effective date to

be used in connection with the offering and any solicitation of interest used in compliance with section 30-14-202(17)(b), Idaho Code;

(14) A specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

(15) A signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;

(16) A signed or conformed copy of a consent of any accountant, engineer, appraiser or other person whose profession gives authority for a statement made by the person, if the person is named as having prepared or certified a report or valuation, other than an official record, that is public, which is used in connection with the registration statement;

(17) A balance sheet of the issuer as of a date within four (4) months before the filing of the registration statement; a statement of income and a statement of cash flows for each of the three (3) fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three (3) years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and

(18) Any additional information or records required by a rule adopted or an order issued under this chapter.

(c) Conditions for effectiveness of registration statement. A registration statement under this section becomes effective thirty (30) days, or any shorter period provided by a rule adopted or an order issued under this chapter, after the date the registration statement or the last amendment other than a price amendment is filed, if:

(1) A stop order is not in effect and a proceeding is not pending under section 30-14-306, Idaho Code;

(2) The administrator has not issued an order under section 30-14-306, Idaho Code, delaying effectiveness; and

(3) The applicant or registrant has not requested that effectiveness be delayed.

(d) Delay of effectiveness of registration statement. The administrator may delay effectiveness once for not more than ninety (90) days if the administrator determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The administrator may also delay effectiveness for a further period of not more than thirty (30) days if the administrator determines that the delay is necessary or appropriate.

(e) Prospectus distribution may be required. A rule adopted or an order issued under this chapter may require as a condition of registration under this section that a prospectus containing a specified part of the information or record specified in subsection (b) of this section be sent or given to each person to which an offer is made, before or concurrently, with the earliest of:

(1) The first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) The confirmation of a sale made by or for the account of the person;

(3) Payment pursuant to such a sale; or

(4) Delivery of the security pursuant to such a sale.

History.

I.C., § 30-14-304, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 304; RUSA Section 304.

1. This Section generally follows the 1956 Act and RUSA. Any security may be registered by qualification, whether or not another type of

registration is available. Ordinarily, however, registration by qualification will only be used by an issuer when no other procedure is available.

2. Section 304(b) originally was modeled on Schedule A of the Securities Act of 1933.

3. In Section 304(b)(12) pending litigation can include litigation that has not yet been filed.

4. Section 304(b)(17) uses the same terminology as is used currently in Regulation S-X of the Securities and Exchange Commission. Under Sections 605(a) and (c) the administrator is authorized to specify the form and content of rules and forms governing registration statements and the form and content of financial statements required under this Act.

5. Under Sections 304(b)(18) and 307 the administrator may require additional information or may waive in whole or in part or condition any of the requirements of Section 304(b). Section 304(b)(18), for example, would authorize the administrator to require that a report by an accountant, engineer, appraiser or other professional person be filed. Section 304(b)(18) would also authorize that securities of designated classes under a trust indenture contain additional specified information.

§ 30-14-305. Securities registration filings. — (a) Who may file. A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this chapter.

(b) Filing fee. A person filing a registration statement shall pay a filing fee of three hundred dollars ($300). If a registration statement is withdrawn before the effective date or a pre-effective stop order is issued under section 30-14-306, Idaho Code, the administrator shall retain the fee.

(c) Status of offering. A registration statement filed under section 30-14-303 or 30-14-304, Idaho Code, must specify:

(1) The amount of securities to be offered in this state;

(2) The states in which a registration statement or similar record in connection with the offering has been or is to be filed; and

(3) Any adverse order, judgment or decree issued in connection with the offering by a state securities regulator, the securities and exchange commission, or a court.

(d) Incorporation by reference. A record filed under this chapter or the predecessor act within five (5) years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

(e) Nonissuer distribution. In the case of a nonissuer distribution, information or a record may not be required under subsection (i) of this section or section 30-14-304, Idaho Code, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) Escrow and impoundment. A rule adopted or an order issued under this chapter may require as a condition of registration that a security issued within the previous five (5) years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this state be impounded

until the issuer receives a specified amount from the sale of the security either in this state or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by a rule adopted or an order issued under this chapter, provided however that the administrator may not reject a depository institution solely because of its location in another state.

(g) Form of subscription. A rule adopted or an order issued under this chapter may require as a condition of registration that a security registered under this chapter be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this chapter or preserved for a period specified by the rule or order, which may not be longer than five (5) years.

(h) Effective period. Except while a stop order is in effect under section 30-14-306, Idaho Code, a registration statement is effective for one (1) year after its effective date, or for any longer period designated in an order under this chapter during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. A registration statement remains effective for each additional year by filing a renewal as prescribed by a rule adopted or an order issued under this chapter. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this chapter are considered to be registered while the registration statement is effective. If any securities of the same class are outstanding, a registration statement may not be withdrawn until one (1) year after its effective date. A registration statement may be withdrawn only with the approval of the administrator.

(i) Periodic reports. While a registration statement is effective, a rule adopted or an order issued under this chapter may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current and to disclose the progress of the offering.

(j) Posteffective amendments. A registration statement shall be amended after its effective date if there are material changes in information or documents in the registration statement. The posteffective amendment becomes effective when the administrator so orders.

History.

I.C., § 30-14-305, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

Official Comment

Prior Provisions: 1956 Act Section 305; RUSA Section 305.

1. Section 305 generally follows the 1956 Act and RUSA except that earlier provisions in both Acts referring to Investment Company Act of 1940 securities, which are federal covered securities, see Section 102(7), have been deleted.

2. Section 305 is applicable both to registration by coordination, see Section 303, and to registration by qualification, see Section 304.

3. Section 305(a) expressly authorizes registration by "a person on whose behalf the offering is to be made." This would permit a nonissuer, cf. Section 102(18), or a broker-dealer to file a registration statement independent of the issuer.

4. This Act is intended, to the extent practicable, to be revenue neutral in its impact on existing state law, see Comment 3 to Section 608. Accordingly, Section 305(b) does not specify what fees states should provide. If a State prefers to have the fees in this section established by rule, replace the phrase "a fee of $[___]" in subsections (b) and (j) with the phrase "a fee established by the administrator by rule pursuant to the [state administrative procedure act]" and replace the phrase "$[___] of the fee" in subsection (b) with the phrase "an amount of the fee established by the administrator by rule". See Comment 3 to Section 410.

5. Section 305(c), which generally follows the 1956 Act and RUSA, does not require in Section 305(c)(3) disclosure of an order permitting the withdrawal of a registration statement. The administrator may, however, require disclosure of this information in a registration by qualification under Section 304(b)(18).

6. Section 305(c), like every other provision concerned with the content of the registration statement, must be read with Section 306(a)(1) which judges the accuracy and completeness of the registration statement as of its effective date unless an order denying effectiveness had been entered before the effective date. A registration statement must be kept current with changing developments until the effectiveness date, but a registration statement is not required to be amended after the effective date except to correct inaccuracies or deficiencies which existed as of the effective date. An administrator, however, separately may require under Section 305(i) or (j) periodic reports or amendments to keep reasonably current the information contained in the registration statement.

7. Under Section 305(d) incorporation by reference is permitted as a matter of administrative practice.

8. Section 305(e) is the substantive equivalent to provisions in the 1956 Act and RUSA. This subsection is designed to address nonissuer offerings where the seller cannot obtain certified financial statements and other normally required records. The phrase "without unreasonable effort or expense" originated in Section 10(a)(3) of the Securities Act of 1933. It is not meant to apply to expenses incidental to supplying required information required for registration in the case of a nonissuer distribution by a person in a control relationship with the issuer or otherwise having access to or contractual rights to obtain the required information. Section 305(e) applies only to registration by qualification under Section 304 and periodic reports for either registration by coordination or registration by qualification under Section 305(i).

9. Section 305(f), follows the 1956 Act and RUSA, and authorizes the administrator to require the impoundment of funds until the issuer receives a specified amount from the sale of the security in this State or elsewhere and to require the escrow of promotional stock until specific conditions are met. This Section is limited to a security issued within the past five years or

to be issued to a promoter for a consideration substantially different from the public offering price or to a person for a consideration other than cash. The typical distribution subject to Section 305(f) will be a relatively new promotional or speculative offering. Section 305(f) follows the 1956 Act and RUSA and provides that the administrator may not reject a depository solely because of its location in another state. Unlike the statute in *Schwaemmle Const. Co. v. Michigan Dep't of Commerce*, 360 N.W.2d 141 (Mich. 1984), Section 305(f) broadly provides that the administrator "may determine the conditions of any escrow or impoundment under this subsection." As in *Schwaemmle,* this power will operate only until the impounded funds or escrowed shares are released.

10. Section 305(g) follows the 1956 Act in authorizing the administrator to specify the form of a subscription or sale contract.

11. Section 305(h) generally follows the 1956 Act and RUSA. The term "nonissuer transaction" or "nonissuer distribution" is defined in Section 102(18). A sale by a nonissuer would have to be registered under Section 301 unless it is exempted or involves a federal covered security. Section 202(1) exempts "isolated nonissuer transactions." When a nonissuer transaction is not exempt under Section 202(1), it may still be exempted under other transaction exemptions.

If no exemption is available for a nonissuer distribution, and it does not involve a federal covered security, the security must be registered under Article 3. Under the first sentence of Section 305(h) each registration statement remains effective for at least one year and for any longer period the administrator may determine. However, no registration statement is effective while a stop order with respect to it is in effect under Section 306.

For the purposes of a nonissuer transaction, all outstanding securities of the same class as a registered security are considered to be registered as long as the registration statement remains effective. This means that during the effective period of a registration statement under this Act all outstanding securities of the same class can be traded by anyone, including nonissuers, as if they were registered.

Section 305(h) also provides that, unless the administrator determines otherwise, a registration statement cannot be withdrawn until one year after its effective date if any securities of the same class are outstanding. This is

designed to protect sellers who would be unaware of a withdrawal from being subject to civil liability.

12. Section 305(j) follows RUSA and a procedure limited to investment companies in the 1956 Act in allowing posteffective date amendments. Under Section 305(j), when a posteffective amendment increases the number of securities to be offered or sold, an additional registration fee is required.

§ 30-14-306. Denial, suspension, and revocation of securities registration. — (a) Stop orders. The administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the administrator finds that the order is in the public interest and that:

(1) Any of the following is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact:

(A) The registration statement as of its effective date, or before the effective date in the case of an order denying effectiveness;

(B) A posteffective amendment under section 30-14-305(j), Idaho Code, as of its effective date; or

(C) A periodic report under section 30-14-305(i), Idaho Code;

(2) This chapter or a rule adopted or an order issued under this chapter, or a condition imposed under this chapter, has been willfully violated in connection with the offering, by: the person filing the registration statement; the issuer, a partner, officer or director of the issuer or a person having a similar status or performing a similar function; a promoter of the issuer; or a person directly or indirectly controlling or controlled by the issuer; but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

(3) The security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign or state law other than this chapter applicable to the offering, provided however the administrator may not institute a proceeding against an effective registration statement under this paragraph more than one (1) year after the date of the order or injunction on which it is based, and the administrator may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another state unless the order or injunction was based on conduct that would

constitute, as of the date of the order, a ground for a stop order under this section;

(4) The issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

(5) With respect to a security sought to be registered under section 30-14-303, Idaho Code, there has been a failure to comply with the undertaking required by section 30-14-303(b)(4), Idaho Code;

(6) The applicant or registrant has not paid the filing fee, provided however the administrator shall void the order if the deficiency is corrected; or

(7) The offering:

(A) Will work or tend to work a fraud upon purchasers or would so operate;

(B) Has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions or other compensation, or promoters' profits or participations, or unreasonable amounts or kinds of options; or

(C) Is being made on terms that are unfair, unjust or inequitable.

(b) Enforcement. To the extent practicable, the administrator by a rule adopted or an order issued under this chapter shall publish standards that provide notice of conduct that violates subsection (a)(7) of this section.

(c) Institution of stop order. The administrator may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the administrator when the registration statement became effective unless the proceeding is instituted within thirty (30) days after the registration statement became effective.

(d) Summary process. The administrator may summarily revoke, deny, postpone or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the administrator shall promptly notify each person specified in subsection (e) of this section that the order has been issued, the reasons for the revocation, denial, postponement or suspension, and that within fifteen (15) days after the receipt of a request in a record from the person the

matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator, within thirty (30) days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the administrator, after notice of and an opportunity for a hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) Procedural requirements for stop order. A stop order may not be issued under this section without:

(1) Appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) An opportunity for a hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with chapter 52, title 67, Idaho Code.

(f) Modification or vacation of stop order. The administrator may modify or vacate a stop order issued under this section if the administrator finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors.

History.

I.C., § 30-14-306, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 306; RUSA Section 306.

1. This Section generally follows the 1956 Act and RUSA and applies to both registration by coordination under Section 303 and registration by qualification under Section 304.

2. Section 306(a)(1) follows the 1956 Act and RUSA in testing in a suspension or revocation proceeding the completeness and accuracy of a registration statement as of the registration statement's effective date. A registration statement that becomes misleading because of a development that occurs after its effective date is not a ground for the issuance of a stop order under Section 306(a)(1). An administrator, however, may require periodic reports under Section 305(i) or a posteffective amendment under

Section 305(j). With respect to periodic reports under Section 305(i), a misleading report would be the basis of a stop order under Section 306(a)(1) if it is materially inaccurate as of the date it was filed.

3. On the meaning of "willfully," see Comment 2 under Section 508.

4. A violation by an issuer has the same consequences whether the issuer has filed a registration statement or has had a broker-dealer file it. But this is not the case when the registration statement is filed by a broker-dealer acting independently.

5. The verb "is" at the beginning of Section 306(a)(3) means that a stop order or injunction that has expired or been vacated is not the ground for action under this paragraph.

6. Section 306(a)(4) applies to activity that is conducted in a State where that activity is illegal. It does not apply if the activity is not illegal under that State's law. This paragraph is not meant to apply to activity which is lawful where conducted but would be illegal if conducted in the State where the registration statement is filed.

7. Sections 306(a)(5) and (6) follow the 1956 Act and RUSA.

8. Sections 306(a)(7) and (b) address merit regulation. Sections 306(E) and (F) of the 1956 Act authorized a stop order when an "offering has worked or tended to work a fraud upon purchasers or would so operate" or "the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options." By 1985 a majority of states which had adopted the 1956 Act had adopted this approach to merit regulation rather than the earlier and broader "unfair, unjust or inequitable" standard that then applied in a minority of States.

RUSA Sections 306(a)(5) and (6) adopted provisions substantively identical to the 1956 Act and included in brackets an "unfair, unjust, or inequitable" alternative.

The National Securities Markets Improvement Act of 1996 subsequently preempted merit regulation of federal covered securities. See Section 102(7).

Sections 306(a)(7) and (b) take a different approach. Subject to the National Securities Markets Improvement Act of 1996, merit standards are retained but hortatory paragraph 306(b) encourages the administrator, to the extent practicable, to adopt, by rule or order, standards that provide notice to issuers of a state's merit standards. Notice will address one criticism of merit regulation. See generally 1 Louis Loss & Joel Seligman, Securities Regulation 111-124 (3d ed. rev. 1998). Statements of Policy of the North American Securities Administrator Association that have been adopted by a state would provide notice in compliance with Section 306(b). Similarly other state rules or orders could be adopted in the future to address new types of securities as they occur.

An order under Section 306(b) can be adopted after a securities registration statement has been filed. Under Section 306(b) an administrator, by rule or order, for example, could adopt a standard that would provide the basis for a stop order denying effectiveness to a development stage company that has no specific business purpose or plan or has indicated that its primary business plan is to engage in a merger or acquisition with an unidentified company, entity, or person. "Blank check offerings" are subject to Rule 419 adopted under the Securities Act of 1933. See Comment 3 to Section 202.

9. Section 306(c) follows the 1956 Act and RUSA and allows an administrator up to 30 days after a registration statement becomes effective to institute a stop order proceeding on the basis of a fact or transaction known when the registration statement became effective. This is to avoid the necessity of an administrator issuing a stop order prematurely.

10. Sections 306(d) and (e) assure each person subject to a stop order of notice, opportunity for a hearing, and findings of fact and conclusions of law contained in a record.

11. An administrator must consider the public interest when issuing a stop order and may under Section 306(f) consider the public interest when modifying or vacating a stop order. See, e.g., *TechnoMedical Lab., Inc. v. Utah Sec. Div.*, 744 P.2d 320, 324-325 (Utah Ct. App. 1987) (a state has a valid public interest in stopping the issuance of hundreds of thousands of public shares that did not comply with the disclosure requirements of securities registration); cf. stop orders under the Securities Act of 1933, see

1 Louis Loss & Joel Seligman, Securities Regulation 576-589 (3d ed. rev. 1998).

12. As of September 2002 46 jurisdictions had adopted a form of Section 306(a)(7)(A) ("will tend to work a fraud or would so operate"); 34 jurisdictions had adopted a form of Section 306(a)(7)(B) ("unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoter profits or participations, or unreasonable amounts or kinds of options"); and 16 jurisdictions had adopted a form of bracketed Section 306(a)(7)(C) ("terms that are unfair, unjust, or inequitable").

§ 30-14-307. Waiver and modification. — The administrator may waive or modify, in whole or in part, any or all of the requirements of sections 30-14-302, 30-14-303 and 30-14-304(b), Idaho Code, or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to section 30-14-305(i), Idaho Code.

History.

I.C., § 30-14-307, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provision: RUSA Section 303(h). Section 307 follows RUSA Section 303(h) and empowers the administrator to waive or modify any of the requirements of 302, 303, 304(b), or the requirement of any information or record in a registration statement. An example would be the expedited procedure several states have adopted to coordinate with shelf registration under Rule 415 of the Securities Act of 1933. In waiving or modifying requirements the administrator must make a finding satisfying the requirements of Section 605(b).

Idaho Code Pt. 4

Part 4
Broker-Dealers, Agents, Investment Advisers, Investment Adviser Representatives, and Federal Covered Investment Advisers

Idaho Code § 30-14-401

§ 30-14-401. Broker-dealer registration requirement and exemptions. — (a) Registration requirement. It is unlawful for a person to transact business in this state as a broker-dealer unless the person is registered under this chapter as a broker-dealer or is exempt from registration as a broker-dealer under subsection (b) or (d) of this section.

(b) Exemptions from registration. The following persons are exempt from the registration requirement of subsection (a) of this section:

(1) A broker-dealer without a place of business in this state if its only transactions effected in this state are with:

(A) The issuer of the securities involved in the transactions;

(B) A broker-dealer registered as a broker-dealer under this chapter or not required to be registered as a broker-dealer under this chapter;

(C) An institutional investor;

(D) A nonaffiliated federal covered investment adviser with investments under management in excess of one hundred million dollars ($100,000,000) acting for the account of others pursuant to discretionary authority in a signed record;

(E) A bona fide preexisting customer whose principal place of residence is not in this state and the person is registered as a broker-dealer under the securities exchange act of 1934 or is not required to be registered under the securities exchange act of 1934 and is registered under the securities act of the state in which the customer maintains a principal place of residence;

(F) A bona fide preexisting customer whose principal place of residence is in this state but who was not present in this state when the

customer relationship was established, if:

(i) The broker-dealer is registered under the securities exchange act of 1934 or is not required to be registered under the securities exchange act of 1934 and is registered under the securities laws of the state in which the customer relationship was established and where the customer had maintained a principal place of residence; and

(ii) Within forty-five (45) days after the customer's first transaction in this state, the person files an application for registration as a broker-dealer in this state and a further transaction is not effected more than seventy-five (75) days after the date on which the application is filed or, if earlier, the date on which the administrator notifies the person that the administrator has denied the application for registration or has stayed the pendency of the application for good cause;

(G) Not more than three (3) customers in this state during the previous twelve (12) months, in addition to those customers specified in subsections (b)(1)(A) through (b)(1)(F) and subsection (b)(1)(H) of this section, if the broker-dealer is registered under the securities exchange act of 1934 or not required to be registered under the securities exchange act of 1934 and is registered under the securities act of the state in which the broker-dealer has its principal place of business; and

(H) Any other person exempted by a rule adopted or an order issued under this chapter; and

(2) A person that deals solely in United States government securities and is supervised as a dealer in government securities by the board of governors of the federal reserve system, the comptroller of the currency, the federal deposit insurance corporation, or the office of thrift supervision.

(c) Limits on employment or association. It is unlawful for a broker-dealer, or for an issuer engaged in offering, offering to purchase, purchasing, or selling securities in this state, directly or indirectly, to employ or associate with an individual to engage in an activity related to

securities transactions in this state if the registration of the individual is suspended or revoked or the individual is barred from employment or association with a broker-dealer, an issuer, an investment adviser, or a federal covered investment adviser by an order of the securities regulator of a state, the securities and exchange commission, or a self-regulatory organization. A broker-dealer or issuer does not violate this subsection if the broker-dealer or issuer did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation or bar. Upon request from a broker-dealer or issuer and for good cause, an order under this chapter may modify or waive, in whole or in part, the application of the prohibitions of this subsection to the broker-dealer.

(d) Foreign transactions. A rule adopted or an order issued under this chapter may permit:

(1) A broker-dealer that is registered in Canada or other foreign jurisdiction and that does not have a place of business in this state to effect transactions in securities with or for, or attempt to effect the purchase or sale of any securities by:

(A) An individual from Canada or other foreign jurisdiction who is temporarily present in this state and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States;

(B) An individual from Canada or other foreign jurisdiction who is present in this state and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor in that foreign jurisdiction; or

(C) An individual who is present in this state, with whom the broker-dealer customer relationship arose while the individual was temporarily or permanently resident in Canada or the other foreign jurisdiction; and

(2) An agent who represents a broker-dealer that is exempt under this subsection to effect transactions in securities or attempt to effect the purchase or sale of securities in this state as permitted for a broker-dealer described in subsection (b)(1) [paragraph (1)] of this subsection.

History.

I.C., § 30-14-401, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The "securities exchange act of 1934", referred to throughout subsection (b)(1) of this section, is compiled as 15 U.S.C.S. §§ 77b to 77e, 77j, 77k, 77m, 77o, 77s, 78a to 78o, 78o-3, and 78p to 78hh.

The office of thrift supervision, referred to in paragraph (b)(2), was merged into the office of the comptroller of the currency and ceased to exist on October 19, 2011, pursuant to 12 U.S.C.S. § 5412.

Compiler's Notes.

For more on board of governors of the federal reserve system, see *http://www.federalreserve.gov/*.

For more on comptroller of the currency, see *http://www.occ.treas.gov/*.

For more on federal deposit insurance corporation, see *http://www.fdic.gov/*.

The bracketed insertion near the end of paragraph (d)(2) was added by the compiler to correct the statutory reference and to conform to the uniform act.

CASE NOTES

Violations of Registration and Licensing Requirements.

Scienter is not required for violations of the securities registration and licensing requirements; therefore, because defendant's racketeering charge was predicated on twenty-three counts of violating those requirements, strict liability provision, good faith reliance on legal counsel is not a defense. State v. Montgomery, 135 Idaho 348, 17 P.3d 292 (2001).

Official Comment

Prior Provisions: 1956 Act Section 201; RUSA Sections 201 — 202.

1. “Broker-dealer” is defined in Section 102(4). The scope of the Section 401(a) reference “to transact business in this State” is specified in Section 610. “Transacts a business” has been held to mean “more than a trivial or *de minimis* business.” *United States v. Schwartz*, 464 F.2d 499, 506 (2d Cir. 1972), *cert. denied,* 409 U.S. 1009 (1972).

2. Under Section 401(a) a person can be required to register as a securities broker-dealer only if the person transacts business in securities. See, e.g., *AMR Realty Co. v. State*, 373 A.2d 1002 (N.J. Supr. Ct. App. Div. 1977) (requirement that the transactions involve securities).

3. “Bona fide” is a much construed term particularly in the U.C.C. context. See, e.g., *MCC Proceeds, Inc. v. Advest, Inc.*, 743 N.Y.S.2d 1 (N.Y. A.D. 2002) (comparing bona fide to good faith standard).

4. Section 401(b)(1)(D) was added to provide relief in situations where a broker-dealer is accepting orders from a sophisticated financial professional who is making the investment decisions for its customers.

5. Under 401(b)(1)(E) and (F) preexisting customers must be bona fide. A principal place of residence, for example, normally would be the residence where the customer spends a majority of time. These exemptions were intended to facilitate ongoing broker-customer relationships with customers who have established a second or other residence for such purposes as a winter home (i.e. “snowbirds”).

6. Section 401(c) prohibits a broker-dealer or issuer from employing or associating with an individual in a capacity for which that individual has been suspended by the administrator. Violation of this provision does not result in strict liability. In order for a broker-dealer or issuer to be liable, the broker-dealer or issuer must have known or should have known of the administrator’s order to the individual suspended or barred. Cf. Comment 17 to Section 412.

7. Section 401(d) recognizes the increasingly transnational nature of securities brokerage and permits, if the administrator adopts a rule or order, transactions by a Canadian or a foreign broker-dealer with a person from Canada or other foreign jurisdiction who is resident in this State. This subsection is not self-executing and is effective only if the administrator adopts a rule or order.

8. To give effect to action taken by rule or order under Section 401(d), there must be a transaction registration exemption that will enable securities transactions to take place in customer accounts involving the broker-dealers and agents contemplated in Section 401(d). See Sections 202 and 203.

§ 30-14-402. Agent registration requirement and exemptions. — (a) Registration requirement. It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration as an agent under subsection (b) of this section.

(b) Exemptions from registration. The following individuals are exempt from the registration requirement of subsection (a) of this section:

(1) An individual who represents a broker-dealer in effecting transactions in this state limited to those described in section 15(i)(3) of the securities exchange act of 1934 (15 U.S.C. 78o(i)(3));

(2) An individual who represents a broker-dealer that is exempt under section 30-14-401(b) or (d), Idaho Code;

(3) An individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries, and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(4) An individual who represents an issuer and who effects transactions in the issuer's securities exempted by section 30-14-202, Idaho Code, other than section 30-14-202(14), Idaho Code;

(5) An individual who represents an issuer that effects transactions solely in federal covered securities of the issuer, provided however that an individual who effects transactions in a federal covered security under section 18(b)(3), 18(b)(4)(D), or 18(b)(4)(F) of the securities act of 1933 (15 U.S.C. 77r(b)(3), 77r(b)(4)(D), or 77r(b)(4)(F)) is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(6) An individual who represents a broker-dealer registered in this state under section 30-14-401(a), Idaho Code, or exempt from registration under section 30-14-401(b), Idaho Code, in the offer and sale of

securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of one hundred million dollars ($100,000,000) acting for the account of others pursuant to discretionary authority in a signed record;

(7) An individual who represents an issuer in connection with the purchase of the issuer's own securities;

(8) An individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; or

(9) Any other individual exempted by a rule adopted or an order issued under this chapter.

(c) Registration effective only while employed or associated. The registration of an agent is effective only while the agent is employed by or associated with a broker-dealer registered under this chapter or an issuer that is offering, selling or purchasing its securities in this state.

(d) Limit on employment or association. It is unlawful for a broker-dealer, or an issuer engaged in offering, selling or purchasing securities in this state, to employ or associate with an agent who transacts business in this state on behalf of broker-dealers or issuers unless the agent is registered under subsection (a) of this section or is exempt from registration under subsection (b) of this section.

(e) Limit on affiliations. Unless prohibited by a rule adopted or an order issued under this chapter, an individual may act as an agent for more than one (1) broker-dealer or one (1) issuer at a time.

History.

I.C., § 30-14-402, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 4, p. 171; am. 2020, ch. 103, § 1, p. 274.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, updated several federal references throughout the section and substituted "section 30-14-202(14)" for "sections 30-14-202(11) and 30-14-202(14)" in paragraph (b)(4).

The 2020 amendment, by ch. 103, in subsection (b), substituted “section 15(i)(3) of the securities exchange act of 1934 (15 U.S.C. 78o(i)(3))” for “section 15(h)(2) of the securities exchange act of 1934 (15 U.S.C. 78o(h)(2))” near the end of paragraph (1), and substituted “section 18(b)(3), 18(b)(4)(D), or 18(b)(4)(F) of the securities act of 1933 (15 U.SC. 77r(b)(3), 77r(b)(4)(D), or 77r(b)(4)(F)” for “section 18(b)(3) or 18(b)(4)(D) of the securities act of 1933 (15 U.S.C. 77r(b)(3) or 77r(b)(4)(D)” near the middle of paragraph (5).

Compiler’s Notes.

The words enclosed in parentheses so appeared in the law as enacted.

Official Comment

Prior Provisions: RUSA Sections 201 — 202.

1. “Agent” is defined in Section 102(2). The scope of the Section 402(a) reference to “transact business in this State” is specified in Section 610. An administrator may by rule or order take action under Section 401(d)(2) to address an agent.

2. An independent contractor must be either a broker-dealer or an agent if the individual transacts business as a broker-dealer or agent. There is no other status permitted under this Act for securities activities.

3. A broker-dealer in violation of Section 402(a) may be disciplined under Section 412 and be subject to a civil or administrative enforcement action under Section 603 or 604.

4. Under Sections 402(b)(3) and (5) an agent may be exempt if acting for an issuer and receiving compensation (for example, as a corporate executive), as long as the compensation is not a commission or other remuneration based on transactions in the issuer’s own securities. Such an agent could receive a salary with conventional benefits, including an annual bonus (related to his or her performance) as an executive, and still be within this exemption unless the agent is also being compensated directly or indirectly for participation in the specified securities transactions.

5. Section 402(b)(6) was added to provide relief in situations where an agent is accepting orders from a sophisticated financial professional who is

making the investment decisions for its customers.

6. Ministerial or clerical acts in Section 402(b)(8) might include preparing routine written communications or responding to inquiries.

7. Section 402(e) limits agents to a single employment or affiliation unless a rule or order of the administrator authorizes multiple affiliations. In any event an agent must be registered, see Section 402(a), or exempt from registration, see Section 402(b). Registration is effective only while an agent is employed by or associated with a broker-dealer or an issuer. See Section 402(c).

§ 30-14-403. Investment adviser registration requirement and exemptions. — (a) Registration requirement. It is unlawful for a person to transact business in this state as an investment adviser unless the person is registered under this chapter as an investment adviser or is exempt from registration as an investment adviser under subsection (b) of this section.

(b) Exemptions from registration. The following persons are exempt from the registration requirement of subsection (a) of this section:

(1) A person without a place of business in this state that is registered under the securities act of the state in which the person has its principal place of business if its only clients in this state are:

(A) Federal covered investment advisers, investment advisers registered under this chapter, or broker-dealers registered under this chapter;

(B) Institutional investors;

(C) Bona fide preexisting clients whose principal places of residence are not in this state if the investment adviser is registered under the securities act of the state in which the clients maintain principal places of residence; or

(D) Any other client exempted by a rule adopted or an order issued under this chapter;

(2) A person without a place of business in this state if the person has had, during the preceding twelve (12) months, not more than five (5) clients that are resident in this state in addition to those specified under subsection (b)(1) of this section;

(3) A federal covered investment adviser; or

(4) Any other person exempted by a rule adopted or an order issued under this chapter.

(c) Limits on employment or association. It is unlawful for an investment adviser, directly or indirectly, to employ or associate with an individual to engage in an activity related to investment advice in this state if the

registration of the individual is suspended or revoked or the individual is barred from employment or association with an investment adviser, federal covered investment adviser, or broker-dealer by an order under this chapter, the securities and exchange commission, or a self-regulatory organization, unless the investment adviser did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation or bar. Upon request from the investment adviser and for good cause, the administrator, by order, may waive, in whole or in part, the application of the prohibitions of this subsection to the investment adviser.

(d) Investment adviser representative registration required. It is unlawful for an investment adviser to employ or associate with an individual required to be registered under this chapter as an investment adviser representative who transacts business in this state on behalf of the investment adviser unless the individual is registered under section 30-14-404(a), Idaho Code, or is exempt from registration under section 30-14-404(b), Idaho Code.

History.

I.C., § 30-14-403, as added by 2004, ch. 45, § 2, p. 169.

CASE NOTES

Federal Law.

The provisions of 15 U.S.C. § 80b-1 do not have the effect of invalidating this section which requires registration of investment advisers. Kinsela v. State, Dep't of Fin., 117 Idaho 632, 790 P.2d 1388 (1990).

Cited In re Tolman, 491 B.R. 138 (Bankr. D. Idaho 2013).

Official Comment

Prior Provisions: 1956 Act Section 201; RUSA Sections 203-204.

1. "Investment adviser" is defined in Section 102(15). The scope of the Section 403(a) reference to "transact business in this State" is specified in Section 610.

2. Excluded from the definition of investment adviser in Section 102(15)(C) is a broker-dealer who receives no special compensation for investment advisory services. Such a broker-dealer would not have to register as both a

broker-dealer and investment adviser in this State. A broker-dealer that does receive special compensation, on the other hand, would also meet the statutory definition of investment adviser and would be required to register in both capacities.

3. Section 403(b)(2) is consistent with the National Securities Markets Improvement Act of 1996 which prohibits a State from regulating an investment adviser that does not have a place of business in this State and had fewer than six clients who were state residents during the preceding 12 months.

4. Section 403(c) prohibits an investment adviser from employing an individual who is prohibited from such employment or association by the administrator. Violation of this provision does not result in strict liability. To be liable the investment adviser must have known or should have known of the administrator's order to the individual suspended or barred.

§ 30-14-404. Investment adviser representative registration requirement and exemptions. — (a) Registration requirement. It is unlawful for an individual to transact business in this state as an investment adviser representative unless the individual is registered under this chapter as an investment adviser representative or is exempt from registration as an investment adviser representative under subsection (b) of this section.

(b) Exemptions from registration. The following individuals are exempt from the registration requirement of subsection (a) of this section:

(1) An individual who is employed by or associated with an investment adviser that is exempt from registration under section 30-14-403(b), Idaho Code, unless the individual has a place of business in this state or is not an investment adviser representative as defined by this chapter; and

(2) Any other individual exempted by a rule adopted or an order issued under this chapter.

(c) Registration effective only while employed or associated. The registration of an investment adviser representative is not effective while the investment adviser representative is not employed by or associated with an investment adviser registered under this chapter or a federal covered investment adviser that has made or is required to make a notice filing under section 30-14-405, Idaho Code.

(d) Limit on affiliations. An individual may transact business as an investment adviser representative for more than one (1) investment adviser or federal covered investment adviser unless a rule adopted or an order issued under this chapter prohibits or limits an individual from acting as an investment adviser representative for more than one (1) investment adviser or federal covered investment adviser.

(e) Limits on employment or association. It is unlawful for an individual acting as an investment adviser representative, directly or indirectly, to conduct business in this state on behalf of an investment adviser or a federal covered investment adviser if the registration of the individual as an investment adviser representative is suspended or revoked or the individual is barred or enjoined from employment or association with an investment

adviser or a federal covered investment adviser by an order under this chapter, the securities and exchange commission, or a self-regulatory organization, or a court of competent jurisdiction. Upon request from a federal covered investment adviser and for good cause, the administrator, by order issued, may waive, in whole or in part, the application of the requirements of this subsection to the federal covered investment adviser.

(f) Referral fees. An investment adviser registered under this chapter, a federal covered investment adviser that has filed a notice under section 30-14-405, Idaho Code, or a broker-dealer registered under this chapter, is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this chapter, a federal covered investment adviser who has filed a notice under section 30-14-405, Idaho Code, or a broker-dealer registered under this chapter with which the individual is employed or associated as an investment adviser representative.

History.

I.C., § 30-14-404, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

No Prior Provision.

1. "Investment adviser representative" is defined in Section 102(16). The scope of the Section 404(a) reference to "transacts business in this State" is specified in Section 610.

2. Neither the 1956 Act nor RUSA provided for the registration of investment adviser representatives. In recent years, however, the states increasingly have done so.

3. Under this Act a sole practitioner may register as an investment adviser. See Section 403. The Investment Adviser Registration Depository currently provides for entry of the legal name of the individual as the investment adviser and the entry of any name the individual is doing business under that is different from the individual's name. A sole practitioner is not required to register under Section 404 as an investment adviser representative, unless the administrator requires such registration.

4. Section 404(e) prohibits an investment adviser representative from association with a federal covered investment adviser when such association is prohibited by an order of the administrator. Unlike similar provisions in Sections 401 and 403, there is no culpability requirement that the investment adviser representative' "knows or in the exercise of reasonable care should have known" of a suspension or bar because the order should be received by the investment adviser representative. As with Sections 401 and 403, the administrator may waive this prohibition. Cf. Comment 17 to Section 412.

5. The administrator may adopt rules or orders under Section 404(f) in accordance with Section 605. The Securities and Exchange Commission has adopted a rule that addresses referral fees in Rule 206(4)-3 of the Investment Advisers Act of 1940.

6. For a state that intends to extend Section 404(f) to those broker-dealers and investment advisers who are not required to register and those federal covered investment advisers not required to file a notice, this subsection should read:

(f) [*Referral Fees*.] An investment adviser registered under this [Act], a federal covered investment adviser that has filed a notice under Section 405, or a broker-dealer registered under this [Act] is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this [Act], or not required to register under this [Act], a federal covered investment who has filed a notice under Section 405 or is not required to file a notice under Section 405, or a broker-dealer registered under this [Act] or not required to register under this [Act] with which the individual is employed or associated as an investment adviser representative.

§ 30-14-405. Federal covered investment adviser notice filing requirement. — (a) Notice filing requirement. Except with respect to a federal covered investment adviser described in subsection (b) of this section, it is unlawful for a federal covered investment adviser to transact business in this state as a federal covered investment adviser unless the federal covered investment adviser complies with subsection (c) of this section.

(b) Notice filing requirement not required. The following federal covered investment advisers are not required to comply with subsection (c) of this section: (1) A federal covered investment adviser without a place of business in this state if its only clients in this state are: (A) Federal covered investment advisers, investment advisers registered under this chapter, and broker-dealers registered under this chapter; (B) Institutional investors;

(C) Bona fide preexisting clients whose principal places of residence are not in this state; or (D) Other clients specified by a rule adopted or an order issued under this chapter; (2) A federal covered investment adviser without a place of business in this state if the person has had, during the preceding twelve (12) months, not more than five (5) clients that are resident in this state in addition to those specified under subsection (b)(1) of this section; and (3) Any other person excluded by a rule adopted or an order issued under this chapter.

(c) Notice filing procedure. A person acting as a federal covered investment adviser, not excluded under subsection (b) of this section, shall file a notice, a consent to service of process complying with section 30-14-611, Idaho Code, and such records as have been filed with the securities and exchange commission under the investment advisers act of 1940 required by a rule adopted or an order issued under this chapter and pay the fees specified in section 30-14-410(e), Idaho Code.

(d) Effectiveness of filing. The notice under subsection (c) of this section becomes effective upon its filing and expires on December thirty-first of each year unless renewed.

History.

I.C., § 30-14-405, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The investment advisers act of 1940, referred to in subsection (c), is codified as 15 USCS § 80b-1 et seq.

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

Official Comment

No Prior Provision.

1. "Federal covered investment adviser" is defined in Section 102(6). The scope of the Section 405(a) reference to "transacts business in this State" is specified in Section 610.

2. Section 405(b)(2) is necessitated by the National Securities Markets Improvement Act of 1996 and is intended to coordinate this Act with the Investment Advisers Act of 1940.

3. Section 404(c) provides limits on those who can be employed by or associated with a federal covered investment adviser.

4. The succession provision of Section 407(a) is available to a federal covered investment adviser who has filed a notice under Section 405.

§ 30-14-406. Registration by broker-dealer, agent, investment adviser, and investment adviser representative. — (a) Application for initial registration. A person shall register as a broker-dealer, agent, investment adviser, or investment adviser representative by filing an application and a consent to service of process complying with section 30-14-611, Idaho Code, and paying the fee specified in section 30-14-410, Idaho Code, and any reasonable fees charged by the designee of the administrator for processing the filing. The application must contain:

(1) The information or record required for the filing of a uniform application; and

(2) Upon request by the administrator, any other financial or other information or record that the administrator determines is appropriate.

(b) Amendment. If the information or record contained in an application filed under subsection (a) of this section is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) Effectiveness of registration. If an order is not in effect and a proceeding is not pending under section 30-14-412, Idaho Code, registration becomes effective at noon on the forty-fifth day after a completed application is filed, unless the registration is denied. A rule adopted or an order issued under this chapter may set an earlier effective date or may defer the effective date until noon on the forty-fifth day after the filing of any amendment completing the application.

(d) Registration renewal. A registration is effective until midnight on December thirty-first of the year for which the application for registration is filed. Unless an order is in effect under section 30-14-412, Idaho Code, a registration may be automatically renewed each year by filing such records as are required by a rule adopted or an order issued under this chapter, by paying the fee specified in section 30-14-410, Idaho Code, and by paying costs charged by the designee of the administrator for processing the filings.

(e) Additional conditions or waivers. A rule adopted or an order issued under this chapter may impose such other conditions, not inconsistent with

the national securities markets improvement act of 1996 (110 Stat. 3416). An order issued under this chapter may waive, in whole or in part, specific requirements in connection with registration as are in the public interest and for the protection of investors.

History.

I.C., § 30-14-406, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The national securities market improvement act of 1996, referred to in subsection (e), is Public Law 104-290, enacted October 11, 1996, which is generally codified throughout Title 15 of the United States Code.

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

Official Comment

Prior Provisions: 1956 Act Section 202; RUSA Sections 205, 208.

1. Under Section 406(a), the administrator is authorized to accept standardized forms such as Form B-D for broker-dealers; Form U-4 for agents and investment adviser representatives; and Form ADV for investment advisers, which are filed today through such designees as the Web-CRD or the Investment Adviser Registration Depository (IARD). While this Act generally encourages uniformity, Sections 406(a) and (e) are intended to give the administrator authority to augment or waive disclosure requirements in appropriate cases.

2. Section 406(a) eliminates the listing of specified information delineated in Section 202 of the 1956 Act. As with RUSA Section 205, the intent is to facilitate coordination with widely used standardized forms.

3. Under this Act a single person may act both as an agent and investment adviser representative if the person satisfies applicable registration requirements to be both an agent and investment adviser representative.

§ 30-14-407. Succession and change in registration of broker-dealer or investment adviser. — (a) Succession. A broker-dealer or investment adviser may succeed to the current registration of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser, and a federal covered investment adviser may succeed to the current registration of an investment adviser or notice filing of another federal covered investment adviser, by filing as a successor an application for registration pursuant to section 30-14-401 or 30-14-403, Idaho Code, or a notice pursuant to section 30-14-405, Idaho Code, for the unexpired portion of the current registration or notice filing.

(b) Organizational change. A broker-dealer or investment adviser that changes its form of organization or state of incorporation or organization may continue its registration by filing an amendment to its registration if the change does not involve a material change in its financial condition or management. The amendment becomes effective when filed or on a date designated by the registrant in its filing. The new organization is a successor to the original registrant for the purposes of this chapter. If there is a material change in financial condition or management, the broker-dealer or investment adviser shall file a new application for registration. A predecessor registered under this chapter shall stop conducting its securities business other than winding down transactions and shall file for withdrawal of broker-dealer or investment adviser registration within forty-five (45) days after filing its amendment to effect succession.

(c) Name change. A broker-dealer or investment adviser that changes its name may continue its registration by filing an amendment to its registration. The amendment becomes effective when filed or on a date designated by the registrant.

(d) Change of control. A change of control of a broker-dealer or investment adviser may be made in accordance with a rule adopted or an order issued under this chapter.

History.

I.C., § 30-14-407, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 202(c); RUSA 210.

1. Section 407 is intended to avoid unnecessary interruptions of business by specifying procedures for a successor broker-dealer or investment adviser; a broker-dealer or investment adviser to maintain its registration if it changes its form of organization or name; or, in accordance with a rule or order adopted under this Act, a change of control of a broker-dealer or investment adviser.

2. There is no filing fee under Section 407.

§ 30-14-408. Termination of employment or association of agent and investment adviser representative and transfer of employment or association. — (a) Notice of termination. If an agent registered under this chapter terminates employment by or association with a broker-dealer or issuer, or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser or federal covered investment adviser, or if either registrant terminates activities that require registration as an agent or investment adviser representative, the broker-dealer, issuer, investment adviser, or federal covered investment adviser shall promptly file a notice of termination. If the registrant learns that the broker-dealer, issuer, investment adviser, or federal covered investment adviser has not filed the notice, the registrant may do so.

(b) Transfer of employment or association. If an agent registered under this chapter terminates employment by or association with a broker-dealer registered under this chapter and begins employment by or association with another broker-dealer registered under this chapter; or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under section 30-14-405, Idaho Code, and begins employment by or association with another investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under section 30-14-405, Idaho Code; then upon the filing by or on behalf of the registrant, within thirty (30) days after the termination, of an application for registration that complies with the requirement of section 30-14-406(a), Idaho Code, and payment of the filing fee required under section 30-14-410, Idaho Code, the registration of the agent or investment adviser representative is:

(1) Immediately effective as of the date of the completed filing, if the agent's central registration depository record or successor record or the investment adviser representative's investment adviser registration depository record or successor record does not contain a new or amended disciplinary disclosure within the previous twelve (12) months; or

(2) Temporarily effective as of the date of the completed filing, if the agent's central registration depository record or successor record or the investment adviser representative's investment adviser registration depository record or successor record contains a new or amended disciplinary disclosure within the preceding twelve (12) months.

(c) Withdrawal of temporary registration. The administrator may withdraw a temporary registration if there are or were grounds for discipline as specified in section 30-14-412, Idaho Code, and the administrator does so within thirty (30) days after the filing of the application. If the administrator does not withdraw the temporary registration within the thirty (30) day period, registration becomes automatically effective on the thirty-first day after filing.

(d) Power to prevent registration. The administrator may prevent the effectiveness of a transfer of an agent or investment adviser representative under subsection (b)(1) or (2) of this section based on the public interest and the protection of investors.

(e) Termination of registration or application for registration. If the administrator determines that a registrant or applicant for registration is no longer in existence or has ceased to act as a broker-dealer, agent, investment adviser or investment adviser representative, or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator or guardian, or cannot reasonably be located, a rule adopted or an order issued under this chapter may require the registration be canceled or terminated or the application denied. The administrator may reinstate a canceled or terminated registration, with or without hearing, and may make the registration retroactive.

History.

I.C., § 30-14-408, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provision: 1956 Act Section 204(d).

1. Under Sections 402(c) and 404(c) registration of an agent or investment adviser representative is effective only while the agent or investment adviser representative is employed by or associated with a

broker-dealer, issuer, or investment adviser, as may be the case. Section 408(a) specifies a procedure to inform the administrator of a notice of termination.

2. To expedite transfer to a new broker-dealer or investment adviser, Section 408(b) provides a procedure by which agents or investment adviser representative registration will be effective immediately as of the date of new employment when there is no new or added disciplinary disclosure in the relevant Central Research Depository or Investment Adviser Registration Depository records. Both electronic systems are currently administered by the National Association of Securities Dealers. Section 408(d) is intended to ensure that the administrator has the authority to prevent immediate effectiveness in appropriate cases.

§ 30-14-409. Withdrawal of registration of broker-dealer, agent, investment adviser and investment adviser representative. — Withdrawal of registration by a broker-dealer, agent, investment adviser or investment adviser representative becomes effective sixty (60) days after the filing of the application to withdraw or within any shorter period as provided by a rule adopted or an order issued under this chapter unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, withdrawal becomes effective when and upon such conditions as required by a rule adopted or an order issued under this chapter. The administrator may institute a revocation or suspension proceeding under section 30-14-412, Idaho Code, within one (1) year after the withdrawal became effective automatically and issue a revocation or suspension order as of the last date on which registration was effective if a proceeding is not pending.

History.

I.C., § 30-14-409, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 204(e); RUSA Section 214.

1. This section generally follows the 1956 Act Section 204(e) and RUSA Section 214. This section does not affect any applicant's privilege of withdrawal of an application from registration before the registration becomes effective. It is simply designed to prevent withdrawal of an effective registration under fire. The last sentence preserves the ability of the administrator to initiate an action under Section 412 when the administrator does not know of a reason to object to withdrawal until after withdrawal has become effective.

2. Ordinarily today a registrant will file a standardized form such as Form U-5, BD-W or ADV-W to withdraw registration.

§ 30-14-410. Filing fees. — (a) Broker-dealers. A person shall pay a fee of two hundred dollars ($200) when initially filing an application for registration as a broker-dealer and a fee of two hundred dollars ($200) when filing a renewal of registration as a broker-dealer. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(b) Agents. The fee for an individual is fifty dollars ($50.00) when filing an application for registration as an agent, a fee of fifty dollars ($50.00) when filing a renewal of registration as an agent, and a fee of fifty dollars ($50.00) when filing for a change of registration as an agent. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(c) Investment advisers. A person shall pay a fee of one hundred fifty dollars ($150) when filing an application for registration as an investment adviser and a fee of one hundred fifty dollars ($150) when filing a renewal of registration as an investment adviser. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(d) Investment adviser representatives. The fee for an individual is thirty dollars ($30.00) when filing an application for registration as an investment adviser representative, a fee of thirty dollars ($30.00) when filing a renewal of registration as an investment adviser representative, and a fee of thirty dollars ($30.00) when filing a change of registration as an investment adviser representative. If the filing results in a denial or withdrawal, the administrator shall retain the fee.

(e) Federal covered investment advisers. A federal covered investment adviser required to file a notice under section 30-14-405, Idaho Code, shall pay an initial fee of thirty dollars ($30.00) and an annual notice fee of thirty dollars ($30.00).

(f) Payment. A person required to pay a filing or notice fee under this section may transmit the fee through or to a designee as a rule or order provides under this chapter.

(g) Dual agent/investment adviser representative. An investment adviser representative who is registered as an agent under section 30-14-402, Idaho Code, and who represents a person that is both registered as a broker-dealer

under section 30-14-401, Idaho Code, and registered as an investment adviser under section 30-14-403, Idaho Code, or required as a federal covered investment adviser to make a notice filing under section 30-14-405, Idaho Code, is not required to pay an initial or annual registration fee for registration as an investment adviser representative.

History.

I.C., § 30-14-410, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 202(b); RUSA Section 206.

1. Each state should determine the appropriate fee for each type of registration and for each type of renewal, denial, or withdrawal of a registration.

2. Similarly each state should determine whether it wishes to remove the brackets from Section 410(g) and charge a single fee for dually registered agents and investment adviser representatives.

3. If a State prefers to have the fees in this section established by rule, amend this section to read as follows, inserting the appropriate reference to the State's administrative procedure act:

[**SECTION 410. FILING FEES.**

(a) [*Fee established by administrator.*] The administrator shall establish fees by rule pursuant to the [state administrative procedure act] for:

(1) an initial filing of an application as a broker-dealer and renewal of an application by a broker-dealer for registration, but, if the filing results in a denial or withdrawal, the administrator shall retain an amount of the fee established by the administrator;

(2) an application for registration as an agent and renewal of registration as an agent, but, if the filing results in a denial or withdrawal, the administrator shall retain an amount of the fee established by the administrator;

(3) an application for registration as an investment adviser and renewal of registration as an investment adviser, but, if the filing results in a denial or

withdrawal, the administrator shall retain an amount of the fee established by the administrator.

(4) an application for registration as an investment adviser representative, a renewal of registration as an investment adviser representative, and a change of registration as an investment adviser representative, but, if the filing results in a denial or withdrawal, the administrator shall retain an amount of the fee established by the administrator; and

(5) an initial fee and annual notice fee for a federal covered investment adviser required to file a notice under Section 405.

(b) [*Payment*.] A person required to pay a filing or notice fee under this section may transmit the fee through or to a designee as a rule or order provides under this [Act].

(c) [*Dual agent/investment adviser representative*.] An investment adviser representative who is registered as an agent under Section 402 and who represents a person that is both registered as a broker-dealer under Section 401 and registered as an investment adviser under Section 403 or required as a federal covered investment adviser to make a notice filing under Section 405 is not required to pay an initial or annual registration fee for registration as an investment adviser representative.]

§ 30-14-411. Postregistration requirements. — (a) Financial requirements. Subject to section 15(i) of the securities exchange act of 1934 (15 U.S.C. 78o(i)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-18a), a rule adopted or an order issued under this chapter may establish minimum financial requirements for broker-dealers registered or required to be registered under this chapter and investment advisers registered or required to be registered under this chapter.

(b) Financial reports. Subject to section 15(i) of the securities exchange act of 1934 (15 U.S.C. 78o(i)) or section 222(b) of the investment advisers act of 1940 (15 U.S.C. 80b-18a), a broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall file such financial reports as are required by a rule adopted or an order issued under this chapter. If the information contained in a record filed under this subsection is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) Recordkeeping. Subject to section 15(i) of the securities exchange act of 1934 (15 U.S.C. 78o(i)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-18a):

(1) A broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall make and maintain the accounts, correspondence, memoranda, papers, books and other records required by a rule adopted or an order issued under this chapter;

(2) Broker-dealer records required to be maintained under subsection (c)(1) of this section may be maintained in any form of data storage acceptable under section 17(a) of the securities exchange act of 1934 (15 U.S.C. 78q(a)) if they are readily accessible to the administrator; and

(3) Investment adviser records required to be maintained under subsection (c)(1) of this section may be maintained in any form of data storage required by a rule adopted or an order issued under this chapter.

(d) Audits or inspections. The records of every person issuing or guaranteeing any securities subject to the provisions of this chapter, if such person is registered or required to be registered under this chapter, and of every broker-dealer, agent, investment adviser or investment adviser representative registered or required to be registered under this chapter are subject to such reasonable periodic, special or other audits or inspections by a representative of the administrator, within or without this state, as the administrator considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The administrator may copy, and may remove for audit or inspection copies of, all records the administrator reasonably considers necessary or appropriate to conduct the audit or inspection. The administrator may assess a reasonable charge for conducting an audit or inspection under this subsection.

(e) Custody and discretionary authority bond or insurance. Subject to section 15(i) of the securities exchange act of 1934 (15 U.S.C. 78o(i)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-18a), a rule adopted or an order issued under this chapter may require a broker-dealer or investment adviser that has custody of or discretionary authority over funds or securities of a customer or client to obtain insurance or post a bond or other satisfactory form of security in an amount not to exceed twenty-five thousand dollars ($25,000). The administrator may determine the requirements of the insurance, bond or other satisfactory form of security. Insurance or a bond or other satisfactory form of security may not be required of a broker-dealer registered under this chapter whose net capital exceeds, or of an investment adviser registered under this chapter whose minimum financial requirements exceed, the amounts required by rule or order under this chapter. The insurance, bond or other satisfactory form of security must permit an action by a person to enforce any liability on the insurance, bond or other satisfactory form of security if instituted within the time limitations in section 30-14-509(j)(2), Idaho Code.

(f) Requirements for custody. Subject to section 15(i) of the securities exchange act of 1934 (15 U.S.C. 78o(i)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-18a), an agent may not have custody of funds or securities of a customer except under the supervision of a broker-dealer and an investment adviser representative may not have custody of

funds or securities of a client except under the supervision of an investment adviser or a federal covered investment adviser. A rule adopted or an order issued under this chapter may prohibit, limit, or impose conditions on a broker-dealer regarding custody of funds or securities of a customer and on an investment adviser regarding custody of securities or funds of a client.

(g) Investment adviser brochure rule. With respect to an investment adviser registered or required to be registered under this chapter, a rule adopted or an order issued under this chapter may require that information or other record be furnished or disseminated to clients or prospective clients in this state as necessary or appropriate in the public interest and for the protection of investors and advisory clients.

(h) Continuing education. A rule adopted or an order issued under this chapter may require an individual registered under section 30-14-402 or 30-14-404, Idaho Code, to participate in a continuing education program approved by the securities and exchange commission and administered by a self-regulatory organization or, in the absence of such a program, a rule adopted or an order issued under this chapter may require continuing education for an individual registered under section 30-14-404, Idaho Code.

History.

I.C., § 30-14-411, as added by 2004, ch. 45, § 2, p. 169; am. 2020, ch. 82, § 17, p. 174; am. 2020, ch. 103, § 2, p. 274.

STATUTORY NOTES

Amendments.

This section was amended by two 2020 acts which appear to be compatible and have been compiled together.

The 2020 amendment, by ch. 82, substituted "(15 U.S.C. 80b-18a)" for "(15 U.S.C. 80b-22)" near the middle of subsection (a), near the beginning of the first sentence in subsection (b), at the end of the introductory paragraph in subsection (c), and near the beginning of the first sentences in subsections (e) and (f).

The 2020 amendment, by ch. 103, substituted "section 15(i) of the securities exchange act of 1934 (15 U.S.C. 78o(i)) or section 222 of the

investment advisers act of 1940 (15 U.S.C. 80b-18a)" for "section 15(h) of the securities exchange act of 1934 (15 U.S.C. 78o(h)) or section 222 of the investment advisers act of 1940 (15 U.S.C. 80b-22)" throughout the section.

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

CASE NOTES

Production of Records.

Idaho department of finance did not have the authority to request a securities agent's list of clients' addresses and telephone numbers, her financial records, and her personal bank account records, as they were not the type of records subject to the recordkeeping requirements, and, therefore, the agent's license should not have been suspended as a result of her refusal to produce these records. In re Karel, 144 Idaho 379, 162 P.3d 758 (2007).

Official Comment

Prior Provisions: 1956 Act Sections 102(c), 202(d) and (e) and 203; RUSA Sections 209, 211 and 215.

1. Sections 411(a) through (c) and (e) through (f) implicitly refer to "capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements." Under the National Securities Markets Improvement Act of 1996, States may not impose such requirements on covered broker-dealers and investment advisers greater than those specified in Section 15(h) of the Securities Exchange Act of 1934 and Section 222 of the Investment Advisors Act of 1940.

2. Minimum financial requirements must be maintained during the entire time a person is registered and not merely at the time of the registration. See, e.g., *National Grange Mut. Ins. Co. v. Prioleau*, 236 S.E.2d 808 (S.C. 1977) (continuing bond requirement); *Ridgeway, McLeod & Assoc.*, 281 A.2d 390 (N.J. Super. Ct. App. Div. 1971) (continuing minimum capital requirement).

3. The duty in Section 411(b) to correct or update information is limited to material information which a reasonable investor would continue to consider important in deciding whether to purchase or sell securities. Cf. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444-450 (1970); Securities Act Release No. 6084, 17 SEC Dock. 1048, 1054 (1979) ("persons are continuing to rely on all or any material portion of the statements").

4. Section 411(c)(1) authorizes the administrator to require all records to be preserved for the period the administrator prescribes by rule or order.

5. Rule 17a-4 is the current rule under Section 17(a) of the Securities Exchange Act referred to in Section 411(c)(2) that addresses acceptable forms of data storage.

6. The administrator's power to copy and examine records in Section 411(d) is subject to all applicable privileges. See, e.g., 10 Louis Loss & Joel Seligman, Securities Regulation 4921-4925 n.69 (3d ed. rev. 1996). The power in Section 411(d) to conduct audits or inspections is distinguishable from the administrator's enforcement powers under Section 602. No subpoena is necessary under Section 411(d). Failure to submit to a reasonable audit or inspection is a violation of this Act which may result in an action by the administrator under Section 412(d)(8), a criminal prosecution under Section 508, or an injunction under Section 603. An unreasonable audit, inspection or demand for information or documents would be subject to challenge in an appropriate court.

7. Section 411(f) broadens 1956 Act Section 102(c) and RUSA Section 215 to apply to agents as well as investment adviser representatives. Subject to Section 15(h) of the Securities Exchange Act of 1934 and Section 222 of the Investment Adviser Act of 1940, the administrator is given broad authority to prohibit, limit, or condition custody arrangements.

8. Section 411(g) parallels Rule 204-3, adopted under the Investment Advisers Act of 1940, popularly known as the brochure rule, which authorizes the SEC to require dissemination to investment adviser clients of specified information about the investment adviser and investment advice.

§ 30-14-412. Denial, revocation, suspension, withdrawal, restriction, condition or limitation of registration. — (a) Disciplinary conditions — Applicants. If the administrator finds that the order is in the public interest and subsection (d) of this section authorizes the action, an order issued under this chapter may deny an application, or may condition or limit registration of an applicant to be a broker-dealer, agent, investment adviser or investment adviser representative, and, if the applicant is a broker-dealer or investment adviser of any partner, officer, director or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser.

(b) Disciplinary conditions — Registrants. If the administrator finds that the order is in the public interest and subsection (d) of this section authorizes the action, an order issued under this chapter may revoke, suspend, condition or limit the registration of a registrant and, if the registrant is a broker-dealer or investment adviser of any partner, officer, director or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser. Provided however, the administrator may not:

(1) Institute a revocation or suspension proceeding under this subsection based on an order issued under a law of another state that is reported to the administrator or a designee of the administrator more than one (1) year after the date of the order on which it is based; or

(2) Under subsection (d)(5)(A) or (B) of this section, issue an order on the basis of an order issued under the securities act of another state unless the other order was based on conduct for which subsection (d) of this section would authorize the action had the conduct occurred in this state.

(c) Disciplinary penalties — Registrants. If the administrator finds that the order is in the public interest and subsections (d)(1) through (6), (8), (9), (10), (12) or (13) of this section authorizes the action, an order under this chapter may censure, impose a bar or suspension from association with a broker-dealer or investment adviser registered in this state, or impose a civil penalty in an amount not to exceed five thousand dollars ($5,000) for each violation, on a registrant and, if the registrant is a broker-dealer or

investment adviser, a partner, officer, director or person having a similar status or performing similar functions, or a person directly or indirectly in control, of the broker-dealer or investment adviser.

(d) Grounds for discipline. A person may be disciplined under subsections (a) through (c) of this section if the person:

(1) Has filed an application for registration in this state under this chapter or the predecessor act within the previous ten (10) years, which, as of the effective date of registration or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) Willfully violated or willfully failed to comply with this chapter or the predecessor act or a rule adopted or an order issued under this chapter or the predecessor act within the previous ten (10) years;

(3) Has been convicted of any felony or within the previous ten (10) years has been convicted of a misdemeanor involving a security, a commodity future or option contract, or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance;

(4) Is enjoined or restrained by a court of competent jurisdiction in an action instituted by the administrator under this chapter or the predecessor act, a state, the securities and exchange commission, or the United States from engaging in or continuing an act, practice or course of business involving an aspect of a business involving securities, commodities, investments, franchises, insurance, banking or finance;

(5) Is the subject of an order, issued after notice and opportunity for hearing by:

(A) The securities, depository institution, insurance or other financial services regulator of a state or by the securities and exchange commission or other federal agency denying, revoking, barring or suspending registration as a broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative;

(B) The securities regulator of a state or the securities and exchange commission against a broker-dealer, agent, investment adviser, investment adviser representative, or federal covered investment adviser;

(C) The securities and exchange commission or a self-regulatory organization suspending or expelling the registrant from membership in the self-regulatory organization;

(D) A court adjudicating a United States postal service fraud order;

(E) The insurance regulator of a state denying, suspending or revoking registration as an insurance agent; or

(F) A depository institution regulator suspending or barring the person from the depository institution business;

(6) Is the subject of an adjudication or determination, after notice and opportunity for hearing, by the securities and exchange commission, the commodity futures trading commission; the federal trade commission; a federal depository institution regulator, or a depository institution, insurance or other financial services regulator of a state that the person willfully violated the securities act of 1933, the securities exchange act of 1934, the investment advisers act of 1940, the investment company act of 1940, or the commodity exchange act, the securities or commodities law of a state, or a federal or state law under which a business involving investments, franchises, insurance, banking or finance is regulated;

(7) Is insolvent, either because the person's liabilities exceed the person's assets or because the person cannot meet the person's obligations as they mature, provided however that the administrator may not enter an order against an applicant or registrant under this paragraph (7) without a finding of insolvency as to the applicant or registrant;

(8) Refuses to allow or otherwise impedes the administrator from conducting an audit or inspection under section 30-14-411(d), Idaho Code, or refuses access to a registrant's office to conduct an audit or inspection under section 30-14-411(d), Idaho Code;

(9) Has failed to reasonably supervise an agent, investment adviser representative or other individual, if the agent, investment adviser representative or other individual was subject to the person's supervision

and committed a violation of this chapter or the predecessor act or a rule adopted or an order issued under this chapter or the predecessor act within the previous ten (10) years;

(10) Has not paid the proper filing fee within thirty (30) days after having been notified by the administrator of a deficiency, provided however that the administrator shall vacate an order under this paragraph (10) when the deficiency is corrected;

(11) After notice and opportunity for a hearing, has been found within the previous ten (10) years:

(A) By a court of competent jurisdiction to have willfully violated the laws of a foreign jurisdiction under which the business of securities, commodities, investment, franchises, insurance, banking or finance is regulated;

(B) To have been the subject of an order of a securities regulator of a foreign jurisdiction denying, revoking or suspending the right to engage in the business of securities as a broker-dealer, agent, investment adviser, investment adviser representative or similar person; or

(C) To have been suspended or expelled from membership by or participation in a securities exchange or securities association operating under the securities laws of a foreign jurisdiction;

(12) Is the subject of a cease and desist order issued by the securities and exchange commission or issued under the securities, commodities, investment, franchise, banking, finance or insurance laws of a state;

(13) Has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance or insurance business within the previous ten (10) years; or

(14) Is not qualified on the basis of factors such as training, experience and knowledge of the securities business. Provided however, in the case of an application by an agent for a broker-dealer that is a member of a self-regulatory organization or by an individual for registration as an investment adviser representative, a denial order may not be based on this paragraph (14) if the individual has successfully completed all examinations required by subsection (e) of this section. The administrator

may require an applicant for registration under section 30-14-402 or 30-14-404, Idaho Code, who has not been registered in a state within the two (2) years preceding the filing of an application in this state to successfully complete an examination.

(e) Examinations. A rule adopted or an order issued under this chapter may require that an examination, including an examination developed or approved by an organization of securities regulators, be successfully completed by a class of individuals or all individuals. An order issued under this chapter may waive, in whole or in part, an examination as to an individual and a rule adopted under this chapter may waive, in whole or in part, an examination as to a class of individuals if the administrator determines that the examination is not necessary or appropriate in the public interest and for the protection of investors.

(f) Summary process. The administrator may suspend or deny an application summarily; restrict, condition, limit or suspend a registration; or censure, bar, or impose a civil penalty on a registrant before final determination of an administrative proceeding. Upon the issuance of an order, the administrator shall promptly notify each person subject to the order that the order has been issued, the reasons for the action, and that within fifteen (15) days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the administrator within thirty (30) days after the date of service of the order, the order becomes final by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend the order until final determination.

(g) Procedural requirements. An order issued may not be issued under this section, except under subsection (f) of this section, without:

(1) Appropriate notice to the applicant or registrant;

(2) Opportunity for hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with chapter 52, title 67, Idaho Code.

(h) Control person liability. A person that controls, directly or indirectly, a person not in compliance with this section may be disciplined by order of

the administrator under subsections (a) through (c) of this section to the same extent as the noncomplying person, unless the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct that is a ground for discipline under this section.

(i) Limit on investigation or proceeding. The administrator may not institute a proceeding under subsection (a), (b) or (c) of this section based solely on material facts actually known by the administrator unless an investigation or the proceeding is instituted within one (1) year after the administrator actually acquires knowledge of the material facts.

History.

I.C., § 30-14-412, as added by 2004, ch. 45, § 2, p. 169; am. 2008, ch. 143, § 2, p. 420; am. 2012, ch. 65, § 5, p. 171.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 143, in subsection (a) and in the introductory paragraph in subsection (b), substituted "or a partner" for "of a partner."

The 2012 amendment, by ch. 65, substituted "of any partner" for "or a partner" in subsection (a) and in the introductory paragraph in subsection (b).

Federal References.

The federal references in subsection (d)(6) of this section are codified as follows: The Securities Act of 1933, 15 U.S.C.S., § 77a et seq.; the Securities Exchange Act of 1934, 15 U.S.C.S., § 78a et seq.; the Investment Advisers Act of 1940, 15 U.S.C.S. § 80b-1 et seq.; the Investment Company Act of 1940, 15 U.S.C.S. § 80a-1 et seq.; and the commodity exchange act, 7 U.S.C.S. § 1 et seq.

Compiler's Notes.

For more on securities and exchange commission, referred to in paragraphs (d)(4), (d)(5), (d)(6), and (d)(12), see *http://www.sec.gov*.

For more on the United States commodity futures trading commission, referred to in paragraph (d)(6), see *http://www.cftc.gov/index.htm*.

For more on the federal trade commission, referred to in paragraph (d)(6), see *http://ftc.gov/*.

Official Comment

Prior Provisions: 1956 Act Section 204; RUSA Sections 207, 212-213.

1. Section 412 generally follows Section 204 of the 1956 Act and Sections 207 and 212-213 of RUSA, but has been modified to reflect subsequent developments that have broadened the scope and remedies of counterpart federal and state statutes.

2. Section 412 authorizes the administrator to seek a sanction based on the seriousness of the misconduct. Under Section 412 the administrator must prove that the denial, revocation, suspension, cancellation, withdrawal, restriction, condition, or limitation both is (1) in the public interest and (2) involves one of the enumerated grounds in Section 412(d). See, e.g., *Mayflower Sec. Co., Inc. v. Bureau of Sec.*, 312 A.2d 497 (N.J. 1973). The "public interest" is a much litigated concept that has come to have settled meanings. See generally 6 L. Loss & J. Seligman, Securities Regulation 3103.5-3103.18 (3d ed. rev. 2002) (under federal securities laws). The public interest will not require imposition of a sanction for every minor or technical violation of subsection (d).

3. The term "foreign" means a jurisdiction outside of the United States, not a different state within the United States.

4. Section 412(a) through (c) authorizes the administrator to proceed against an entire firm, regardless of whether the administrator proceeds against any individual, when an individual partner, officer, or director or person occupying a similar status or performing similar functions, or a controlling person is disciplined under subsection (d), but only if proceeding against the entire firm is in the public interest. The discipline of such an individual may not automatically be used against a broker-dealer or investment adviser. When, however, there is a failure to reasonably supervise, see Section 412(d)(9) or control person liability, see Section 412(h), the administrator is empowered to proceed against a firm in an

appropriate case. In Section 412, "any partner, officer, or director, any person occupying a similar status or performing similar function." can include a branch manager, assistant branch manager, or other supervisor.

5. In Section 412(d)(1) the completeness and accuracy of an effective application for registration is tested as of the appropriate effective date. An application that becomes incomplete or inaccurate after its effective date is not a ground for discipline under paragraph (d)(1). In an appropriate case, an action might be available under paragraph (d)(2) and Section 406(b). On the other hand, in a proceeding to deny effectiveness to a pending application for registration, the completeness and accuracy of the application is not limited to the effective date and can be judged on any date after filing.

6. The term "willfully" in Section 412(d)(2) and (11)(A) is discussed in Comment 2 to Section 508.

7. There is no time limit or statute of limitations on felony convictions in Section 412(d)(3) as a ground for disciplinary action.

8. The present tense of the verb "is" in Sections 412(d)(4) through (6) and (12) means that an injunction, order, adjudication, or determination that has expired or been vacated is no longer a ground for discipline.

9. In Sections 412(d)(5) and (6) the administrator is not required to prove the validity of the ground which led to the earlier disciplinary order.

10. Under Section 412(d)(7) the administrator may not proceed against a broker-dealer or investment adviser firm on the basis of the insolvency of a partner, officer, director, controlling person or other person specified in subsection (b), unless it is a sole proprietorship.

11. Section 412(d)(8) can be violated by a refusal to cooperate with an administrator's reasonable audit or inspection, including by withholding or concealing records, refusing to furnish required records, or refusing the administrator reasonable access to any office or location within an office to conduct an audit or inspection under this Act. However, a request by a person subject to an audit or inspection for a reasonable delay to obtain assistance of counsel does not constitute a violation of Section 412(d)(8).

12. The term "failed to supervise reasonably" in Section 412(d)(9) includes not having reasonable supervisory procedures in place as well as a

proper system of supervision and internal control. Cf. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Section 15(b)(4)(E) of the Securities Exchange Act of 1934 similarly addresses "failure to supervise reasonably." See 6 Louis Loss & Joel Seligman, Securities Regulation 3097-3101 (3d ed. rev. 2002).

13. The term "dishonest and unethical practices" in Section 412(d)(13) has been held not to be unconstitutionally vague. See, e.g., *Brewster v. Maryland Sec. Comm'n*, 548 A.2d 157, 160 (M.D. Ct. Spec. App. 1988) ("a broad statutory standard is not vague if it has a meaningful referent in business practice, custom or usage"); *Johnson-Bowles Co. v. Division of Sec.*, 829 P.2d 101, 114 (Utah Ct. App. 1992) (such legislative language bespeaks a legislative intent to delegate the interpretation of what constitutes "dishonest and unethical practices" in the securities industry to the administrator). Ministerial or clerical violations of a statute or rule, if immaterial and occurring without intent or recklessness, typically would not constitute dishonest or unethical practices.

14. Under the counterparts to Section 412(d)(14) and (e) applicants to become agents of broker-dealers typically take standardized tests administered by the National Association of Securities Dealers, Inc.

15. Sections 412(f) and (g) amplify the earlier procedures found in Section 204(f) of the 1956 Act and are intended to facilitate summary disciplinary proceedings, when these are appropriate.

16. Section 412(i) parallels the language of Section 204 of the 1956 Act and Section 212(b) of RUSA with some significant changes. The time period in which the administrator can act has been extended to one year from 30 days in the 1956 Act and 90 days in RUSA. The limitation on instituting a proceeding can also be tolled by instituting a formal investigation. The addition of the word "solely" is intended to make it clear that an administrator may consider the prior history of an applicant or registrant even if that prior history had been known to the administrator for more than one year if there are additional material facts which are actually known to the administrator within the last year.

17. "Actually known" in Section 412(i) is used to signify that the mere filing of material facts in the Central Registration Depository or Investment Advisory Registration Depository systems does not constitute actual

knowledge, unless that information was received by the administrator, or, but for a decision by the administrator, would have been received by the administrator.

Part 5
Fraud and Liabilities

Idaho Code § 30-14-501

§ 30-14-501. General fraud. — It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

(1) To employ a device, scheme, or artifice to defraud;

(2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

(3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person; or

(4) To divert investor money to the personal use of the issuer, offeror or seller, or to pay prior investors without specifically disclosing that use before receiving the investor's money.

History.

I.C., § 30-14-501, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 6, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, added subsection (4).

CASE NOTES

Detrimental Reliance.

Detrimental reliance is not required when the department of finance is pursuing an enforcement action for the offer of securities under this section. State Dep't of Fin. v. Tenney, 124 Idaho 243, 858 P.2d 782 (Ct. App. 1993).

Cited Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166 (2007).

Official Comment

Prior Provisions: 1956 Act Section 101; RUSA Section 501.

1. Section 501, which was Section 101 in the 1956 Act, was modeled on Rule 10b-5 adopted under the Securities Exchange Act of 1934 and on Section 17(a) of the Securities Act of 1933. There has been significant later case development interpreting Rule 10b-5, Section 17(a), and Section 101 of the 1956 Act. Section 501 is not identical to either Rule 10b-5 or Section 17(a).

2. There are no exemptions from Section 501.

3. Section 501 applies to any securities offer, sale or purchase, including offers, sales, or purchases involving registered, exempt, or federal covered securities. It would also apply to a rescission offer under Section 510.

4. The possible consequences of violating Section 501 are many. These include denial, suspension, or revocation of securities registration under Section 306; denial, revocation, suspension, withdrawal, restriction, condition or limitation of a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412; criminal prosecution under Section 508; civil enforcement proceedings under Sections 603; and administrative proceedings under 604.

5. Because Section 501, like Rule 10b-5, reaches market manipulation, see 8 Louis Loss & Joel Seligman, Securities Regulation Ch. 10D (3d ed. 1991), this Act does not include the RUSA market manipulation Section 502, which had no counterpart in the 1956 Act.

6. The culpability required to be pled or proved under Section 501 is addressed in the relevant enforcement context. See, e.g., Section 508, criminal penalties, where "willfulness" must be proven; Section 509, civil liabilities, which includes a reasonable care defense; or civil and administrative enforcement actions under Sections 603 and 604, where no culpability is required to be pled or proven.

7. There is no private cause of action, express or implied, under Section 501. Section 509(m) expressly provides that only Section 509 provides a private cause of action for conduct that could violate Section 501.

§ 30-14-502. Prohibited conduct in providing investment advice. — (a) Fraud in providing investment advice. It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

(1) To employ a device, scheme, or artifice to defraud another person;

(2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person; or

(3) To divert investor money to the personal use of the issuer, offeror or seller, or to pay prior investors without specifically disclosing that use before receiving the investor's money.

(b) Rules defining fraud. A rule adopted under this chapter may define an act, practice, or course of business of an investment adviser or an investment adviser representative, as fraudulent, deceptive or manipulative, and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives, from engaging in acts, practices, and courses of business defined as fraudulent, deceptive or manipulative.

(c) Rules specifying contents of advisory contract. A rule adopted or an order issued under this chapter may specify the contents of an investment advisory contract entered into, extended or renewed by an investment adviser.

History.

I.C., § 30-14-502, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 7, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, added paragraph (a)(3).

Official Comment

Prior Provisions: 1956 Act Section 102(a); RUSA Section 503.

1. Section 502(a) applies to any person that commits fraud in providing investment advice. Section 502(b) is not limited to persons registered as investment advisers or investment adviser representatives.

2. A person can violate both Section 501 and Section 502 if the person violates Section 502 in connection with the offer, purchase, or sale of a security.

3. The rulemaking authority under Sections 502(b) and (c) would provide the basis for existing NASAA rules concerning investment advisers, to the extent these rules are not preempted by the National Securities Markets Improvement Act of 1996.

4. Under Section 203A(b)(2) of the Investment Advisers Act States retain their authority to investigate and bring enforcement actions with respect to fraud or deceit against a federal covered investment adviser or a person associated with a federal covered investment adviser. Under Section 502(a), which applies to any person, a State could bring an enforcement action against a federal covered investment adviser, including a federal covered investment adviser excluded from the definition of investment adviser in Section 102(15)(E).

5. There is no private cause of action, express or implied, under Section 502. Section 509(m) expressly provides that only Section 509 provides for a private cause of action for prohibited conduct in providing investment advice that could violate Section 502.

§ 30-14-503. Evidentiary burden. — (a) Civil. In a civil action or administrative proceeding under this chapter, a person claiming an exemption, exception, preemption or exclusion has the burden to prove the applicability of the claim.

(b) Criminal. In a criminal proceeding under this chapter, a person claiming an exemption, exception, preemption or exclusion has the burden of going forward with evidence of the claim.

History.

I.C., § 30-14-503, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 402(d); RUSA Section 608.

1. As specified in Section 503(a), in a civil or administrative action, the person claiming an exemption, exception, preemption, or exclusion has the burden of persuasion.

2. In contrast, in a criminal action under Section 503(b), the prosecutor is required to prove each element of a crime "beyond a reasonable doubt." The defendant only has the burden of producing evidence of an exemption, exception, preemption, or exclusion. Some court decisions have characterized this burden as an affirmative defense. See, e.g., United States ex. rel. Schott v. Tehan, 365 F.2d 191, 195 (6th Cir. 1966) (Ohio blue sky law constitutionally shifts burden of production to defendant); Commonwealth v. David, 309 N.E.2d 484, 488 (Mass. 1974) (exemption is an affirmative defense); State v. Frost, 387 N.E.2d 235, 238-239 (Ohio 1979) (it is not unconstitutional to require the burden of proof as an affirmative defense to prove a securities law exemption); State v. Andersen, 773 A.2d 328 (Conn. 2001) (an exemption from registration is an affirmative defense to the charge of selling unregistered securities).

§ 30-14-504. Filing of sales and advertising literature. — (a) Filing requirement. Except as otherwise provided in subsection (b) of this section, a rule adopted or an order issued under this chapter may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this chapter.

(b) Excluded communications. This section does not apply to sales and advertising literature specified in subsection (a) of this section which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by section 30-14-201, 30-14-202 or 30-14-203, Idaho Code, except as required pursuant to section 30-14-201(7), Idaho Code.

History.

I.C., § 30-14-504, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 403; RUSA Section 405.

1. The prospectuses, pamphlets, circulars, form letters, advertisements, sales literature or advertising communications, include material disseminated electronically or available on a web site.

2. The administrator may bring a civil enforcement action in a court under Section 603 or institute administrative enforcement under Section 604 to prevent publication, circulation or use of any materials required by the administrator to be filed under Section 504 that have not been filed.

3. Section 504(b) is meant to refer to the communications described in Section 504(a).

§ 30-14-505. Misleading filings. — It is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this chapter, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

History.

I.C., § 30-14-505, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions. 1956 Act Section 404; RUSA Section 504.

The definition of "materiality" in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) ("an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote") has generally been followed in both federal and state securities law. See 4 Louis Loss & Joel Seligman, Securities Regulation 2071-2105 (3d ed. rev. 2000).

§ 30-14-506. Misrepresentations concerning registration or exemption. — The filing of an application for registration, a registration statement, a notice filing under this chapter, the registration of a person, the notice filing by a person, or the registration of a security under this chapter does not constitute a finding by the administrator that a record filed under this chapter is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption or exclusion for a security or a transaction does not mean that the administrator has passed upon the merits or qualifications of, or recommended or given approval to, a person, security or transaction. It is unlawful to make, or cause to be made, to a purchaser, customer, client, or prospective customer or client a representation inconsistent with this section.

History.

I.C., § 30-14-506, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 405; RUSA Section 505.

This Section follows the 1956 Act and RUSA, as well as state securities statutes generally, in providing that a misrepresentation concerning registration or an exemption is unlawful.

§ 30-14-507. Qualified immunity. — A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by the administrator, or designee of the administrator, the securities and exchange commission or a self-regulatory organization, unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

History.

I.C., § 30-14-507, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Source of Law: National Association of Securities Dealers, Inc. Proposal Relating to Qualified Immunity in Arbitration Proceedings for Statements Made in Forms U-4 and U-5.

1. In 1994 The Securities and Exchange Commission Division of Market Regulation published The Large Firm Project: A Review of Hiring, Retention, and Supervisory Practices (1994), which found that a small number of "rogue brokers" were responsible for a significant proportion of customer disciplinary complaints. These brokers in some instances moved from one broker-dealer firm to another, it was explained, without full and complete disclosure of disciplinary problems by the broker-dealer, because of broker-dealer firms' fear of state law defamation claims. See also GAO, Actions Needed to Better Protect Investors against Unscrupulous Brokers 3 (1994); Testimony of SEC Chairman Arthur Levitt Concerning the Large Firm Project, Subcomm. on Telecommunications & Fin., House Comm. on Energy & Commerce (Sept. 14, 1994), *reprinted in* 1994-1995 Fed. Sec. L. Rep. (CCH) ¶ 85,433 (1994).

2. In 1998, the National Association of Securities Dealers proposed qualified immunity for statements made in Forms U-4 and U-5 to address

this problem. This proposal was reprinted in Securities Exchange Act Release 39,892, 66 SEC Dock. 2473 (1998). This proposal was limited to arbitration proceedings. It was not acted on by the Securities and Exchange Commission.

3. An alternative approach would be a standard providing for absolute immunity. See generally Anne Wright, Form U-5 Defamation, 52 Wash. & Lee L. Rev. 1299 (1995); *Acciardo v. Millennium Sec. Corp.*, 83 F. Supp. 2d 413 (S.D.N.Y. 2000) (discussing both New York qualified and absolute immunity cases).

4. Securities administrators or self-regulatory organizations generally are subject to absolute or qualified immunity for actions of their employees within the course of their official duties. See 10 Louis Loss & Joel Seligman, Securities Regulation 4818-4821 (3d ed. rev. 1996).

5. As is generally the law "truth is a complete defense to a defamation action." *Andrews v. Prudential Sec., Inc.*, 160 F.3d 304, 308 (6th Cir. 1998).

6. An agent who has been the subject of a Form U-5, Uniform Termination Notice for Securities Industry Registration, may respond to specified adverse disclosures and have her or his responses reprinted on the published version of Form U-5.

7. Through September 2002 no state had adopted an immunity provision in its securities statute. No state has rejected immunity in this context by judicial decision. A number of states have adopted qualified immunity by judicial decision. See, e.g., *Eaton Vance Distrib., Inc. v. Ulrich*, 692 So.2d 915 (Fla. Dist. Ct. App. 1997); *Bavarati v. Josephal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994) (Illinois); *Andrews v. Prudential Sec., Inc.*, 160 F.3d 304 (6th Cir. 1998) (Michigan); *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411 (N.D. Okla. 1996) (Oklahoma); *Glennon v. Dean Witter Reynolds Inc.*, 83 F.3d 132 (6th Cir. 1996) (Tennessee).

§ 30-14-508. Criminal penalties. — (a) Criminal penalties. A person that willfully violates this chapter, or a rule adopted or an order issued under this chapter, except section 30-14-504, Idaho Code, or the notice filing requirements of section 30-14-302 or 30-14-405, Idaho Code, or that willfully violates section 30-14-505, Idaho Code, knowing the statement made to be false or misleading in a material respect, shall be guilty of a felony and upon conviction, shall be fined not more than ten thousand dollars ($10,000) or imprisoned not more than five (5) years, or both. An individual convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the individual did not have knowledge of the rule or order.

(b) A person that willfully violates section 30-14-501 or 30-14-502(a), Idaho Code, and in connection with that violation, the violator knowingly accepts any money representing:

(1) Equity in a person's home;

(2) A withdrawal from any individual retirement account or similar retirement account; or

(3) A withdrawal from any qualified retirement plan as defined in the Internal Revenue Code,

shall upon conviction be punished by imprisonment for not less than three (3) years or more than fifteen (15) years if, at the time the crime was committed, the property, money or thing unlawfully obtained or sought to be obtained was worth ten thousand dollars ($10,000) or more.

(c) If, in the commission of an offense described in subsection (a) or (b) of this section, the victim is an elder or dependent adult, and the violator has knowledge that the victim is an elder or dependent adult, the defendant shall receive an additional term of imprisonment as follows:

(1) Three (3) years if the victim is under seventy (70) years of age.

(2) Five (5) years if the victim is seventy (70) years of age or older.

(d) As used in this section, "elder" means any person who is sixty-five (65) years of age or older.

(e) As used in this section, “dependent adult” means any person who is between the ages of eighteen (18) and sixty-four (64) years, who has physical or mental limitations which restrict the person’s ability to carry out normal activities or to protect the person’s rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.

(f) No indictment or information may be returned under this chapter more than five (5) years after the alleged violation.

(g) Criminal reference not required. The attorney general or the proper prosecuting attorney with or without a reference from the administrator, may institute criminal proceedings under this chapter.

(h) No limitation on other criminal enforcement. This chapter does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state.

History.

I.C., § 30-14-508, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

CASE NOTES

Limitation on action.

Sentence upheld.

Willfully.

Limitation on action.

Defendant’s securities fraud crimes were governed by the five-year statute of limitation in the securities law, rather than by the three-year statute of limitation generally applicable to all felonies, § 19-402. State v. Burchard, 123 Idaho 382, 848 P.2d 440 (Ct. App. 1993).

Sentence Upheld.

Where defendant, who pled guilty to three counts of omitting material facts in the sale of securities, was convicted and sentenced to a suspended three-year term with nine years of probation and ordered to make $42,000 in restitution to the defrauded investors and to perform 2,500 hours of community service, the trial court did not abuse its sentencing discretion by failing to grant a withheld judgment, because the public interest would be best served by requiring defendant to make restitution, keeping defendant out of the security-advising field, and deterring others. State v. Geier, 109 Idaho 963, 712 P.2d 664 (Ct. App. 1985).

Willfully.

Although "wilfulness" is not specifically defined within the provisions of the law governing the sale of securities, since both the securities laws and the criminal code relate to criminal prosecutions, the definition of wilfulness, as set forth in the criminal code, is applicable. See § 18-101. State v. Montgomery, 135 Idaho 348, 17 P.3d 292 (2001).

Official Comment

Prior Provisions: 1956 Act Section 409; RUSA Section 604; Securities Exchange Act of 1934 Section 32(a).

1. This Section follows the 1956 Act and the federal securities laws in imposing criminal penalties for any willful violation of the Act. RUSA Section 604 distinguished between felonies and misdemeanors, limiting willful violations of cease and desist orders to a misdemeanor.

2. The term "willfully" has the same meaning in Section 508 as it did in the 1956 Act. All that is required is proof that a person acted intentionally in the sense that the person was aware of what he or she was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required.

3. The final sentence of Section 508(a) is based on Section 32(a) of the Securities Exchange Act of 1934, which provides: "[N]o person shall be subject to imprisonment under this section in violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation." The "no knowledge" clause in Section 508(a) is relevant only to sentencing. The person convicted has the burden of persuasion to prove

no knowledge at sentencing. Because this does not impose a burden on the defendant to disprove the elements of a crime, Section 32(a) of the Securities Exchange Act of 1934 has been held not to raise a constitutional problem. *United States v. Mandel*, 296 F. Supp. 1038, 1040 (S.D.N.Y. 1969).

4. The appropriate state prosecutor under Section 508(b) may decide whether to bring a criminal action under this statute, another statute, or, when applicable, common law. In certain states the administrator has full or limited criminal enforcement powers.

5. This section does not specify maximum dollar amounts for criminal fines, maximum terms for imprisonment, nor the years of limitation, but does provide for each state to specify appropriate magnitudes for criminal fines or maximum terms for imprisonment.

6. The definition of willfulness in Comment 2 to Section 508 has been followed by most courts. See, e.g., *State v. Hodge*, 460 P.2d 596, 604 (Kan. 1969) ("No specific intent is necessary to constitute the offense where one violates the securities act except the intent to do the act denounced by the statute"); *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979) ("[I]t is widely understood that the legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer"); *State v. Fries*, 337 N.W.2d 398, 405 (Neb. 1983) (proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under a state's blue sky law); *People v. Riley*, 708 P.2d 1359, 1362 (Colo. 1985) ("A person acts 'knowingly' or 'willfully' with respect to conduct . . . when he is aware that his conduct . . . exists"); *State v. Larsen*, 865 P.2d 1355, 1358 (Utah 1993) (willful implies a willingness to commit the act, not an intent to violate the law or to injure another or acquire any advantage); *State v . Montgomery*, 17 P.3d 292, 294 (Idaho 2001) (bad faith is not required for a violation of a state securities act; willful implies "simply a purpose or willingness to commit the act or make the omission referred to"); *State v. Dumke*, 901 S.W.2d 100, 102 (Mo. Ct. App. 1995) (*mens rea* not required); *State v. Mueller*, 549 N.W.2d 455, 460 (Wis. Ct. App. 1996) (willfulness does not require proof that the defendant acted with intent to defraud or knowledge that the law was violated); *United States v. Lilley*, 291 F. Supp. 989, 993

(S.D. Tex. 1968) ("no knowledge" clause in federal statute not available to defendant claiming lack of knowledge of particular SEC rule).

§ 30-14-509. Civil liability. — (a) Securities litigation uniform standards act. Enforcement of civil liability under this section is subject to the securities litigation uniform standards act of 1998, as cited in section 30-14-103, Idaho Code.

(b) Liability of seller to purchaser. A person is liable to the purchaser if the person sells a security in violation of section 30-14-301, Idaho Code, or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in subsection (b)(3) of this section.

(2) The tender referred to in subsection (b)(1) of this section may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in subsection (b)(3) of this section.

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase, costs, and reasonable attorneys' fees determined by the court.

(c) Liability of purchaser to seller. A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security, and any income received on the security, costs, and reasonable attorneys' fees determined by the court, upon the tender of the purchase price, or for actual damages as provided in subsection (c)(3) of this section.

(2) The tender referred to in subsection (c)(1) of this section may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in subsection (c)(3) of this section.

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the sale of the security, costs, and reasonable attorneys' fees determined by the court.

(d) Liability of unregistered broker-dealer and agent. A person acting as a broker-dealer or agent that sells or buys a security in violation of section 30-14-401(a), 30-14-402(a) or 30-14-506, Idaho Code, is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsections (b)(1) through (3) of this section, or, if a seller, for a remedy as specified in subsections (c)(1) through (3) of this section.

(e) Liability of unregistered investment adviser and investment adviser representative. A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of section 30-14-403(a), 30-14-404(a) or 30-14-506, Idaho Code,

is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of payment, costs, and reasonable attorneys' fees determined by the court.

(f) Liability for investment advice. A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the fraudulent conduct, costs, and reasonable attorneys' fees determined by the court, less the amount of any income received as a result of the fraudulent conduct.

(2) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(g) Joint and several liability. The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f) of this section:

(1) A person that directly or indirectly controls a person liable under subsections (b) through (f) of this section, unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(2) An individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f) of this section, including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could

not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(3) An individual who is an employee of or associated with a person liable under subsections (b) through (f) of this section and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist; and

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (b) through (f) of this section, unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(h) Right of contribution. A person liable under this section has a right of contribution as in cases of contract against any other person liable under this section for the same conduct.

(i) Survival of cause of action. A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.

(j) Statute of limitations. A person may not obtain relief:

(1) Under subsection (b) of this section for violation of section 30-14-301, Idaho Code, or under subsection (d) or (e) of this section, unless the action is instituted within one (1) year after the violation occurred; or

(2) Under subsection (b) of this section, other than for violation of section 30-14-301, Idaho Code, or under subsection (c) or (f) of this section, unless the action is instituted within the earlier of two (2) years after discovery of the facts constituting the violation or five (5) years after the violation.

(k) No enforcement of violative contract. A person that has made, or has engaged in the performance of, a contract in violation of this chapter or a rule adopted or an order issued under this chapter, or that has acquired a purported right under the contract with knowledge of conduct by reason of

which its making or performance was in violation of this chapter, may not base an action on the contract.

(*l*) No contractual waiver. A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or an order issued under this chapter is void.

(m) Survival of other rights or remedies. The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist, but this chapter does not create a cause of action not specified in this section or section 30-14-411(e), Idaho Code.

History.

I.C., § 30-14-509, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Federal References.

The securities litigation uniform standards act of 1998, referred to in subsection (a), is generally codified as 15 USCS § 77p and 78bb(f).

CASE NOTES

Attorneys' Fees.

The mere inclusion of reasonable attorneys' fees as an item of recovery does not mean that the subject of attorneys' fees should have been submitted to the jury as a question at law; the allowance and amount of attorneys' fees is not a jury question, but is within the sound discretion of the trial judge. Hatrock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984).

Statute of Limitations.

Defendant's securities fraud crimes were governed by the statute of limitation specifically set out in the securities act, providing for criminal punishment for violations of the act, rather than by the statute of limitations applicable to all felonies, § 19-402. State v. Burchard, 123 Idaho 382, 848 P.2d 440 (Ct. App. 1993).

Venue.

In a securities case brought by the shareholders against the corporation and its representatives, alleging fraud, venue was proper in the county where the offer to sell was made and the shares were sold. Hayes v. Kingston, 140 Idaho 551, 96 P.3d 652 (2004).

Cited Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166 (2007).

Official Comment

Prior Provisions: 1956 Act Section 410; RUSA Sections 605-607, 609, 802.

1. Under Section 509 violations of two or more sections can be proven, but the remedy is limited either to rescission or actual damages. Actual damages means compensatory damages. Punitive or "double" damages are not provided by this section which also is the standard under Section 28(a) of the Securities Exchange Act of 1934. See 9 Louis Loss & Joel Seligman, Securities Regulation 4408-4427 (3d ed. rev. 1992).

2. The Securities Litigation Uniform Standards Act of 1998 cited in Section 509(a) modifies the entire Section 509.

3. As with Section 12(a)(2) of the Securities Act of 1933, Section 509(b) contains a type of privity requirement in that the purchaser is required to bring an action against the seller. Section 509(b) is broader than Section 12(a)(2) in that it will reach all sales in violation of Section 301, not just sales "by means of a prospectus" as is the law under Section 12(a)(2). See Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995).

4. Unlike the current standards on implied rights of action under Rule 10b-5, neither causation nor reliance has been held to be an element of a private cause of action under the precursor to Section 509(b). See *Gerhard W. Gohler, IRA v. Wood*, 919 P.2d 561 (Utah 1996); *Ritch v. Robinson-*

Humphrey Co., 748 So. 2d 861 (Ala. 1999); *Kaufman v. I-Stat Corp.*, 754 A.2d 1188 (N.J. 2000).

5. The measure of damages in Section 509(b)(3) is that contemplated by Section 12 of the Securities of 1933. See 9 Louis Loss and Joel Seligman, Securities Regulations 4242-4246 (3d ed. 1992). The measure of damages in Section 509(c)(3), however, is that contemplated by Rule 10b-5. Sec. 9 id. 4408-4427. In providing for damages as an alternative to rescission, Section 509(b)(3) follows the 1956 Act and is an improvement upon many earlier state provisions, which conditioned the plaintiff's right of recovery on his or her being in a position to make a good tender. A plaintiff is not given the right under this type of statutory formula to retain stock and also seek damages.

6. Sections 509(e) and (f) are based on a proposed NASAA amendment to the Uniform Securities Act adopted in order "to establish civil liability for individuals who willfully violate Section 102 dealing with fraudulent practices pertaining to advisory activities." Neither provision is intended to limit other state law claims for providing investment advice.

7. Broker-dealer employees, including research analysts, who receive no special compensation from third parties for investment advice would not be liable under Section 509(f).

8. The control liability provision in Section 509(g)(1) is modeled on that in the 1956 Act. On the meaning of "control," see 4 Louis Loss & Joel Seligman, Securities Regulations 1703-1727 (3d ed. rev. 2000).

9. The defense of lack of knowledge in Sections 509(g) is also modeled on the 1956 Act.

10. Under Section 509(g)(2) partners, officers, and directors are liable, subject to the defense afforded by that subsection, without proof that they aided in the sale. In Section 509(g)(2), the term "partner" is intended to be limited to partners with management responsibilities, rather than a partner with a passive investment.

11. Under 509(g)(4), the performance by a clearing broker of the clearing broker's contractual functions — even though necessary to the processing of a transaction — without more would not constitute material aid or result

in liability under this subsection. See, e.g., *Ross v. Bolton*, 904 F.2d 819 (2d Cir. 1990).

12. The "reasonable attorneys' fees" specified in Section 509 are permissive, not mandatory. See, e.g., *Andrews v. Blue*, 489 F.2d 367, 377 (10th Cir. 1973), (Colorado statute).

13. The contribution provision in Section 509(h) is a safeguard to avoid the common law principle that prohibited contribution among joint tortfeasors.

14. The statute of limitations in Section 509(j) is a hybrid of the 1956 Act and federal securities law approaches. The 1956 Act Section 410(p) provided that: "No person may sue under this section more than two years after the contract of sale." Under this provision, the state courts generally decline to extend a statute of limitations period on grounds of fraudulent concealment or equitable tolling.

Before the July 2002 enactment of the Sarbanes-Oxley Act, Rule 10b-5 of the Securities Exchange Act as construed by the United States Supreme Court in Lampf, Pleva, Lipkind, Prepis & Petigrew v. Gilbertson, 501 U.S. 350 (1991), prohibited equitable tolling under the federal securities law one year after discovery and three years after the act formula. See generally 10 Louis Loss & Joel Seligman, Securities Regulation 4505-4525 (3d. ed. rev. 1996). The Sarbanes-Oxley Act added 28 U.S.C. §1658(b) which provides

> . . . a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of —
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

Section 509(j)(1), as with the 1956 Act, is a unitary statute of repose, requiring an action to be commenced within one year after a violation occurred. It is not intended that equitable tolling be permitted.

Section 509(j)(2), in contrast, generally follows the federal securities law model. An action must be brought within the earlier of two years after

discovery or five years after the violation. As with federal courts construing the statute of limitations under Rule 10b-5, it is intended that the plaintiff's right to proceed is limited to two years after actual discovery "or after such discovery should have been made by the exercise of reasonable diligence" (inquiry notice), see, e.g., *Law v. Medco Research, Inc.*, 113 F.3d 781 (7th Cir. 1997), or five years after the violation.

The rationale for replicating the basic federal statute of limitations in this Act is to discourage forum shopping. If the statute of limitations applicable to Rule 10b-5 were to be changed in the future, identical changes should be made in Section 509(j)(2).

15. Section 509(k) is similar to Section 29(b) of the Securities Exchange Act and is intended to apply only to actions to enforce illegal contracts. See Louis Loss, Commentary on the Uniform Securities Act 150 (1976).

16. Section 509(m) follows the 1956 Act.

17. Section 509 and Section 411(e) provide the exclusive private causes of action under this Act.

§ 30-14-510. Rescission offers. — A purchaser, seller, or recipient of investment advice may not maintain an action under section 30-14-509, Idaho Code, if:

(a) The purchaser, seller, or recipient of investment advice receives in a record, before the action is instituted:

(1) An offer stating the respect in which liability under section 30-14-509, Idaho Code, may have arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer, and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this chapter to be furnished to that person at the time of the purchase, sale, or investment advice;

(2) If the basis for relief under this section may have been a violation of section 30-14-509(b), Idaho Code, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase, less the amount of any income received on the security, or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase in cash equal to the damages computed in the manner provided in this subsection;

(3) If the basis for relief under this section may have been a violation of section 30-14-509(c), Idaho Code, an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the sale; or if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the

purchase in the absence of the purchaser's conduct that may have caused liability and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the sale;

(4) If the basis for relief under this section may have been a violation of section 30-14-509(d), Idaho Code; and if the customer is a purchaser, an offer to pay as specified in subsection (b) of this section [paragraph (2) of this subsection]; or, if the customer is a seller, an offer to tender or to pay as specified in subsection (c) of this section [paragraph (3) of this subsection];

(5) If the basis for relief under this section may have been a violation of section 30-14-509(e), Idaho Code, an offer to reimburse in cash the consideration paid for the advice and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of payment; or

(6) If the basis for relief under this section may have been a violation of section 30-14-509(f), Idaho Code, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the violation causing the loss;

(b) The offer under subsection (a)(1) [subsection (a)] of this section states that it must be accepted by the purchaser, seller, or recipient of investment advice within thirty (30) days after the date of its receipt by the purchaser, seller, or recipient of investment advice or any shorter period, of not less than three (3) days, that the administrator, by order, specifies;

(c) The offeror has the present ability to pay the amount offered or to tender the security under subsection (a)(1) [subsection (a)] of this section;

(d) The offer under subsection (a)(1) [subsection (a)] of this section is delivered to the purchaser, seller, or recipient of investment advice, or sent in a manner that ensures receipt by the purchaser, seller, or recipient of investment advice; and

(e) The purchaser, seller, or recipient of investment advice that accepts the offer under subsection (a)(1) [subsection (a)] of this section in a record

within the period specified under subsection (a)(2) [subsection (b)] of this section is paid in accordance with the terms of the offer.

History.

I.C., § 30-14-510, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in paragraph (a)(4) and subsections (b), (c), (d), and (e) were added by the compiler to correct the statutory references and to conform to the uniform act.

Official Comment

Prior Provisions: 1956 Act Section 410(e); RUSA Section 607.

1. A rescission offer must meet the specific requirements of Section 510 for civil liability under Section 509 to be extinguished. Cf. *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663, 666 (N.D. Ga. 1990). See generally Rowe, Rescission Offers under Federal and State Securities Law, 12 J. Corp. L. 383 (1987).

2. A rescission offer that does not comply with Section 510 is subject to civil liability, administrative enforcement, or criminal penalties under this Act. A rescission offer, for example, could violate Section 501, the general fraud provision.

3. The administrator may publish a form that would comply with Section 510, but the form would not be the only one that could be used by the parties.

4. A valid rescission offer will be exempt from securities registration. See Section 202(19).

5. If a state chooses to add a notice or filing provision, it could provide this provision in Section 510(6), which would state:

> (6) The offer [or a notice] is required to be filed with the administrator 10 business days before the offering and conform in form and content with a rule prescribed by the administrator.

Part 6
Administration and Judicial Review

§ 30-14-601. Administration. — (a) Administration. The administration of the provisions of this chapter shall be under the general supervision and control of the administrator.

(b) Unlawful use of records or information. It is unlawful for the administrator or an officer, employee, or designee of the administrator to use for personal benefit or the benefit of others records or other information obtained by or filed with the administrator that are not public under section 30-14-607(b), Idaho Code. This chapter does not authorize the administrator or an officer, employee, or designee of the administrator to disclose the record or information, except in accordance with section 30-14-602, 30-14-607(c) or 30-14-608, Idaho Code.

(c) No privilege or exemption created or diminished. This chapter does not create or diminish a privilege or exemption that exists at common law, by statute or rule, or otherwise.

(d) Investor education. The administrator may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the administrator may collaborate with public and nonprofit organizations with an interest in investor education. The administrator may accept a grant or donation from a person that is not affiliated with the securities industry or from a nonprofit organization, regardless of whether the organization is affiliated with the securities industry, to develop and implement investor education initiatives. This subsection does not authorize the administrator to require participation or monetary contributions of a registrant in an investor education program.

(e) The securities investor education and training fund. The securities investor education and training fund is hereby created to provide funds for the purposes specified in subsection (d) of this section. All moneys received

by the state by reason of civil penalties and administrative fines collected pursuant to this chapter shall be deposited in the securities investor education and training fund up to but not exceeding fifty thousand dollars ($50,000) per year. The administrator may use funds in this account in a manner consistent with the duties of the department of finance under this chapter.

History.

I.C., § 30-14-601, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 406; RUSA Sections 701-702.

1. Section 601(b) should be read with Section 607. Section 601(b) prohibits the administrator or the administrator's officers and employees from using for personal benefit records or information that Section 607(b) specifies do not constitute public records. Section 601(b) is not intended to limit the operation of Section 607(a). Neither Section 601(b) nor 607(b) is intended to impede the ability of the agencies specified in Section 608(a) from sharing records or other information in connection with an examination or an investigation.

2. Section 601(c) makes clear that nothing in this Act alters the availability of evidentiary privileges. That question is left to the general law of the particular state.

3. Sections 601(d) and (e) were adopted in recognition of the importance of investor education. An increasing number of jurisdictions are earmarking specific funds for this purpose. The lack of financial acumen among public investors, seniors, and students continues to be demonstrated in recent industry and regulatory studies. The importance of investor financial literacy is increasingly crucial given the decades long shift from defined benefit retirement plans toward defined contribution plans where employees are left to direct their own retirement accounts.

§ 30-14-602. Investigations and subpoenas. — (a) Authority to investigate. The administrator may:

(1) Conduct public or private investigations within or outside of this state which the administrator considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or an order issued under this chapter, or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter;

(2) Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the administrator determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and

(3) Publish a record concerning an action, proceeding, or an investigation under, or a violation of, this chapter or a rule adopted or an order issued under this chapter if the administrator determines it is necessary or appropriate in the public interest and for the protection of investors.

(b) Administrator powers to investigate. For the purpose of an investigation or proceeding under this chapter, the administrator or its designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the administrator considers relevant or material to the investigation or proceeding.

(c) Procedure and remedies for noncompliance. If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the administrator under this chapter, the administrator may apply to any court of competent jurisdiction or a court of another state for an order to enforce compliance. The court may:

(1) Hold the person in contempt;

(2) Order the person to appear before the administrator;

(3) Order the person to testify about the matter under investigation or in question;

(4) Order the production of records;

(5) Grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;

(6) Impose a civil penalty of not less than five hundred dollars ($500) and not greater than five thousand dollars ($5,000) for each violation; and

(7) Grant any other necessary or appropriate relief.

(d) Application for relief. This section does not preclude a person from applying to any court of competent jurisdiction or a court of another state for relief from a request to appear, testify, file a statement, produce records, or obey a subpoena.

(e) Use immunity procedure. An individual is not excused from attending, testifying, filing a statement, producing a record or other evidence, or obeying a subpoena of the administrator under this chapter or in an action or proceeding instituted by the administrator under this chapter on the ground that the required testimony, statement, record, or other evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to a criminal fine, penalty, or forfeiture. If the individual refuses to testify, file a statement, or produce a record or other evidence on the basis of the individual's privilege against self-incrimination, the administrator may apply to any court of competent jurisdiction to compel the testimony, the filing of the statement, the production of the record, or the giving of other evidence. The testimony, record, or other evidence compelled under such an order may not be used, directly or indirectly, against the individual in a criminal case, except in a prosecution for perjury or contempt or otherwise failing to comply with the order.

(f) Assistance to securities regulator of another jurisdiction. At the request of a law enforcement or other governmental or regulatory agency or self-regulatory organization, the administrator may provide assistance if the requesting entity states that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters

that the requesting regulator administers or enforces. The administrator may provide the assistance by using the authority to investigate and the powers conferred by this section as the administrator determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of this chapter or other law of this state if occurring in this state. In deciding whether to provide the assistance, the administrator may consider whether the requesting regulator is permitted and has agreed to provide assistance reciprocally within its state, federal or foreign jurisdiction to the administrator on securities matters when requested; whether compliance with the request would violate or prejudice the public policy of this state; and the availability of resources and employees of the administrator to carry out the request for assistance.

History.

I.C., § 30-14-602, as added by 2004, ch. 45, § 2, p. 169.

CASE NOTES

Production of Materials.

In an investigation of a seminar scheme offering $10 million "self-liquidating loans" in exchange for a $4000 fee, the department of finance had the authority to require the materials sought, where there was no assertion that the department was arbitrary or capricious, that its acts were overreaching, or that the action was taken solely to harass the individual conducting the seminar. State ex rel. McEldowney v. Uhl, 111 Idaho 915, 728 P.2d 1324 (1986).

Official Comment

Prior Provisions: 1956 Act Section 407; RUSA Section 601.

1. Sections 602 (a) and (b) follow the 1956 Act, which was modeled generally on Sections 21(a) through (d) of the Securities Exchange Act of 1934 as it then read.

2. Standards for issuance of subpoenas have been generally established in federal and state securities law. See, e.g., 10 Louis Loss & Joel Seligman,

Securities Regulation 4917-4937 (3d ed. rev. 1996) (discussing *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) and other cases). The scope of subpoena enforcement in each state is a general matter for judicial determination. Under Section 602, an individual subpoenaed to testify by the administrator is not compelled to testify within the meaning of these sections simply by service of a subpoena. Under Section 602(b) the individual can be subpoenaed and compelled to attend. Once in attendance an individual can assert an evidentiary privilege or exemption, see Section 601(c), including the Fifth Amendment privilege against self-incrimination. If an individual refuses to testify or give evidence, the administrator may apply (or have the appropriate State attorney apply) to the appropriate court for the relief specified in Section 602(c). If the individual invokes the privilege against self-incrimination, Section 602(d) allows the administrator to apply to the appropriate court to compel testimony under the "use immunity" provision barring the record compelled or other evidence obtained from being used in a criminal case. See *People v. District Co. of Arapahoe County*, 894 P.2d 739 (Colo. 1995). The phrase "directly or indirectly" in Section 602(e) is intended to include testimony, other evidence, or other information derived from immunized testimony, statements, records, or evidence.

3. Section 602 is intended to apply generally to securities offers and sales under Article 3 and broker-dealer and investment adviser activity under Article 4, when there is noncompliance with the first sentence of Section 602(c). This subsection does not limit the powers of an administrator under other provisions of this Act.

4. A court may quash a subpoena for good cause under Section 602(d). The court may decline to enforce a subpoena that is arbitrary, capricious, or oppressive.

5. Where appropriate under Section 602(f), an administrator could move to authorize admission of a requesting state's attorney under existing *pro hac vice* rules.

6. Section 602(f) is consistent with the Securities Litigation Uniform Standard Act of 1998 which provides in Section 102(e):

> The Securities and Exchange Commission, in consultation with State securities commissions (or any agencies or offices performing like

functions), shall seek to encourage the adoption of State laws providing for reciprocal enforcement by State securities commissions of subpoenas issued by another State securities commission seeking to compel persons to attend, testify in, or produce documents or records in connection with an action or investigation by a State securities commission of an alleged violation of State securities laws.

7. There are limitations on financial institutions being subject to visitorial powers by State officials, such as those affecting national banks contained in 12 U.S.C. 484 and 12 C.F.R. Sec. 7.4000. Law outside this Act may place similar limits on state chartered financial institutions being subjected to visitorial powers. This Act does not negate these limitations.

§ 30-14-603. Civil enforcement. — (a) Civil action instituted by administrator. If the administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or an order issued under this chapter or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this chapter or a rule adopted or an order issued under this chapter, the administrator may maintain an action in any court of competent jurisdiction to enjoin the act, practice, or course of business and to enforce compliance with this chapter or a rule adopted or an order issued under this chapter.

(b) Relief available. In an action under this section and on a proper showing, the court may:

(1) Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

(2) Order other appropriate or ancillary relief, which may include:

(A) An asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the administrator, for the defendant or the defendant's assets;

(B) Ordering the administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property;

(C) Imposing a civil penalty not to exceed ten thousand dollars ($10,000) for each violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this chapter or the predecessor act or a rule adopted or an order issued under this chapter or the predecessor act; and

(D) Ordering the payment of prejudgment and postjudgment interest; or

(3) Order such other relief as the court considers appropriate.

(c) No bond required. The administrator shall not be required to post a bond in an action or proceeding under this chapter.

(d) Statute of limitation. If the administrator brings a civil action under this section, such action must be instituted within three (3) years from the discovery by the administrator of the facts constituting the alleged violation.

History.

I.C., § 30-14-603, as added by 2004, ch. 45, § 2, p. 169; am. 2012, ch. 65, § 8, p. 171.

STATUTORY NOTES

Amendments.

The 2012 amendment, by ch. 65, added subsection (d).

CASE NOTES

Decisions Under Prior Law

Intent.

Intent was not an element of securities fraud under subsections (2) and (3) of former § 30-1403. State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995). (See now § 30-14-603 and § 30-14-604).

Official Comment

Prior Provisions: 1956 Act Section 408; RUSA Section 603

1. Section 408 of the 1956 Act was limited to injunctions. This Section follows RUSA in broadening the civil remedies available when the administrator believes that a violation has occurred. A primary purpose of a broad range of potential sanctions is to enable administrators to better tailor appropriate sanctions to particular misconduct.

2. The administrator alternatively may proceed to seek administrative enforcement under Section 604; to deny, suspend, or revoke a securities registration under Section 306; or to deny, suspend, revoke, or take other

action against a broker-dealer, agent, investment adviser, or investment adviser representative registration under Section 412.

3. Constitutional due process considerations can also be addressed by rulemaking or incorporation of the applicable administrative procedure act provisions of each jurisdiction. The term “upon a proper showing” has a settled meaning in the federal securities laws. See, e.g., Securities Act of 1933 Section 20(b).

4. As with Sections 509(g)(3) and (4), materially aid in Section 603(a) does not include ministerial or clerical acts.

§ 30-14-604. Administrative enforcement. — (a) Issuance of an order or notice. If the administrator determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or an order issued under this chapter or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this chapter or a rule adopted or an order issued under this chapter, the administrator may:

(1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter;

(2) Issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under section 30-14-401(b)(1)(D) or (F), Idaho Code, or an investment adviser under section 30-14-403(b)(1)(C), Idaho Code; or

(3) Issue an order under section 30-14-204, Idaho Code.

(b) Summary process. An order under subsection (a) of this section is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement whether the administrator will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within fifteen (15) days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the administrator within thirty (30) days after the date of service of the order, the order, which may include a civil penalty or costs of the investigation if a civil penalty or costs were sought in the statement accompanying the order, becomes final as to that person by operation of law. If a hearing is requested or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(c) Procedure for final order. If a hearing is requested or ordered pursuant to subsection (b) of this section, a hearing must be held pursuant to chapter 52, title 67, Idaho Code. A final order may not be issued unless the administrator makes findings of fact and conclusions of law in a record pursuant to chapter 52, title 67, Idaho Code. The final order may make final, vacate, or modify the order issued under subsection (a) of this section.

(d) Civil penalty. In a final order under subsection (c) of this section, the administrator may impose a civil penalty not to exceed five thousand dollars ($5,000) for each violation.

(e) Costs. In a final order, the administrator may charge the actual cost of an investigation or proceeding for a violation of this chapter or a rule adopted or an order issued under this chapter.

(f) Filing of certified final order with court — Effect of filing. If a petition for judicial review of a final order is not filed in accordance with section 30-14-609, Idaho Code, the administrator may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

(g) Enforcement by court — Further civil penalty. If a person does not comply with an order under this section, the administrator may petition a court of competent jurisdiction to enforce the order. The court may not require the administrator to post a bond in an action or proceeding under this section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount not less than five hundred dollars ($500) but not greater than five thousand dollars ($5,000) for each violation and may grant any other relief the court determines is just and proper in the circumstances.

History.

I.C., § 30-14-604, as added by 2004, ch. 45, § 2, p. 169.

CASE NOTES

Decisions Under Prior Law

Intent.

Intent was not an element of securities fraud under subsections (2) and (3) of former § 30-1403. State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995). (See now § 30-14-603 and § 30-14-604).

Official Comment

Prior Provisions: RUSA Sections 602, 712.

1. Section 604, unlike Section 603, may be initiated by the administrator without prior judicial process or a prior hearing. The section, among other matters, empowers the administrator to act summarily in appropriate circumstances.

2. Sections 603 and 604 are intended to be available to the administrator against persons not subject to stop orders under Section 306 or proceedings against registered broker-dealers, agents, investment advisers, or investment adviser representatives under Section 412. All persons or securities not subject to Section 306 or 412 will be subject to Sections 603 and 604. A person must be covered by either (1) Sections 306 or 412 or (2) Sections 603 or 604.

3. Service of an order or notice under this Section is not effective unless made in accordance with Section 611.

§ 30-14-605. Rules, forms, orders, interpretative opinions, and hearings. — (a) Issuance and adoption of forms, orders, and rules. The administrator may:

(1) Issue forms and orders and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out this chapter and may repeal rules, including rules and forms governing registration statements, applications, notice filings, reports, and other records;

(2) By rule, define terms, whether or not used in this chapter, but those definitions may not be inconsistent with this chapter; and

(3) By rule, classify securities, persons, and transactions and adopt different requirements for different classes.

(b) Findings and cooperation. Under this chapter, a rule or form may not be adopted or amended, or an order issued or amended, unless the administrator finds that the rule, form, order, or amendment is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by this chapter. In adopting, amending, and repealing rules and forms, section 30-14-608, Idaho Code, applies in order to achieve uniformity among the states and coordination with federal laws in the form and content of registration statements, applications, reports, and other records, including the adoption of uniform rules, forms, and procedures.

(c) Financial statements. Subject to section 15(i) of the securities exchange act and section 222 of the investment advisers act of 1940, the administrator may require that a financial statement filed under this chapter be prepared in accordance with generally accepted accounting principles in the United States and comply with other requirements specified by rule adopted or an order issued under this chapter. A rule adopted or an order issued under this chapter may establish:

(1) Subject to section 15(i) of the securities exchange act and section 222 of the investment advisors act of 1940, the form and content of financial statements required under this chapter;

(2) Whether unconsolidated financial statements must be filed; and

(3) Whether required financial statements must be audited by an independent certified public accountant.

(d) Interpretative opinions. The administrator may provide interpretative opinions or issue determinations that the administrator will not institute a proceeding or an action under this chapter against a specified person for engaging in a specified act, practice, or course of business if the determination is consistent with this chapter. A rule adopted or an order issued under this chapter may establish a reasonable charge for interpretative opinions or determinations that the administrator will not institute an action or a proceeding under this chapter.

(e) Effect of compliance. A penalty under this chapter may not be imposed for, and liability does not arise from, conduct that is engaged in or omitted in good faith believing it conforms to a rule, form, or order of the administrator under this chapter.

(f) Presumption for public hearings. A hearing in an administrative proceeding under this chapter must be conducted in public unless the administrator for good cause consistent with this chapter determines that the hearing will not be so conducted.

History.

I.C., § 30-14-605, as added by 2004, ch. 45, § 2, p. 169; am. 2020, ch. 103, § 3, p. 274.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 103, in subsection (c), substituted "section 15(i) of the securities exchange act" for "section 15(h) of the securities exchange act" near the beginning of the introductory paragraph and near the beginning of paragraph (1).

Federal References.

The federal references in subsection (c) of this section are codified as follows: Section 15(i) of the Securities Exchange Act at 15 USCS § 78o(i) and § 222 of the Investment Advisers Act of 1940 at 15 USCS § 80b-18a.

Official Comment

Prior Provisions: 1956 Act Section 412; RUSA Sections 705, 707.

1. It is anticipated that the administrator will propose amendments or make rules under Section 605(a) to remain coordinate with relevant federal law, as well as appropriate rules of the National Association of Securities Dealers, and to achieve uniformity among the States.

2. Uniform forms such as Form B-D, U-4, U-5, and NF are today common in the securities industry and are authorized by Section 605(b).

3. Section 605(c) refers to generally accepted accounting principles in the United States which currently are promulgated by the Financial Accounting Standards Board and the Securities and Exchange Commission.

4. It is anticipated that the states will employ websites, e-mail or other electronic means to provide notice of proposed rulemaking or adoption of new rules, rule amendments, forms or form amendments, statements of policy or interpretations adopted by the administrator, and issuance of orders to registrants and others who have provided a current e-mail or similar address and expressed an interest in receiving such notice.

5. Section 605(e) does not apply to staff no action or interpretative opinions, but does apply to rules, forms, orders, statements of policy or interpretations adopted by the administrator.

§ 30-14-606. Administrative files and opinions. — (a) Public register of filings. The administrator shall maintain, or designate a person to maintain, a register of applications for registration of securities; registration statements; notice filings; applications for registration of broker-dealers, agents, investment advisers, and investment adviser representatives; notice filings by federal covered investment advisers that are or have been effective under this chapter or the predecessor act; notices of claims of exemption from registration or notice filing requirements contained in a record; orders issued under this chapter or the predecessor act; and interpretative opinions or no action determinations issued under this chapter.

(b) Public availability. The administrator shall make all rules, forms, interpretative opinions, and orders available to the public.

(c) Copies of public records. The administrator shall furnish a copy of a record that is a public record or a certification that the public record does not exist to a person that so requests. A rule adopted under this chapter may establish a reasonable charge for furnishing the record or certification. A copy of the record certified or a certificate by the administrator of a record's nonexistence is prima facie evidence of a record or its nonexistence.

History.

I.C., § 30-14-606, as added by 2004, ch. 45, § 2, p. 169.

Official Comment Prior Provisions: 1956 Act Section 413; RUSA Section 709.

1. "Record" is defined in Section 102(25).

2. Compliance with a state records law will typically satisfy the requirements of Section 606(a).

§ 30-14-607. Public records — Confidentiality. — (a) Presumption of public records. Except as otherwise provided in subsection (b) of this section, records obtained by the administrator or filed under this chapter, including a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination.

(b) Nonpublic records. Records as set forth in section 74-111, Idaho Code, are not public records and are not available for public examination under subsection (a) of this section.

(c) Administrator discretion to disclose. If disclosure is for the purpose of a civil, administrative, or criminal investigation, action, or proceeding or to a person specified in section 30-14-608(a), Idaho Code, the administrator may disclose a record obtained in connection with an audit or inspection under section 30-14-411(d), Idaho Code, or a record obtained in connection with an investigation under section 30-14-602, Idaho Code.

History.

I.C., § 30-14-607, as added by 2004, ch. 45, § 2, p. 169; am. 2015, ch. 141, § 52, p. 379.

STATUTORY NOTES

Amendments.

The 2015 amendment, by ch. 141, substituted "74-111" for "9-340H" in subsection (b).

Official Comment

Prior Provisions: RUSA Section 703; SEC Rule Section 200.80(b)(4); Securities Exchange Act of 1934 Sections 24(d) and (e).

1. Section 607(a) reflects the extensive development of freedom of information and open records laws since the 1956 Act was adopted.

2. Section 607(b) may insulate from public disclosure records or other information that may be available under a state freedom of information or open records act. Unless the state freedom of information or open records act implements a constitutional provision, this Act as the later and more specific enactment should control as a matter of statutory construction. A state may amend its freedom of information act, open records act or this section to eliminate any inconsistencies.

3. Records and other information obtained by an administrator in connection with an audit or inspection under subsection 411(d) or an investigation under Section 602 may be made public in the enforcement action, even if records and other information would otherwise be subject to subsection 607(b)(1).

4. An administrator may orally disclose information under Section 607(c) to a person specified in Section 608(a) for the purposes specified in Section 607(c).

§ 30-14-608. Uniformity and cooperation with other agencies. — (a) Objective of uniformity. The administrator shall, in its discretion, cooperate, coordinate, consult, and, subject to section 30-14-607, Idaho Code, share records and information with the securities regulator of another state, Canada, a Canadian province or territory, a foreign jurisdiction, the securities and exchange commission, the United States department of justice, the commodity futures trading commission, the federal trade commission, the securities investor protection corporation, a self-regulatory organization, a national or international organization of securities regulators, a federal or state banking or insurance regulator, and a governmental law enforcement or regulatory agency to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, states, and foreign governments.

(b) Policies to consider. In cooperating, coordinating, consulting, and sharing records and information under this section and in acting by rule, order, or waiver under this chapter, the administrator shall, in the administrator's discretion, take into consideration in carrying out the public interest the following general policies:

(1) Maximizing effectiveness of regulation for the protection of investors;

(2) Maximizing uniformity in federal and state regulatory standards; and

(3) Minimizing burdens on the business of capital formation, without adversely affecting essentials of investor protection.

(c) Subjects for cooperation. The cooperation, coordination, consultation, and sharing of records and information authorized by this section include:

(1) Establishing or employing one (1) or more designees as a central depository for registration and notice filings under this chapter and for records required or allowed to be maintained under this chapter;

(2) Developing and maintaining uniform forms;

(3) Conducting a joint examination or investigation;

(4) Holding a joint administrative hearing;

(5) Instituting and prosecuting a joint civil or administrative proceeding;

(6) Sharing and exchanging personnel;

(7) Coordinating registrations under section 30-14-301, Idaho Code, and sections 30-14-401 through 30-14-404, Idaho Code, and exemptions under section 30-14-203, Idaho Code;

(8) Sharing and exchanging records, subject to section 30-14-607, Idaho Code;

(9) Formulating rules, statements of policy, guidelines, forms, and interpretative opinions and releases;

(10) Formulating common systems and procedures;

(11) Notifying the public of proposed rules, forms, statements of policy, and guidelines;

(12) Attending conferences and other meetings among securities regulators, which may include representatives of governmental and private sector organizations involved in capital formation, deemed necessary or appropriate to promote or achieve uniformity; and

(13) Developing and maintaining a uniform exemption from registration for small issuers, and taking other steps to reduce the burden of raising investment capital by small businesses.

History.

I.C., § 30-14-608, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

For more on securities and exchange commission, see *http://www.sec.gov*.

For more on the United States commodity futures trading commission, see *http://www.cftc.gov/index.htm*.

For more on the federal trade commission, see *http://ftc.gov/*.

For more on the securities investor protection corporation, see *http://www.sipc.org/*.

Official Comment

Prior Provisions: 1956 Act Section 415; RUSA Sections 704 and 803; 19(c) of the Securities Act of 1933.

1. Uniformity of regulation among the states and coordination with the Securities and Exchange Commission is a principal objective of this Act. Section 608 is intended to encourage such cooperation to the maximum extent appropriate. Operative phrases such as "shall, in its discretion" in Sections 608(a) and (b) are intended to be precisely coordinate with the directive that Congress gave to the Securities and Exchange Commission in Section 19(c) of the Securities Act of 1933.

2. The goals of uniformity among the states and coordination with related federal regulation, including self-regulatory organizations, may be enhanced by greater use of information technology systems such as the Web-CRD, the Investment Adviser Registration Depository (IARD), or the Securities and Exchange Commission Electronic Data Gathering, Analysis and Retrieval System (EDGAR). These types of techniques are consistent with a potential system of "one stop filing" of all federal and state forms that is encouraged by this Act.

3. This Act is intended, to the extent practicable, to be revenue neutral in its impact on existing state laws.

4. Section 608(c) lists some joint or coordinated efforts which might be undertaken. Other appropriate cooperative activities are also encouraged.

5. Court decisions interpreting the securities laws have construed these acts to achieve "broad protection to investors," a remedial approach that "embodies a flexible rather than a static principle, one that is capable of adaption to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits." *SEC v. W.J. Howey Co*., 328 U.S. 293, 299, 301 (1946).

§ 30-14-609. Judicial review. — Judicial review of orders. A final order issued by the administrator under this chapter is subject to judicial review in accordance with chapter 52, title 67, Idaho Code.

History.

I.C., § 30-14-609, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Prior Provisions: 1956 Act Section 411; RUSA Section 711(b).

1. The 1956 Act Section 411 specified procedures for judicial review of orders, in part modeled on Section 12 of the Model Administrative Procedure Act, 54 Handbook of National Conference of Commissioners on Uniform State Laws 334 (1944) and partly on Section 25 of the Securities Exchange Act.

2. A rule adopted under this Act may be subject to judicial review in accordance with the state administrative procedure act. [Idaho did not adopt subsection (b) of the uniform act, governing judicial review of rules adopted under this chapter.]

3. In those states in which judicial review of rules is permitted, a state may choose to add Section 609(b). In those states in which judicial review of rules is not permitted, Section 609(b) should be deleted. [Idaho did not adopt subsection (b) of the uniform act, governing judicial review of rules adopted under this chapter.]

§ 30-14-610. Jurisdiction. — (a) Sales and offers to sell. Sections 30-14-301, 30-14-302, 30-14-401(a), 30-14-402(a), 30-14-403(a), 30-14-404(a), 30-14-501, 30-14-506, 30-14-509 and 30-14-510, Idaho Code, do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state.

(b) Purchases and offers to purchase. Sections 30-14-401(a), 30-14-402(a), 30-14-403(a), 30-14-404(a), 30-14-501, 30-14-506, 30-14-509 and 30-14-510, Idaho Code, do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this state or the offer to sell or the sale is made and accepted in this state.

(c) Offers in this state. For the purpose of this section, an offer to sell or to purchase a security is made in this state, whether or not either party is then present in this state, if the offer:

(1) Originates from within this state; or

(2) Is directed by the offeror to a place in this state and received at the place to which it is directed.

(d) Acceptances in this state. For the purpose of this section, an offer to purchase or to sell is accepted in this state, whether or not either party is then present in this state, if the acceptance:

(1) Is communicated to the offeror in this state and the offeree reasonably believes the offeror to be present in this state and the acceptance is received at the place in this state to which it is directed; and

(2) Has not previously been communicated to the offeror, orally or in a record, outside this state.

(e) Publications, radio, television, or electronic communications. An offer to sell or to purchase is not made in this state when a publisher circulates or there is circulated on the publisher's behalf in this state a bona fide newspaper or other publication of general, regular, and paid circulation that is not published in this state, or that is published in this state but has had more than two-thirds (2/3) of its circulation outside this state during the

previous twelve (12) months or when a radio or television program or other electronic communication originating outside this state is received in this state. A radio or television program, or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless:

(1) The program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state;

(2) The program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;

(3) The program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television, or other electronic system; or

(4) The program or communication consists of an electronic communication that originates in this state, but which is not intended for distribution to the general public in this state.

(f) Investment advice and misrepresentations. Sections 30-14-403(a), 30-14-404(a), 30-14-405(a), 30-14-502, 30-14-505 and 30-14-506, Idaho Code, apply to a person if the person engages in an act, practice, or course of business instrumental in effecting prohibited or actionable conduct in this state, whether or not either party is then present in this state.

History.

I.C., § 30-14-610, as added by 2004, ch. 45, § 2, p. 169.

Official Comment

Source of Law: 1956 Act Section 414; RUSA Section 801.

1. Section 610 defines the application of the Act to interstate or international transactions when only some of the elements of a violation occur in this State. This Section applies to all types of proceedings specified by the Act — administrative, civil, and criminal. The law is now settled that a person may violate the law of a particular state without ever being within

the state or performing each act necessary to violate the law within that state.

2. Section 610 generally follows Section 414 of the 1956 Act, but has been modernized to reflect the development of the Internet and other electronic communications after 1956.

3. Section 610 can be illustrated in the context of a civil action under Section 509(b) by a purchaser in State A against a seller in State B:

> Section 610(a) would apply when an "offer to sell is made in this State."

Section 610(c) provides that an offer which originates in State B and is directed to State A is made in both states. The securities act of State A would apply under Section 610(c)(2). The act of State B would apply also, under Section 610(c)(1). The intent is to prevent a seller in State B from using that state as a base of operations for defrauding person in other states.

Section 610(e) addresses offers made through publications, radio, television, or electronic communications. The subsection provides a series of safe harbors for advertisements in newspapers, magazines, radio, television, or electronic media that either originate outside State A or that originate in State A but are directed outside the state to the general public. With respect to bona fide newspapers or other publications of general, regular, and paid circulation, the safe harbor requires that more than two thirds of its circulation be outside State A. With respect to radio, television, or other electronic communications, safe harbors are specified in Sections 610(e)(1) through (4).

Section 610(d), however, provides that a person in State A who makes an offer to purchase as a result of communication described in Section 610(e) may cause the act to be applicable if the offeror accepts the offer "in this State." Section 610(d) defines when an offer is accepted "in this State."

If a selling broker-dealer in State B solely sends a confirmation into State A, or the purchaser in State A sends a check from within State A, the act will not apply unless, under Section 610(d), the confirmation or delivery constitutes the seller's acceptance of the purchaser's offer to buy in State A.

The applicability of the act to purchaser is addressed by Section 610(b) which is the converse of Section 610(a). Under Section 509(c) there can be

liability of purchasers to sellers.

Section 610(f) is a new provision that specifies jurisdictions in cases involving investment advice and misrepresentations.

4. Under subsection 202(20) certain out-of-state offers or sales are exempt from securities registration.

5. The phrase “other electronic means” is coextensive with computer or other information technology permitted by subsections 102(8), 102(25).

6. Under Section 610 the administrator may adopt interpretative rules or orders to specify when particular uses of new electronic communications, including the Internet, involve an offer to sell or to purchase a security, acceptance of an order to purchase or sell a security, or an act or practice involving prohibited conduct, within a State, whether or not a purchaser, seller, or other party is then present in the State. The NASAA Interpretive Order Concerning Broker-Dealers, Agents, and Investment Adviser Representatives Using the Internet for General Dissemination of Information for Products and Services (Apr. 23, 1997) is an illustration of an interpretative order that would be in compliance with the administrator’s authority under Section 610. Under this Order, broker-dealers, agents, investment advisers, and investment adviser representatives who distribute information on available products and services through communications on the Internet generally to anyone having access to the Internet such as postings on a bulletin board or home page shall not be deemed to be transacting business in a State if specified conditions are satisfied including a legend clearly stating that the broker-dealer, agent, investment adviser, or investment adviser representative may transact business in that State only if first registered, excluded or exempted from applicable registration requirements.

§ 30-14-611. Service of process. — (a) Signed consent to service of process. A consent appointing the administrator the person's agent for service of process in a noncriminal action or proceeding against the person, or the person's successor or personal representative under this chapter or a rule adopted or an order issued under this chapter after the consent is filed, has the same force and validity as if the service were made personally on the person filing the consent. Registrants shall be required to submit a consent to service of process only if there has been a material change.

(b) Conduct constituting appointment of agent for service. If a person, including a nonresident of this state, engages in an act, practice, or course of business prohibited or made actionable by this chapter or a rule adopted or an order issued under this chapter and the person has not filed a consent to service of process under subsection (a) of this section, the act, practice, or course of business constitutes the appointment of the administrator as the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative.

(c) Procedure for service of process. Service under subsection (a) or (b) of this section may be made by providing a copy of the process to the office of the administrator, but it is not effective unless:

(1) The plaintiff, which may be the administrator, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address, or takes other reasonable steps to give notice; and

(2) The plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the administrator in a proceeding before the administrator, allows.

(d) Service in administrative proceedings or civil actions by administrator. Service pursuant to subsection (c) of this section may be used in a proceeding before the administrator or by the administrator in a civil action in which the administrator is the moving party.

(e) Opportunity to defend. If process is served under subsection (c) of this section, the court, or the administrator in a proceeding before the administrator, shall order continuances as are necessary or appropriate to afford the defendant or respondent reasonable opportunity to defend.

History.

I.C., § 30-14-611, as added by 2004, ch. 45, § 2, p. 169; am. 2008, ch. 143, § 3, p. 423; am. 2012, ch. 65, § 9, p. 171.

STATUTORY NOTES

Amendments.

The 2008 amendment, by ch. 143, deleted the former second sentence in subsection (a), which read: "From September 1, 2004, through June 30, 2005, all persons applying for registration or making a notice filing shall submit to the administrator a signed consent to service of process."

The 2012 amendment, by ch. 65, deleted "From July 1, 2005, and thereafter" from the beginning of the last sentence in subsection (a).

Official Comment

Prior Provisions: 1956 Act Sections 414(g) and (h); RUSA Section 708.

1. Section 611 follows the 1956 Act and RUSA in providing for a signed consent to service of process in Section 611(a); a substituted service of process in Section 611(b); and process and opportunity to defend in Sections 611(c) through (e).

2. An issuer is not required to file a consent to service of process unless it proposes to offer a security in this State through someone acting on an agency basis. Since the civil liability provisions of Section 509(b) apply only in a suit by a purchaser against a seller, the issuer in a firm commitment underwriting is civilly liable only to the underwriter, who, in turn, may be liable to the dealer, who, in turn, may be liable to the purchaser. In contrast, in a best efforts underwriting, when the security is sold on an agency basis and title passes directly to the purchaser, the issuer can be liable to the purchaser.

3. Section 611(b) generally follows Section 414(h) of the 1956 Act and Section 708(c) of RUSA. The intent is to provide for substituted service of process when a seller in one state directs an offer into a second state either in violation of the laws of the second state or fraudulently. Under Section 611(b) the purchaser may sue the seller in the purchaser's state and then bring an action on the judgment in the seller's state. The constitutionality of this type of statute has long been sustained.

4. This section was originally based on the type of nonresident motorist statute whose constitutionality was sustained in *Hess v. Pawlowski*, 274 U.S. 352 (1927) and subsequently in other contexts. See, e.g., *International Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945); *Travelers Health Ass'n v. Commonwealth of Va.*, 339 U.S. 643 (1950).

§ 30-14-612. Severability clause. — If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

History.

I.C., § 30-14-612, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2004, Chapter 45, which is codified as §§ 18-7803, 30-14-101 to 30-14-703, 39-1452 and 41-1004.

Official Comment Prior Provisions: 1956 Act Section 417; RUSA Section 805.

Part 7
Transition

§ 30-14-701. Effective date. — This act takes effect on September 1, 2004.

History.

I.C., § 30-14-701, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2004, Chapter 45, which is codified as §§ 18-7803, 30-14-101 to 30-14-703, 39-1452 and 41-1004.

§ 30-14-702. Repeals. — The following chapter is repealed: The Idaho securities act, chapter 14, title 30, Idaho Code.

History.

I.C., § 30-14-702, as added by 2004, ch. 45, § 2, p. 169.

§ 30-14-703. Application of chapter to existing proceeding and existing rights and duties. — (a) Applicability of predecessor act to pending proceedings and existing rights. The predecessor act exclusively governs all actions or proceedings that are pending on the effective date of this act or may be instituted on the basis of conduct occurring before the effective date of this act, but a civil action may not be maintained to enforce any liability under the predecessor act unless instituted within any period of limitation that applied when the cause of action accrued or within five (5) years after the effective date of this act, whichever is earlier.

(b) Continued effectiveness under predecessor act. All effective registrations under the predecessor act, all administrative orders relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no action determinations, and conditions imposed on the registrations under the predecessor act remain in effect while they would have remained in effect if this act had not been enacted. They are considered to have been filed, issued, or imposed under this act, but are exclusively governed by the predecessor act.

(c) Applicability of predecessor act to offers or sales. The predecessor act exclusively applies to an offer or sale made within one (1) year after the effective date of this act pursuant to an offering made in good faith before the effective date of this act on the basis of an exemption available under the predecessor act.

History.

I.C., § 30-14-703, as added by 2004, ch. 45, § 2, p. 169.

STATUTORY NOTES

Compiler's Notes.

The term "this act" in subsection (b) refers to S.L. 2004, Chapter 45, which is codified as §§ 18-7803, 30-14-101 to 30-14-703, 39-1452 and 41-1004.

The phrase "the effective date of this act" in subsections (a) and (e) refers to the effective date of S.L. 2004, Chapter 45, which was effective September 1, 2004.

Official Comment

Prior Provisions: 1956 Act Section 418; RUSA Section 807.

Prior law governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of a State blue sky statute. See *Hilton v. Mumaw*, 522 F.2d 588, 600 (9th Cir. 1975).

Chapter 15
IDAHO COMMODITY CODE

Sec.

§ 30-1501. Definitions. — (1) "Board of trade" means any person or group of persons engaged in buying or selling any commodity or receiving the same for sale on consignment, whether such person or group of persons is characterized as a board of trade, exchange or other form of marketplace.

(2) "CFTC rule" means any rule, regulation or order of the commodity futures trading commission in effect on the effective date of this chapter and all subsequent amendments, additions or other revisions thereto, unless the director, within thirty (30) days following the effective date of any such amendment, addition or revision, disallows the application thereof to any provision of this chapter by rule, regulation or order.

(3) "Commodity" means, except as otherwise specified by the director by rule, regulation or order, any agricultural, grain or livestock product or by-product, any metal or mineral including a precious metal as defined in subsection (13) of this section, any gem or gemstone whether characterized as precious, semiprecious or otherwise, any fuel whether liquid, gaseous or otherwise, any foreign currency, and all other goods, articles, products or items of any kind of any other commodity as defined in the commodity exchange act or commodity futures trading commission rules; provided that the term commodity shall not include:

(a) A numismatic coin whose fair market value is at least fifteen per cent (15%) higher than the value of the metal it contains;

(b) Real property or any timber, agricultural or livestock product grown or raised on real property and offered or sold by the owner or lessee of such real property; or

(c) Any work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner thereof.

(4) "Commodity contract" means:

(a) Any account, agreement or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment

or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract or otherwise. Any commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes; and

(b) Does not include any contract or agreement which requires, and under which the purchaser receives, within twenty-eight (28) calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(5) "Commodity exchange act" means the act of congress known as the commodity exchange act, as amended, codified at 7 U.S.C. section 1, et seq. and all subsequent amendments, additions or other revisions thereto, unless the director, within thirty (30) days following the effective date of any such amendment, addition or revision, disallows the application thereof to any provision of this chapter by rule, regulation or order.

(6) "Commodity futures trading commission" means the independent regulatory agency established by congress to administer the commodity exchange act.

(7) "Commodity merchant" means any of the following as defined or described in the commodity exchange act or by CFTC rule:

(a) Futures commission merchant,

(b) Commodity pool operator,

(c) Commodity trading adviser,

(d) Introducing broker,

(e) Leverage transaction merchant,

(f) An associated person of any of the foregoing,

(g) Floor broker, and

(h) Any other person, other than a futures association, required to register with the commodity futures trading commission.

(8) "Commodity option" means:

(a) Any account, agreement or contract giving a party thereto the right, but not the obligation, to purchase or sell one or more commodities or one or more commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty or otherwise; and

(b) Does not include an option traded on a national securities exchange registered with the United States securities and exchange commission.

(9) "Director" means the director of the Idaho department of finance or an agent or employee authorized to act on the director's behalf.

(10) "Financial institution" means a bank, savings institution or trust company organized under, or supervised pursuant to the laws of the United States or this state.

(11) "Offer" includes every offer to sell, offer to purchase, or offer to enter into a commodity contract or commodity option.

(12) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government, but shall not include a contract market designated by the commodity futures trading commission or any clearinghouse thereof or a national securities exchange registered with the securities and exchange commission, or any employee, officer or director of such contract market, clearinghouse or exchange acting solely in that capacity.

(13) "Precious metal" means the following in either coin, bullion or other form:

(a) Silver,

(b) Gold,

(c) Platinum,

(d) Palladium,

(e) Copper, and

(f) Such other items as the director may specify by rule.

(14) “Sale” or “sell” includes every sale, contract of sale, contract to sell, or disposition, for value.

History.

I.C., § 30-1501, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Cross References.

Department of finance, § 67-2701 et seq.

Prior Laws.

Former §§ 30-1501 to 30-1513, which were compiled from 1975, ch. 248, § 1, p. 66; 1980, ch. 135, §§ 1 to 3, p. 294; 1982, ch. 139, § 1, p. 393; 1984, ch. 47, § 16, p. 76, were repealed by S.L. 1986, ch. 149, § 1.

Another former §§ 30-1501 to 30-1514, which comprised S.L. 1986, ch. 149, § 2, p. 425, were repealed by S.L. 1988, ch. 84, § 1.

Compiler’s Notes.

For more on the commodity futures trading commission, see *http://www.cftc.gov/index.htm* and 7 U.S.C.S. § 2.

For more on the securities and exchange commission, see *http://www.sec.gov/* and 15 U.S.C.S. § 78d.

The phrase “the effective date of this chapter” in subsection (2) refers to the effective date of S.L. 1989, Chapter 414, which was effective July 1, 1989.

§ 30-1502. Unlawful commodity transactions. — Except as otherwise provided in sections [section] 30-1503 or 30-1504, Idaho Code, no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into or enter into as seller or purchaser any commodity contract or any commodity option.

History.

I.C., § 30-1502, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1502 was repealed. See Prior Laws, § 30-1501.

Compiler's Notes.

The bracketed insertion near the beginning of this section was added by the compiler to correct the syntax of the statutory reference.

§ 30-1503. Exempt person — Transactions. — (1) The prohibitions in section 30-1502, Idaho Code, shall not apply to any transaction offered by and in which any of the following persons or any employee, officer or director thereof, acting solely in that capacity is the purchaser or seller:

(a) A person registered with the commodity futures trading commission as a futures commission merchant or as a leverage transaction merchant whose activities require such registration;

(b) A person registered with the securities and exchange commission or under the laws of this state as a securities broker-dealer whose activities require such registration;

(c) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by a person referred to in paragraph (a) or (b) of this subsection;

(d) A person who is a member of a contract market designated by the commodity futures trading commission or any clearinghouse thereof; or

(e) A financial institution.

(2) The exemption provided in this section shall not apply to any transaction or activity which is prohibited by the commodity exchange act or CFTC rule.

History.

I.C., § 30-1503, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1503 was repealed. See Prior Laws, § 30-1501.

§ 30-1504. Exempt transactions. — (1) The prohibitions in section 30-1502, Idaho Code, shall not apply to the following:

(a) An account, agreement or transaction within the exclusive jurisdiction of the commodity futures trading commission as granted under the commodity exchange act;

(b) A commodity contract for the purchase of one or more precious metals which requires, and under which the purchaser receives, within seven (7) calendar days from the payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment, provided that, for purposes of this paragraph, physical delivery shall be deemed to have occurred if, within such seven (7) day period, such quantity of precious metals purchased by such payment is delivered whether in specifically segregated or fungible bulk form into the possession of a depository, other than the seller, which is either:

(i) A financial institution,

(ii) A depository the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the commodity futures trading commission,

(iii) A storage facility licensed or regulated by the United States or any agency thereof, or

(iv) A depository designated by the director, and such depository or other person which itself qualifies as a depository as aforesaid, issues and the purchaser receives, a certificate, document of title, confirmation or other instrument evidencing that such quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the purchaser's behalf, free and clear of all liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser, or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;

(c) A commodity contract solely between persons engaged in producing, processing, using commercially or handling as merchants, each commodity subject thereto, or any by-product; or

(d) A commodity contract under which the offeree or the purchaser is a person referred to in section 30-1503, Idaho Code, an insurance company, or an investment company as defined in the investment company act of 1940.

(2) The director may issue rules, regulations or orders prescribing the terms and conditions of all transactions and contracts covered by the provisions of this chapter which are not within the exclusive jurisdiction of the commodity futures trading commission as granted by the commodity exchange act, exempting any person or transaction from any provision of this chapter conditionally or unconditionally and otherwise implementing the provisions of this chapter for the protection of purchasers and sellers of commodities.

History.

I.C., § 30-1504, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1504 was repealed. See Prior Laws, § 30-1501.

Federal References.

The investment company act of 1940, referred to in paragraph (1)(d), is codified as 15 U.S.C.S. § 80a-1 et seq.

§ 30-1505. Unlawful commodity activities. — (1) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person:

(a) Is registered or temporarily licensed with the commodity futures trading commission for each activity constituting such person as a commodity merchant and such registration or temporary license shall not have expired, nor been suspended nor revoked; or (b) Is exempt from such registration by virtue of the commodity exchange act or of a CFTC rule.

(2) No board of trade shall trade, or provide a place for the trading of, any commodity contract or commodity option required to be traded on or subject to the rules of a contract market designated by the commodity futures trading commission unless such board of trade has been so designated for such commodity contract or commodity option and such designation shall not have been vacated, nor suspended nor revoked.

History.

I.C., § 30-1505, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1505 was repealed. See Prior Laws, § 30-1501.

§ 30-1506. Fraudulent conduct — Liability of principals, controlling persons and others. — (1) It is unlawful for any person, directly or indirectly, in connection with a commodity contract or commodity option:

(a) To employ any device, scheme or artifice to defraud;

(b) To make any false report, enter any false record or make any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

(c) To engage in any transaction, act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or

(d) To misappropriate or convert the funds, security or property of any other person.

(2) The act, omission or failure of any person acting for any individual, association, partnership, corporation or trust within the scope of the person's employment or office shall be deemed the act, omission or failure of the individual, association, partnership, corporation or trust, as well as of the person.

(3) Every person who directly or indirectly controls another person liable under any provision of this chapter, every partner, officer, or director of such other person, every person occupying a similar status or performing similar functions, every employee of such other person who materially aids in the violation is also liable jointly and severally with and to the same extent as such other person, unless the person who is also liable by virtue of this provision sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

History.

I.C., § 30-1506, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1506 was repealed. See Prior Laws, § 30-1501.

§ 30-1507. Securities statutes unaffected. — Nothing in this chapter shall impair, derogate or otherwise affect the authority or powers of the director under the Idaho securities act [uniform securities act (2004)] or the application of any provision thereof to any person or transaction subject thereto.

History.

I.C., § 30-1507, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1507 was repealed. See Prior Laws, § 30-1501.

Compiler's Notes.

The bracketed insertion was added by the compiler, as the Idaho securities act was repealed in 2004 and replaced by the uniform securities act (2004). See § 30-14-101 et seq.

§ 30-1508. Purpose. — The provisions of this chapter may be construed and implemented to effectuate the general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts and to maximize coordination with federal law and laws of other states and the administration and enforcement thereof. The provisions of this chapter are not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of this chapter.

History.

I.C., § 30-1508, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1508 was repealed. See Prior Laws, § 30-1501.

§ 30-1509. Investigations. — (1) The director may make investigations, within or outside this state, as the director deems necessary or appropriate to:

(a) Determine whether any person has violated, or is about to violate, any provision of this chapter or any rule or order hereunder; or

(b) Aid in enforcement of the provisions of this chapter.

(2) The director may publish information concerning any violation of the provisions of this chapter or any rule or order of the director.

(3) For purposes of any investigation or proceeding under this chapter, the director or any officer or employee designated by him, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the director deems to be relevant or material to the inquiry.

(4)(a) If a person does not give testimony or produce the documents required by the director pursuant to an administrative subpoena, the director may apply for a court order compelling compliance with the subpoena or the giving of the required testimony.

(b) The request for order of compliance may be addressed to any court of competent jurisdiction, within or outside the state.

History.

I.C., § 30-1509, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1509 was repealed. See Prior Laws, § 30-1501.

§ 30-1510. Enforcement. — (1) If the director believes, whether or not based upon an investigation conducted under section 30-1509, Idaho Code, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order hereunder, the director may:

(a) Issue a cease and desist order;

(b) Issue an order imposing a civil penalty in an amount which may not exceed twenty-five thousand dollars ($25,000) for any single violation or one hundred thousand dollars ($100,000) for multiple violations in a single proceeding or a series of related proceedings; or (c) Initiate any of the actions specified in subsection (2) of this section.

(2) The director may institute any of the following actions in the appropriate courts of this state, or in the appropriate courts of another state, in addition to any legal or equitable remedies otherwise available: (a) An action for a declaratory judgment; (b) An action for a permanent or temporary injunction, restraining order or writ of mandamus to enjoin the violation and to ensure compliance with the provisions of this chapter or any rule or order of the director; (c) An action for disgorgement and other equitable remedies; and (d) An action for appointment of a receiver or conservator for the defendant or the defendant's assets.

History.

I.C., § 30-1510, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1510 was repealed. See Prior Laws, § 30-1501.

§ 30-1511. Power of court to grant relief. —

(1)(a) Upon a showing by the director that a person has violated, or is about to violate, any provision of this chapter or any rule or order of the director, the court may grant appropriate legal or equitable remedies.

(b) Upon a showing of violation of the provisions of this chapter or a rule or order of the director, the court, in addition to traditional legal and equitable remedies, including temporary restraining orders, permanent or temporary injunctions, and writs of prohibition or mandamus, may grant the following special remedies: (i) Imposition of a civil penalty in an amount which may not exceed twenty-five thousand dollars ($25,000) for any single violation or one hundred thousand dollars ($100,000) for multiple violations in a single proceeding or a series of related proceedings; (ii) Disgorgement;

(iii) Declaratory judgment;

(iv) Restitution to investors wishing restitution; and (v) Appointment of a receiver or conservator for the defendant or the defendant's assets.

(c) Appropriate remedies when the defendant is shown only about to violate the provisions of this chapter or a rule or order of the director shall be limited to: (i) A temporary restraining order;

(ii) A temporary or permanent injunction;

(iii) A writ of prohibition or mandamus; or (iv) An order appointing a receiver or conservator for the defendant or the defendant's assets.

(2) The court shall not require the director to post a bond in any official action under this chapter.

(3)(a) Upon a proper showing by the director or securities or commodity agency of another state that a person, other than a government or governmental agency or instrumentality, has violated, or is about to violate, any provision of the commodity act of that state or any rule or order of the director or securities or commodity agency of that state, the court may grant appropriate legal and equitable remedies.

(b) Upon a showing of a violation of the securities or commodity act of the foreign state or a rule or order of the director or securities or commodity agency of the foreign state, the court, in addition to traditional legal or equitable remedies including temporary restraining orders, permanent or temporary injunctions and writs of prohibition or mandamus, may grant the following special remedies: (i) Disgorgement; and

(ii) Appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in the state.

(c) Appropriate remedies when the defendant is shown only about to violate the securities or commodity act of the foreign state or a rule or order of the director or securities or commodity agency of the foreign state shall be limited to: (i) A temporary restraining order;

(ii) A temporary or permanent injunction;

(iii) A writ of prohibition or mandamus; or (iv) An order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

History.

I.C., § 30-1511, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1511 was repealed. See Prior Laws, § 30-1501.

§ 30-1512. Criminal penalties. — (1) Any person who willfully violates:

(a) Any provision of this chapter; or (b) Any rule or order of the director under this chapter shall, upon conviction, be fined not more than twenty-five thousand dollars ($25,000) or imprisoned for not more than ten (10) years, or both, for each violation.

(2) Any person convicted of violating a rule or order under this chapter may be fined, but may not be imprisoned, if the person proves he had no knowledge of the rule or order.

(3) The director may refer such evidence as is available concerning violations of the provisions of this chapter or any rule or order of the director to the attorney general of this state or the proper prosecuting attorney, who may, with or without such a reference from the director, institute the appropriate criminal proceedings under this chapter.

History.

I.C., § 30-1512, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Prior Laws.

Former § 30-1512 was repealed. See Prior Laws, § 30-1501.

§ 30-1513. Administration — Rules and forms. — (1) The administration of the provisions of this chapter shall be under the general supervision and control of the director. The director may from time to time make, amend and rescind such rules and forms as are necessary to carry out the provisions of this chapter. No rule or form may be made unless the director finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes of this chapter.

(2) Neither the director nor any employees of the director shall use any information which is filed with or obtained by the director which is not public information for personal gain or benefit, nor shall the director nor any employees of the director conduct any securities or commodity dealings whatsoever based upon any such information, even though public, if there has not been a sufficient period of time for the securities or commodity markets to assimilate such information.

(3)(a) Except as provided in paragraph (b) of this subsection, all information collected, assembled or maintained by the director is public information and is available for the examination of the public.

(b) The following items are not public information and are deemed to be confidential:

(i) Information or documents obtained by the director concerning any matter or party under investigation;

(ii) Information designated as confidential by any rule or order of the director;

(iii) Information obtained from federal agencies which may not be disclosed under federal law.

(c) The director in his discretion may disclose any information made confidential under paragraph (b)(i) of this subsection to persons identified in section 30-1514, Idaho Code.

(d) No provision of this chapter either creates or derogates any privilege which exists at common law, by statute or otherwise when any

documentary or other evidence is sought under subpoena directed to the director or any employee of the director.

History.

I.C., § 30-1513, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1513 was repealed. See Prior Laws, § 30-1501.

§ 30-1514. Cooperation with other agencies. — To encourage uniform application and interpretation of the provisions of this chapter and securities regulation and enforcement in general, the director and the employees of the director may cooperate, including bearing the expense of the cooperation, with the securities agencies or director of another jurisdiction, Canadian province or territory or such other agencies administering the provisions of this chapter, the commodity futures trading commission, the securities and exchange commission, any self-regulatory organization established under the commodity exchange act or the securities exchange act of 1934, any national or international organization of commodities or securities officials or agencies, and any governmental law enforcement agency.

History.

I.C., § 30-1514, as added by 1989, ch. 414, § 1, p. 1006.

STATUTORY NOTES

Prior Laws.

Former § 30-1514 was repealed. See Prior Laws, § 30-1501.

Federal References.

The securities exchange act of 1934 is codified as 15 U.S.C.S. § 78a et seq.

§ 30-1515. Consent to service of process. — When a person including a nonresident of this state, engages in conduct prohibited or made actionable by the provisions of this chapter or any rule or order of the director, such conduct shall constitute the appointment of the director and his successors as the person's attorney to receive service of any lawful process in a noncriminal proceeding against the person, a successor, or personal representative, which grows out of that conduct and which is brought under this chapter or any rule or order of the director with the same force and validity as if served personally.

History.

I.C., § 30-1515, as added by 1989, ch. 414, § 1, p. 1006.

§ 30-1516. Scope. — (1) Sections 30-1502, 30-1505 and 30-1506, Idaho Code, apply to persons who sell or offer to sell when:

(a) An offer to sell is made in this state, or

(b) An offer to buy is made and accepted in this state.

(2) Sections 30-1502, 30-1505 and 30-1506, Idaho Code, apply to persons who buy or offer to buy when: (a) An offer to buy is made in this state, or

(b) An offer to sell is made and accepted in this state.

(3) For the purposes of this section, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer: (a) Originates from this state, or

(b) Is directed by the offeror to this state and received at the place to which it is directed or at any post office in this state in the case of a mailed offer.

(4) For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance: (a) Is communicated to the offeror in this state, and (b) Has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state, reasonably believing the offeror to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(5) An offer to sell or to buy is not made in this state when: (a) The publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state, but more than two-thirds of the publication's circulation has been outside this state during the previous twelve (12) months, or (b) A radio or television program originating outside this state is received in this state.

History.

I.C., § 30-1516, as added by 1989, ch. 414, § 1, p. 1006.

§ 30-1517. Procedure for entry of an order. — (1) The director shall commence an administrative proceeding under this chapter by entering either a notice of intent to do a contemplated act or a summary order. The notice of intent or summary order may be entered without notice, without opportunity for hearing, and need not be supported by findings of fact or conclusions of law, but must be in writing.

(2) Upon entry of a notice of intent or summary order, the director shall promptly notify all interested parties that the notice or summary order has been entered and the reasons therefor. If the proceeding is pursuant to a notice of intent, the director shall inform all interested parties of the date, time and place set for the hearing on the notice. If the proceeding is pursuant to a summary order, the director shall inform all interested parties that they have thirty (30) business days from the entry of the order to file a written request for a hearing on the matter with the director and that the hearing will be scheduled to commence within thirty (30) business days after the receipt of the written request.

(3) If the proceeding is pursuant to a summary order, the director, whether or not a written request for a hearing is received from any interested party, may set the matter down for hearing on the director's own motion.

(4) If no hearing is requested and none is ordered by the director, the summary order will automatically become a final order after thirty (30) business days.

(5) If a hearing is requested or ordered, the director, after notice of an opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination.

(6) No final order or order after hearing may be returned without:

(a) Appropriate notice to all interested persons;

(b) Opportunity for hearing by all interested persons; and

(c) Entry of written findings of fact and conclusions of law.

Every hearing in an administrative proceeding under the provisions of this chapter shall be public unless the director grants a request joined in by all the respondents that the hearing be conducted privately.

History.

I.C., § 30-1517, as added by 1989, ch. 414, § 1, p. 1006.

§ 30-1518. Judicial review of orders. — Any person aggrieved by a final order of the director may obtain judicial review of the order pursuant to the provisions of chapter 52, title 67, Idaho Code.

History.

I.C., § 30-1518, as added by 1989, ch. 414, § 1, p. 1006; am. 1993, ch. 216, § 15, p. 587.

§ 30-1519. Pleading exemptions. — It shall not be necessary to negative any of the exemptions in this chapter in any complaint, information or indictment, or any writ or proceeding brought under this chapter, and the burden of proof of any such exemption shall be upon the party claiming the same.

History.

I.C., § 30-1519, as added by 1989, ch. 414, § 1, p. 1006.

§ 30-1520. Short title. — This chapter shall be known and may be cited as the “Idaho Commodity Code.”

History.

I.C., § 30-1520, as added by 1989, ch. 414, § 1, p. 1006.

Chapter 16
CONTROL SHARE ACQUISITION ACT

Sec.

§ 30-1601. Definitions. — In this chapter the following terms have the meaning specified:

(1) "Acquiring person" means a person that makes or proposes to make a control share acquisition. If two (2) or more persons act as a partnership, limited partnership, syndicate or other group pursuant to any agreement, arrangement, relationship, understanding or otherwise, whether or not in writing, for the purposes of acquiring, owning or voting shares of an issuing public corporation, all members of the partnership, syndicate or other group constitute a "person." An "acquiring person" does not include a licensed broker or dealer or licensed underwriter that purchases shares of an issuing public corporation solely for purposes of resale to the public and is not acting in concert with an acquiring person.

(2) "Affiliate" means a person that directly or indirectly controls, is controlled by, or is under common control with a specified person.

(3) "Associate," when used to indicate a relationship with any person, means:

(a) Any corporation or organization of which the person is an officer, director or partner or is, directly or indirectly, the beneficial owner of ten per cent (10%) or more of any class or series of shares entitled to vote or other equity interests;

(b) Any trust or estate in which the person has a ten per cent (10%) or more beneficial interest or as to which the person serves as trustee or personal representative or in a similar fiduciary capacity; or

(c) Any relative or spouse of the person, or any relative of the spouse, residing in the home of the person.

(4) "Beneficial owner," when used with respect to shares or other securities, includes any person who, directly or indirectly, through any agreement, arrangement, relationship, understanding or otherwise, whether or not in writing, has or shares the power to vote, or direct the voting of, the shares or securities or has or shares the power to dispose of, or direct the disposition of, the shares or securities, except that:

(a) A person is not deemed the beneficial owner of shares or securities tendered pursuant to a tender or exchange offer made by the person or any of the person's affiliates or associates until the tendered shares or securities are accepted for purchase or exchange or payment, or purchased or exchanged; and

(b) A person is not deemed the beneficial owner of shares or securities with respect to which the person has the power to vote or direct the voting arising solely from a revocable proxy given in response to a proxy solicitation made in accordance with the applicable rules and regulations under the Securities Exchange Act of 1934, as amended, and is not then reportable under that act on a schedule 13D or comparable report under that act.

(5) "Beneficial ownership" includes the right to acquire shares or securities through the exercise of options, warrants or rights, the conversion of convertible securities or otherwise, regardless of whether exercisable only after the passage of time (whether or not less than sixty (60) days) or the occurrence or nonoccurrence of a future event. The shares or securities subject to the options, warrants, rights or conversion privileges held by a person are deemed to be outstanding for the purpose of computing the percentage of outstanding shares or securities of the class or series owned by the person but are not deemed to be outstanding for the purpose of computing the percentage of the class or series owned by any other person. A person is deemed the beneficial owner of shares and securities beneficially owned by an affiliate or associate of the person.

(6) "Business combination," when used in reference to any issuing public corporation and any interested shareholder of the issuing public corporation, means:

(a) Any merger or consolidation of the issuing public corporation or any subsidiary of the issuing public corporation with either:

1. The interested shareholder; or

2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after the merger would be, an affiliate or associate of the interested shareholder, except that the foregoing does not include the merger of a

wholly owned subsidiary of the issuing public corporation into the issuing public corporation or the merger of two (2) or more wholly owned subsidiaries of the issuing public corporation; or

(b) Any exchange, pursuant to a plan of exchange under the laws of this state or a comparable statute of any other state or jurisdiction, of shares of the issuing public corporation or any subsidiary of the issuing public corporation for shares of either:

1. The interested shareholder; or

2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after the exchange would be, an affiliate or associate of the interested shareholder; or

(c) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in a single transaction or a series of transactions, to or with the interested shareholder or any affiliate or associate of the interested shareholder, whether as part of a dissolution or otherwise, of assets of the issuing public corporation or any subsidiary of the issuing public corporation to which any of the following applies:

1. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the assets, determined on a consolidated basis, of the issuing public corporation;

2. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation; or

3. Represents ten per cent (10%) or more of the earning power or net income, determined on a consolidated basis, of the issuing public corporation; or

(d) Any transaction which results in the issuance or transfer by the issuing public corporation or any subsidiary of the issuing public corporation, in a single transaction or a series of transactions, of any shares of the issuing public corporation that have an aggregate market value equal to five per cent (5%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation to the interested shareholder or any affiliate or associate of the interested

shareholder, except pursuant to the exercise of warrants or rights to purchase shares offered or distributed or a dividend or distribution paid or made pro rata to all shareholders of the issuing public corporation, and except pursuant to the exercise or conversion of securities exercisable for or convertible into shares of the issuing public corporation or any subsidiary of the issuing public corporation which securities were outstanding prior to the time that the interested stockholder became such; or

(e) The adoption of any plan or proposal for the liquidation or dissolution of the issuing public corporation, or any reincorporation of the issuing public corporation in another state or jurisdiction, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associate of the interested shareholder; or

(f) Any transaction involving any reclassification of securities, including any share dividend or split, reverse share split or other distribution of shares in respect of shares, recapitalization of the issuing public corporation, merger or consolidation of the issuing public corporation with any subsidiary of the issuing public corporation, exchange of shares of the issuing public corporation with any subsidiary of the issuing public corporation or other transaction, whether or not with or into or otherwise involving the interested shareholder, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associates of the interested shareholder that has the effect directly, or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of shares entitled to vote, or securities that are exchangeable for or convertible into or that carry a right to acquire shares entitled to vote, of the issuing public corporation or any subsidiary of the issuing public corporation that is, directly or indirectly, owned by the interested shareholder of any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(g) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the issuing public corporation, of any

loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through the issuing public corporation or any subsidiary of the issuing public corporation.

(7) “Control,” “controlling,” “controlled by” or “under common control with” means the possession, directly or indirectly, of the power to direct or to cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. A person’s beneficial ownership of ten per cent (10%) or more of the voting power of a corporation’s outstanding shares entitled to vote in the election of directors creates a presumption that the person has control of the corporation. A person is not considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of avoiding the provisions of this chapter, as an agent, bank, broker, nominee, custodian or trustee for one (1) or more beneficial owners who do not individually or as a group have control of the corporation.

(8) “Control share acquisition” means an acquisition, directly or indirectly, by an acquiring person of beneficial ownership of shares of an issuing public corporation that, except for the provisions of this chapter, would, when added to all other shares of the issuing public corporation, beneficially owned by the acquiring person, entitle the acquiring person, immediately after the acquisition, to exercise or direct the exercise of a new range of voting power within any of the ranges specified in section 30-1604(1)(d), Idaho Code, but does not include any of the following:

(a) An acquisition by a donee pursuant to an inter vivos gift not made to avoid the provisions of this chapter or by a distributee as defined in section 15-1-201, Idaho Code;

(b) An acquisition pursuant to a security agreement not created to avoid the provisions of this chapter;

(c) An acquisition from the issuing public corporation; and

(d) An acquisition for the benefit of others by a person acting in good faith and not made to avoid the provisions of this chapter to the extent that the person may not exercise or direct the exercise of voting power or disposition of the shares except on the instruction of others.

All shares, the beneficial ownership of which is acquired within a one hundred twenty (120) day period, and all shares, the beneficial ownership of which is acquired pursuant to a plan to make a control share acquisition, are deemed to have been acquired in the same acquisition.

(9) “Day” means a calendar day and shall consist of the time period from 12:01 a.m. through 12:00 midnight, Idaho time.

(10) “Interested shareholder,” when used in reference to any issuing public corporation, means any person, other than the issuing public corporation or any subsidiary of the issuing public corporation, that is either:

(a) The beneficial owner, directly or indirectly, of ten per cent (10%) or more of the voting power of the outstanding shares entitled to vote of the issuing public corporation; or

(b) An affiliate or associate of the issuing public corporation.

(11) “Interested shares” mean the shares of an issuing public corporation with respect to which any of the following persons may exercise or direct the exercise of voting power in the election of directors of the issuing public corporation:

(a) An acquiring person;

(b) Any officer of the issuing public corporation; or

(c) Any director of the issuing public corporation.

(12) “Issuing public corporation” means a publicly held corporation which has at least fifty (50) shareholders and which either:

(a) Is incorporated under the laws of this state; or

(b)(i) Has a place of business or its principal executive office located in this state, (ii) owns or controls assets located within this state that have a fair market value of at least one million dollars ($1,000,000), (iii) has more than two hundred fifty (250) employees residing in this state, and (iv) has either (X) more than ten per cent (10%) of its shareholders resident in this state, or (Y) more than ten per cent (10%) of its shares owned of record by state residents. For purposes of this subsection, the number of employees shall be computed by including all employees of

subsidiaries or affiliates of the publicly held corporation. For purposes of this subsection, the record date for determining the percentages and number of shareholders and shares shall be the last shareholder record date before the event requiring that the determination be made, except that if a shareholder record date has not been fixed by the board of directors of the issuing public corporation within the preceding four (4) months, the determination shall be made as of the end of the issuing public corporation's most recent fiscal quarter. The residence of a shareholder is presumed to be the address appearing in the records of the issuing public corporation. Shares held of record by banks (except as trustee or guardian), brokers, or nominees shall be disregarded for purposes of calculating percentages and numbers described in this subsection. Shares of an issuing public corporation allocated to the account of an employee or former employee or beneficiaries of employees or former employees of an issuing public corporation held in a plan that is qualified under section 401(a) of the Internal Revenue Code of 1986, as amended, and is a defined contribution plan within the meaning of section 414(i) of the code, shall be deemed for purposes of this subsection, to be held of record by the employee to whose account such shares are allocated.

(13) "Market value," when used in reference to shares or property of any issuing public corporation or any of its subsidiaries, means:

(a) In the case of shares, the highest closing sale price during the thirty (30) day period immediately preceding the date in question of a share of the composite tape for New York Stock Exchange listed shares or, if the shares are not quoted on the composite tape or not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the Securities Exchange Act of 1934, as amended, on which the shares are listed or, if the shares are not listed on any such exchange, on the National Association of Securities Dealers, Inc. Automated Quotations National Market System or, if the shares are not quoted on the National Association of Securities Dealers, Inc. Automated Quotations National Market System, the highest closing bid quotation during the thirty (30) day period preceding the date in question of a share on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use or, if no such quotation is

available, the fair market value on the date in question of a share as determined in good faith by the board of the issuing public corporation; and

(b) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined in good faith by the board of the issuing public corporation.

(14) “Publicly held corporation” means a corporation that has a class of equity securities registered pursuant to section 12 or is subject to section 15(d) of the Securities Exchange Act of 1934, as amended.

History.

I.C., § 30-1601, as added by 1988, ch. 84, § 2, p. 147; am. 1989, ch. 139, § 1, p. 320.

STATUTORY NOTES

Federal References.

The Securities Exchange Act of 1934, referred to in paragraphs (4)(b) and (13)(a), is compiled as 15 U.S.C.S. § 78a et seq.

Sections 401(a) and 414(i) of the internal revenue code of 1986, referred to paragraph (12)(b), are codified as 26 U.S.C.S. §§ 401(a) and 414(i), respectively.

Section 12 and 15(d) of the securities exchange act of 1934, referred to in subsection (14), are codified as 78 U.S.C.S. §§ 78*l* and 78o(d), respectively.

Compiler’s Notes.

For more on schedule 13D of the securities exchange act of 1934, see *http://www.sec.gov/answers/sched13.htm*.

The national association of securities dealers, inc., referred to in paragraph (13)(a), was combined with certain oversight functions of the New York stock exchange in 2007 to form the financial industry regulatory authority. For more on the financial industry regulatory authority, see *http://www.finra.org/*.

For more information on the National Association of Securities Dealers, Inc. Automated Quotations System, referred to in paragraph (13)(a), see

https://www.nasdaq.com/.

For more on the New York stock exchange, see *https://www.nyse.com*.

The words enclosed in parentheses so appeared in the law as enacted.

§ 30-1602. Duties of director. — In discharging the duties of the position of director of an issuing public corporation, a director, in considering the best interests of the corporation, shall consider the long-term as well as the short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation. In addition, a director may consider the interests of Idaho employees, suppliers, customers and communities in discharging his duties.

History.

I.C., § 30-1602, as added by 1988, ch. 84, § 2, p. 147.

§ 30-1603. Application. — (1) The provisions of this chapter shall not apply to a control share acquisition if:

(a) The acquiring person was an acquiring person on, or became an acquiring person pursuant to a tender offer commenced prior to, the day following the effective date of this act, and remained such;

(b) The original articles or bylaws of the issuing public corporation contain a provision expressly electing not to be subject to this chapter;

(c) The issuing public corporation, by action of its board of directors, adopts an amendment to its bylaws expressly electing not to be subject to this chapter; or

(d) The issuing public corporation, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws approved by the shareholders holding sixty-six and two-thirds per cent (66 2/3%) of the outstanding voting power of all shares entitled to vote, excluding the shares of interested shareholders and their affiliates and associates, under which the issuing public corporation by such shareholder action expressly elects not to be subject to this chapter, and such amendment provides that it is not to be effective until eighteen (18) months after the effective date of this chapter.

(2) The shares of an issuing public corporation acquired by an acquiring person in a control share acquisition that exceed the threshold of voting power of any of the ranges specified in section 30-1604(1)(d), Idaho Code, have only the voting rights accorded them pursuant to section 30-1607, Idaho Code, and then only as provided in such section, and will not otherwise have any voting rights regardless of the terms thereof.

(3) This chapter does not apply to insurance companies regulated under Title 41, Idaho Code.

History.

I.C., § 30-1603, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this chapter" in paragraphs (1)(a) and (1)(d) refers to the effective date of S.L. 1988, Chapter 84, which was effective March 22, 1988.

§ 30-1604. Information statement. — (1) An acquiring person shall deliver to the issuing public corporation at its principal executive office an information statement containing all the following:

(a) The identity of the acquiring person, including the identity of each member of any partnership, limited partnership, syndicate or other group constituting the acquiring person and the identity of each affiliate and associate of the acquiring person, including the identity of each affiliate and associate of each member of such partnership, syndicate or other group;

(b) A reference that the information is made under the provisions of this section;

(c) The number and class or series of shares of the issuing public corporation beneficially owned, directly or indirectly, before the control share acquisition by each of the persons identified pursuant to paragraph (a) of this subsection;

(d) The number and class or series of shares of the issuing public corporation acquired or proposed to be acquired pursuant to the control share acquisition by each of the persons identified pursuant to paragraph (a) of this subsection and specification of which of the following ranges of voting power in the election of directors that, except for the provisions of this chapter, the acquiring person in good faith believes resulted or would result from consummation of control share acquisition:

1. At least twenty percent (20%) but less than thirty-three and one-third percent (33 1/3%);

2. At least thirty-three and one-third percent (33 1/3%) but less than or equal to fifty percent (50%); or

3. Over fifty per cent (50%); and

(e) The terms of the control share acquisition or proposed control share acquisition, including the source of moneys or other consideration and the material terms of the financial arrangements for the control share acquisition, plans or proposals of the acquiring person, including plans or

proposals under consideration to enter into a business combination or combinations involving the issuing public corporation, to liquidate or dissolve the issuing public corporation, to sell all or a substantial part of its assets or merge or consolidate it or exchange its shares with any other person, to change the location of its principal place of business or its principal executive office or of a material portion of its business activities, to change materially its management or policies of employment, to change materially its charitable or community contributions or its policies, programs or practices relating thereto, to change materially its relationship with suppliers or customers or the communities in which it operates or to make any other material change in its business, corporate structure, management or personnel and such other objective facts as would be substantially likely to affect the decision of a shareholder with respect to voting on the control share acquisition.

(2) If any material change occurs in the facts set forth in the information statement, including any material increase or decrease in the number of shares of the issuing public corporation acquired or proposed to be acquired by the persons identified pursuant to subsection (1)(a) of this section, the acquiring person shall promptly deliver to the issuing public corporation at its principal executive office an amendment to the information statement containing information relating to such material change. An increase or decrease or proposed increase or decrease equal, in the aggregate for all persons identified pursuant to subsection (1)(a) of this section, to one percent (1%) or more of the total number of outstanding shares of any class or series of the issuing public corporation is deemed material for purposes of this subsection. An increase or decrease or proposed increase or decrease of less than this amount may be material, depending on the facts and circumstances.

History.

I.C., § 30-1604, as added by 1988, ch. 84, § 2, p. 147; am. 2014, ch. 97, § 17, p. 265.

STATUTORY NOTES

Amendments.

The 2014 amendment, by ch. 97, corrected typographical errors and made minor stylistic changes throughout the section.

§ 30-1605. Meeting of shareholders. — If the acquiring person so requests in writing at the time of delivery of an information statement pursuant to section 30-1604, Idaho Code, and has made, or has made a bona fide written offer to make, a control share acquisition and gives a written undertaking to pay or reimburse the issuing public corporation's expenses of a special meeting, except the expenses of the issuing public corporation in opposing approval of the control share acquisition, within ten (10) days after receipt by the issuing public corporation of the information statement, a special meeting of the shareholders of the issuing public corporation shall be called for the purpose of considering the voting rights to be accorded to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired pursuant to the control share acquisition. The special meeting shall be held no later than fifty-five (55) days after receipt of the information statement, unless the acquiring person agrees to a later date. If no request for a special meeting is made, consideration of the voting rights to be accorded to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired pursuant to the control share acquisition shall be presented at the next special or annual meeting of the shareholders, which takes place more than fifty-five (55) days after the receipt of the information statement by the issuing public corporation, unless the matter of the voting rights becomes moot. The notice of the meeting shall be accompanied at a minimum by a copy of the information statement and a copy of any amendment to the information statement previously delivered to the issuing public corporation and a statement disclosing that the board of the issuing public corporation recommends approval of, expresses no opinion and is remaining neutral toward, recommends rejection of or is unable to take a position with respect to according voting rights to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired in the control shares acquisition. The notice of meeting shall be given at least ten (10) days before the meeting.

History.

I.C., § 30-1605, as added by 1988, ch. 84, § 2, p. 147.

§ 30-1606. Financing. — No call of a special meeting of the shareholders of the issuing public corporation is required to be made pursuant to section 30-1605, Idaho Code, and no consideration of the voting rights to be accorded to shares referred to in section 30-1603(2), Idaho Code, acquired or to be acquired pursuant to a control share acquisition shall be presented at any special or annual meeting of the shareholders of the issuing public corporation unless at the time of delivery of the information statement pursuant to section 30-1604, Idaho Code, the acquiring person has entered into and has delivered to the issuing public corporation a copy or copies of a definitive financing agreement or agreements with one (1) or more responsible financial institutions or other entities having the necessary financial capacity for any financing of the control share acquisition not to be provided by moneys of the acquiring person.

History.

I.C., § 30-1606, as added by 1988, ch. 84, § 2, p. 147.

§ 30-1607. Voting rights. — (1) Shares referred to in section 30-1603(2), Idaho Code, acquired in a control share acquisition have the same voting rights as were accorded the shares before the control share acquisition but only if and to the extent approved by a resolution of shareholders of the issuing public corporation at a special or annual meeting of shareholders pursuant to section 30-1605, Idaho Code.

(2) The resolution of shareholders must be approved by the affirmative vote of the holders of sixty-six and two-thirds per cent (66 2/3%) of the voting power of all shares entitled to vote excluding all interested shares.

(3) A class or series of shares of the issuing public corporation is entitled to vote separately as a class or series if any provision of the control share acquisition would, if contained in a proposed amendment to the articles of the issuing public corporation, entitle the class or series to vote separately as a class or series.

(4) To have the voting rights accorded by approval of a resolution of shareholders, any proposed control share acquisition not consummated before the time of the shareholder approval must be consummated within one hundred eighty (180) days after the shareholders' approval.

(5) Any shares referred to in section 30-1603(2), Idaho Code, acquired in a control share acquisition that do not have voting rights accorded to them by approval of a resolution of shareholders shall regain their voting rights on transfer to a person other than the acquiring person or any affiliate or associate of the acquiring person unless the acquisition of the shares by the other person constitutes a control share acquisition, in which case the voting rights of the shares are subject to the provisions of this chapter.

History.

I.C., § 30-1607, as added by 1988, ch. 84, § 2, p. 147.

§ 30-1608. Rights of action. — (1) An acquiring person, an issuing public corporation and shareholders of an issuing public corporation may sue at law or in equity to enforce the provisions of this chapter.

(2) The issuing public corporation may make application to a court of competent jurisdiction to obtain a declaration of the issuing public corporation's and other persons' obligations and rights under the act, and the court in any such action may, to the extent it deems appropriate, modify the timing requirements under this act during the time the court is determining the matter, provided, however, that, consistent with the proper adjudication of the matter, courts of this state will determine the matter in the most expeditious manner practicable.

History.

I.C., § 30-1608, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Compiler's Notes.

The terms "the act" and "this act" in subsection (2) refer to S.L. 1988, Chapter 84, which is compiled as §§ 30-1601 to 30-1614 and 30-1701 to 30-1710.

§ 30-1609. Redemption. — (1) Unless otherwise expressly provided in the articles or in bylaws of an issuing public corporation, the issuing public corporation may call for redemption of all but not less than all shares referred to in section 30-1603(2), Idaho Code, acquired in a control share acquisition at a redemption price equal to the market value of the shares at the time the call for redemption is given if either:

(a) An information statement has not been delivered to the issuing public corporation by the acquiring person by the tenth day after the control share acquisition; or

(b) An information statement has been delivered but the shareholders have voted not to accord voting rights to such shares pursuant to section 30-1607(2), Idaho Code.

(2) The issuing public corporation shall give the call for redemption within thirty (30) days after the event giving the issuing public corporation the option to call the shares for redemption and the shares shall be redeemed within sixty (60) days after the call is given.

History.

I.C., § 30-1609, as added by 1988, ch. 84, § 2, p. 147.

§ 30-1610. Scope. — (1) Nothing contained in this chapter is intended or shall be construed in any way to limit, modify or restrict an issuing public corporation's authority to take any action which the directors may appropriately determine to be in furtherance of the protection of the interests of the corporation and its shareholders, including without limitation the authority to adopt or enter into plans, arrangements or instruments that deny rights, privileges, power or authority to the holder or holders of at least a specified number of shares or percentage of share ownership or voting power in certain circumstances.

(2) The requirements imposed by this chapter are to be in addition to, and not in lieu of, requirements imposed on a transaction by any provision in the articles or the bylaws of the issuing public corporation, or otherwise.

History.

I.C., § 30-1610, as added by 1988, ch. 84, § 2, p. 147.

§ 30-1611. Jurisdiction. — (1) If the jurisdiction under the laws of which the issuing public corporation is organized has adopted or adopts any law comparable to this chapter which imposes limitations on the voting rights of any person in the event that the person acquires or proposes to acquire shares of the issuing public corporation which exceed or meet any level or range of ownership or voting powers specified in such law, and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent necessary to resolve such inconsistency.

(2) If any jurisdiction other than the jurisdiction under the laws of which the issuing public corporation is organized has adopted or adopts any law comparable to the provisions of this chapter which imposes limitations on the voting rights of any person in the event that the person acquires or proposes to acquire shares of the issuing public corporation which exceed or meet any level or range of ownership specified in such law and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent that (i) a greater percentage of shareholders of the issuing public corporation reside in that jurisdiction than in this state, computed in accordance with provisions of section 30-1601(12), Idaho Code, and then, only to the extent necessary to resolve such inconsistency or (ii) the director of the department of finance determines within three (3) business days from the date on which this chapter's provisions are first applicable to a particular control share acquisition that the other jurisdiction's law adequately provides for the protection of Idaho shareholders.

History.

I.C., § 30-1611, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

§ 30-1612. Severability. — The provisions of this chapter are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act that can be given effect without the invalid provision or application. The invalidity of any provision of this act shall not affect the remaining provisions of this act.

History.

I.C., § 30-1612, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1988, Chapter 84, which is compiled as §§ 30-1601 to 30-1614 and 30-1701 to 30-1710.

§ 30-1613. Election. — Any publicly held corporation which meets the requirements specified in section 30-1601(12)(b)(i), (ii) and (iii), Idaho Code, may, by action of its board of directors, adopt an amendment to its bylaws electing to be subject to this chapter, provided such corporation has one thousand (1,000) or more shareholders of record in this state, and thereby shall be subject to the provisions of this chapter as an issuing public corporation.

History.

I.C., § 30-1613, as added by 1988, ch. 84, § 2, p. 147.

§ 30-1614. Short title. — This chapter shall be known and may be cited as the "Control Share Acquisition Law."

History.

I.C., § 30-1614, as added by 1988, ch. 84, § 2, p. 147.

STATUTORY NOTES

Effective Dates.

Section 4 of S.L. 1988, ch. 84 declared an emergency. Approved March 22, 1988.

Chapter 17
BUSINESS COMBINATION ACT

Sec.

§ 30-1701. Definitions. — In this chapter the following terms have the meaning specified:

(1) "Affiliate" means a person that directly or indirectly controls, is controlled by or is under common control with a specified person.

(2) "Announcement date," when used in reference to any business combination, means the date of the first public announcement of a definitive proposal for the business combination.

(3) "Associate," when used to indicate a relationship with any person, means:

(a) Any corporation or organization of which the person is an officer, director or partner or is, directly or indirectly, the beneficial owner of ten per cent (10%) or more of any class or series of shares entitled to vote or other equity interests;

(b) Any trust or estate in which the person has a ten per cent (10%) or more beneficial interest or as to which the person serves as trustee or personal representative or in a similar fiduciary capacity; or

(c) Any relative or spouse of the person, or any relative of the spouse, residing in the home of the person.

(4) "Beneficial owner," when used with respect to shares or other securities, includes any person who, directly or indirectly, through any agreement, arrangement, relationship, understanding or otherwise, whether or not in writing, has or shares the power to vote, or direct the voting of, the shares or securities or has or shares the power to dispose of, or direct the disposition of, the shares or securities, except that:

(a) A person is not deemed the beneficial owner of shares or securities tendered pursuant to a tender or exchange offer made by the person or any of the person's affiliates or associates until the tendered shares or securities are accepted for purchase or exchange or payment, or purchased or exchanged; and

(b) A person is not deemed the beneficial owner of shares or securities with respect to which the person has the power to vote or direct the

voting arising solely from a revocable proxy given in response to a proxy solicitation made in accordance with the applicable rules and regulations under the Securities Exchange Act of 1934, as amended, and is not then reportable under that act on a schedule 13D or comparable report under that act.

(5) "Beneficial ownership" includes the right to acquire shares or securities through the exercise of options, warrants or rights, the conversion of convertible securities or otherwise, regardless of whether exercisable only after the passage of time (whether or not less than sixty (60) days) or the occurrence or nonoccurrence of a future event. The shares or securities subject to the options, warrants, rights or conversion privileges held by a person are deemed to be outstanding for the purpose of computing the percentage of outstanding shares or securities of the class or series owned by the person but are not deemed to be outstanding for the purpose of computing the percentage of the class or series owned by any other person. A person is deemed the beneficial owner of shares and securities beneficially owned by an affiliate or associate of the person.

(6) "Business combination," when used in reference to any issuing public corporation and any interested shareholder of the issuing public corporation, means:

(a) Any merger or consolidation of the issuing public corporation or any subsidiary of the issuing public corporation with either:

1. The interested shareholder; or

2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after the merger would be, an affiliate or associates of the interested shareholder, except that the foregoing does not include the merger of a wholly owned subsidiary of the issuing public corporation into the issuing public corporation or the merger of two (2) or more wholly owned subsidiaries of the issuing public corporation; or

(b) Any exchange, pursuant to a plan of exchange under the laws of this state or a comparable statute of any other state or jurisdiction, of shares of the issuing public corporation or any subsidiary of the issuing public corporation for shares of either:

1. The interested shareholder; or

2. Any other domestic or foreign corporation, whether or not itself an interested shareholder of the issuing public corporation, that is, or after the exchange would be, an affiliate or associate of the interested shareholder; or

(c) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in a single transaction or a series of transactions, to or with the interested shareholder or any affiliate or associate of the interested shareholder, whether as part of a dissolution or otherwise, of assets of the issuing public corporation or any subsidiary of the issuing public corporation to which any of the following applies:

1. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the assets, determined on a consolidated basis, of the issuing public corporation;

2. Has an aggregate market value equal to ten per cent (10%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation; or

3. Represents ten per cent (10%) or more of the earning power or net income, determined on a consolidated basis, of the issuing public corporation; or

(d) Any transaction which results in the issuance or transfer by the issuing public corporation or any subsidiary of the issuing public corporation, in a single transaction or a series of transactions, of any shares of the issuing public corporation that have an aggregate market value equal to five per cent (5%) or more of the aggregate market value of all the outstanding shares of the issuing public corporation to the interested shareholder or any affiliate or associate of the interested shareholder, except pursuant to the exercise of warrants or rights to purchase shares offered or distributed or a dividend or distribution paid or made pro rata to all shareholders of the issuing public corporation, and except pursuant to the exercise or conversion of securities exercisable for or convertible into shares of the issuing public corporation or any subsidiary of the issuing public corporation which securities were

outstanding prior to the time that the interested stockholder became such; or

(e) The adoption of any plan or proposal for the liquidation or dissolution of the issuing public corporation, or any reincorporation of the issuing public corporation in another state or jurisdiction, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associate of the interested shareholder; or

(f) Any transaction involving any reclassification of securities, including any share dividend or split, reverse share split or other distribution of shares in respect of shares, recapitalization of the issuing public corporation, merger or consolidation of the issuing public corporation with any subsidiary of the issuing public corporation, exchange of shares of the issuing public corporation with any subsidiary of the issuing public corporation or other transaction, whether or not with or into or otherwise involving the interested shareholder, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with the interested shareholder or any affiliate or associate of the interested shareholder that has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of shares entitled to vote, or securities that are exchangeable for or convertible into or that carry a right to acquire shares entitled to vote, of the issuing public corporation or any subsidiary of the issuing public corporation that is, directly or indirectly, owned by the interested shareholder of [or] any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(g) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the issuing public corporation, of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through the issuing public corporation or any subsidiary of the issuing public corporation.

(7) “Consummation,” with respect to any business combination, means the date of consummation of the business combination or, in the case of a

business combination as to which a shareholder vote is taken, the later of:

(a) The business day before the vote; or

(b) Twenty (20) days before the date of consummation of the business combination.

(8) "Control," "controlling," "controlled by" or "under common control with" means the possession, directly or indirectly, of the power to direct or to cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. A person's beneficial ownership of ten per cent (10%) or more of the voting power of a corporation's outstanding shares entitled to vote in the election of directors creates a presumption that the person has control of the corporation. A person is not considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of avoiding the provisions of this chapter, as an agent, bank, broker, nominee, custodian or trustee for one (1) or more beneficial owners who do not individually or as a group have control of the corporation.

(9) "Day" means a calendar day and shall consist of the time period from 12:01 a.m. through 12:00 midnight, Idaho time.

(10) "Interested shareholder," when used in reference to any issuing public corporation, means any person, other than the issuing public corporation or any subsidiary of the issuing public corporation, that is either:

(a) The beneficial owner, directly or indirectly, of ten per cent (10%) or more of the voting power of the outstanding shares entitled to vote of the issuing public corporation; or

(b) An affiliate or associate of the issuing public corporation.

(11) "Issuing public corporation" means a publicly held corporation which has at least fifty (50) shareholders and which either:

(a) Is incorporated under the laws of this state; or

(b)(i) Has a place of business or its principal executive office located in this state, (ii) owns or controls assets located within this state that have a fair market value of at least one million dollars ($1,000,000), (iii) has more than two hundred fifty (250) employees residing in this state, and

(iv) has either (X) more than ten per cent (10%) of its shareholders resident in this state, or (Y) more than ten per cent (10%) of its shares owned of record by state residents. For purposes of this subsection, the number of employees shall be computed by including all employees of subsidiaries or affiliates of the publicly held corporation. For purposes of this subsection, the record date for determining the percentages and number of shareholders and shares shall be the last shareholder record date before the event requiring that the determination be made, except that if a shareholder record date has not been fixed by the board of directors of the issuing public corporation within the preceding four (4) months, the determination shall be made as of the end of the issuing public corporation's most recent fiscal quarter. The residence of a shareholder is presumed to be the address appearing in the records of the issuing public corporation. Shares held of record by banks (except as trustee or guardian), brokers, or nominees shall be disregarded for purposes of calculating percentages and numbers described in this subsection. Shares of an issuing public corporation allocated to the account of an employee or former employee or beneficiaries of employees or former employees of an issuing public corporation held in a plan that is qualified under section 401(a) of the Internal Revenue Code of 1986, as amended, and is a defined contribution plan within the meaning of section 414(i) of the code, shall be deemed for purposes of this subsection, to be held of record by the employee to whose account such shares are allocated.

(12) "Market value," when used in reference to shares or property of any issuing public corporation or any of its subsidiaries, means:

(a) In the case of shares, the highest closing sale price during the thirty (30) day period immediately preceding the date in question of a share of the composite tape for New York Stock Exchange listed shares or, if the shares are not quoted on the composite tape or not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the Securities Exchange Act of 1934, as amended, on which the shares are listed or, if the shares are not listed on any such exchange, on the National Association of Securities Dealers, Inc. Automated Quotations National Market System or, if the shares are not quoted on the National Association of Securities Dealers, Inc. Automated

Quotations National Market System, the highest closing bid quotation during the thirty (30) day period preceding the date in question of a share on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use or, if no such quotation is available, the fair market value on the date in question of a share as determined in good faith by the board of the issuing public corporation; and

(b) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined in good faith by the board of the issuing public corporation.

(13) "Publicly held corporation" means a corporation that has a class of equity securities registered pursuant to section 12 or is subject to section 15(d) of the Securities Exchange Act of 1934, as amended.

(14) "Share acquisition date," with respect to any person and any issuing public corporation, means the date that the person first becomes an interested shareholder.

History.

I.C., § 30-1701, as added by 1988, ch. 84, § 3, p. 147; am. 1989, ch. 139, § 2, p. 320.

STATUTORY NOTES

Federal References.

Sections 12 and 15(d) of the securities exchange act of 1934, referred to in subsection (13), are codified as 78 U.S.C.S. §§ 78*l* and 78o(d), respectively.

The Securities Exchange Act of 1934, referred to in paragraphs (4)(b) and (12)(a), is compiled as 15 U.S.C.S. § 78a et seq.

Sections 401(a) and 414(i) of the internal revenue code of 1986, referred to in subsection (11)(b), are codified as 26 U.S.C.S. §§ 401(a) and 414(i), respectively.

Compiler's Notes.

For more on schedule 13D of the securities exchange act of 1934, see *http://www.sec.gov/answers/sched13.htm*.

For more on the New York stock exchange, see *https://nyse.com*.

The national association of securities dealers, inc., referred to in paragraph (12)(a), was combined with functions of the New York stock exchange in 2007 to form the financial industry regulatory authority. For more on the financial industry regulatory authority, see *http://www.finra.org/*.

For more information on the National Association of Securities Dealers, Inc. Automated Quotations System, referred to in paragraph (12)(a), see *https://www.nasdaq.com/*.

The bracketed insertion in paragraph (6)(f) was added by the compiler to correct the enacting legislation.

The words in parentheses so appeared in the law as enacted.

§ 30-1702. Duties of director. — In discharging the duties of the position of director of an issuing public corporation, a director, in considering the best interests of the corporation, shall consider the long-term as well as the short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation. In addition, a director may consider the interests of Idaho employees, suppliers, customers and communities in discharging his duties.

History.

I.C., § 30-1702, as added by 1988, ch. 84, § 3, p. 147.

§ 30-1703. Exclusions from chapter. — The provisions of this chapter shall not apply to an interested shareholder if:

(1) The interested shareholder was an interested shareholder on, or became an interested shareholder pursuant to a tender offer commenced prior to, the day following the effective date of this act, and remained such;

(2) The original articles or bylaws of the issuing public corporation contain a provision expressly electing not to be subject to the provisions of this chapter;

(3) The issuing public corporation, by action of its board of directors, adopts an amendment to its bylaws expressly electing not to be subject to the provisions of this chapter; or

(4) The issuing public corporation, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws approved by the shareholders holding sixty-six and two-thirds per cent (66 2/3%) of the outstanding voting power of all shares entitled to vote, excluding the shares of interested shareholders and their affiliates and associates, under which the issuing public corporation by such shareholder action expressly elects not to be subject to this chapter, and such amendment provides that it is not to be effective until eighteen (18) months after the effective date of this chapter.

(5) The provisions of this chapter do not apply to any business combination of an issuing public corporation with an interested shareholder of the issuing public corporation who became an interested shareholder inadvertently, if the interested shareholder both:

(a) As soon as practicable, divests itself of a sufficient amount of the shares entitled to vote of the issuing public corporation so that it no longer is the beneficial owner, directly or indirectly, of ten per cent (10%) or more of the outstanding shares entitled to vote of the issuing public corporation; and

(b) Would not at any time within the three (3) year period preceding the announcement date with respect to the business combination have been an interested shareholder except for the inadvertent acquisition.

(6) This chapter does not apply to insurance companies regulated under title 41, Idaho Code.

History.

I.C., § 30-1703, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this chapter" in subsections (1) and (4) refers to the effective date of S.L. 1988, Chapter 84, which was effective March 22, 1988.

§ 30-1704. Business combination with interested shareholder — Approval by directors. — (1) Except as provided in section 30-1703, Idaho Code, and notwithstanding any other provisions to the contrary in this title, an issuing public corporation may not engage in any business combination or vote, consent or otherwise act to authorize a subsidiary of the issuing public corporation to engage in any business combination with respect to, proposed by or on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with, any interested shareholder of the issuing public corporation or any affiliate or associate of the interested shareholder for a period of three (3) years after the interested shareholder's share acquisition date, unless the business combination or the acquisition of shares made by the interested shareholder on the interested shareholder's share acquisition date is approved by a committee of the board of the issuing public corporation before the interested shareholder's share acquisition date. The committee shall be formed in accordance with subsection (4) of this section.

(2) If a good faith definitive proposal regarding a business combination is made in writing to the board of the issuing public corporation, a committee of the board formed in accordance with subsection (4) of this section shall consider and take action on the proposal and respond in writing within forty-five (45) days after receipt of the proposal by the issuing public corporation, setting forth its decision regarding the proposal.

(3) If a good faith definitive proposal to acquire shares is made in writing to the board of the issuing public corporation, a committee of the board, formed in accordance with subsection (4) of this section, shall consider and take action on the proposal. Unless the committee responds affirmatively in writing within forty-five (45) days after receipt of the proposal by the issuing public corporation, the committee shall be considered to have disapproved the shares acquisition.

(4) When a business combination or acquisition of shares is proposed pursuant to this section, the board shall promptly form a committee, which may be a committee of the entire board of directors, a majority of which shall be disinterested directors. The committee shall take action on the

proposal by the affirmative vote of a simple majority of the committee members. Notwithstanding the provisions of section 30-1703, Idaho Code, the committee is not subject to any direction or control by the board with respect to the committee's consideration of or any action concerning a business combination or acquisition of shares pursuant to this section. For purposes of this subsection, a director or person is disinterested if the director or person (a) is not a present or former officer or employee of the issuing public corporation or a majority owned subsidiary of the issuing public corporation, or (b) is not an officer, director, employee, affiliate or associate of an interested shareholder.

History.

I.C., § 30-1704, as added by 1988, ch. 84, § 3, p. 147.

§ 30-1705. Requirements. — Except as provided in sections 30-1703 and 30-1704, Idaho Code, and notwithstanding any other provisions to the contrary in this title, an issuing public corporation may not engage at any time in any business combination or vote, consent or otherwise act to authorize a subsidiary of the issuing public corporation to engage in any business combination with respect to, proposed by or on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with an interested shareholder of the issuing public corporation or any affiliate or associate of the interested shareholder other than a business combination meeting all the requirements of this chapter, the articles of the issuing public corporation and the requirements specified in any of the following:

(1) A business combination approved by the board of the issuing public corporation before the interested shareholder's share acquisition date, or as to which the acquisition of shares made by the interested shareholder on the interested shareholder's share acquisition date had been approved by the board of the issuing public corporation before the interested shareholder's share acquisition date.

(2) A business combination approved by the affirmative vote of the holders of sixty-six and two-thirds percent (66 2/3%) of the outstanding shares entitled to vote not beneficially owned by the interested shareholder proposing the business combination or any affiliate or associate of the interested shareholder proposing the business combination at a meeting called for that purpose no earlier than three (3) years after the interested shareholder's share acquisition date.

(3) A business combination, with respect to which the consummation date is no earlier than three (3) years after the interested shareholder's share acquisition date, that meets all the following conditions:

(a) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of the issuing public corporation in the business combination is at least equal to the higher of the following:

1. The highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner, directly or indirectly, of five percent (5%) or more of the outstanding shares entitled to vote of the issuing public corporation, for any common shares of the same class or series acquired by it within the three (3) year period immediately before the announcement date with respect to the business combination or within the three (3) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher, plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of cash dividends paid, and the market value of any dividends paid other than in cash, per common share since the earliest date, up to the amount of the interest; and

2. The market value per common share on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher, plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per common share since that date, up to the amount of the interest.

(b) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of the issuing public corporation in the business combination is at least equal to the highest of the following, whether or not the interested shareholder has previously acquired any shares of the class or series:

1. The highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers' fees, paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner, directly or indirectly, of five percent (5%) or more of

the outstanding shares entitled to vote of the issuing public corporation, for any shares of the class or series acquired by it within the three (3) year period immediately before the announcement date with respect to the business combination or within the three (3) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher, plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of the class or series since such earliest date, up to the amount of the interest;

2. The highest preferential amount per share to which the holders of shares of the class or series are entitled in the event of any voluntary liquidation, dissolution or winding up of the issuing public corporation, plus the aggregate amount of any unpaid dividends declared or due as to which the holders are entitled before payment of dividends on some other class or series of shares unless the aggregate amount of the dividends is included in the preferential amount; and

3. The market value per share of the class or series on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher, plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States treasury obligations from time to time in effect less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of the class or series since that date, up to the amount of the interest.

(c) The consideration to be received by holders of a particular class or series of outstanding shares, including common shares, of the issuing public corporation in the business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of the class or series of shares previously acquired by it and the consideration is distributed promptly.

(d) The holders of all outstanding shares of the issuing public corporation not beneficially owned by the interested shareholder immediately before the consummation date with respect to the business combination are entitled to receive in the business combination cash or other consideration for the shares in compliance with paragraphs (a), (b) and (c) of this subsection.

(e) After the interested shareholder's share acquisition date and before the consummation date with respect to the business combination, the interested shareholder has not become the beneficial owner of any additional shares entitled to vote of the issuing public corporation except:

1. As part of the transaction that resulted in the interested shareholder becoming an interested shareholder;

2. By virtue of proportionate share splits, share dividends or other distributions of shares in respect of shares not constituting a business combination;

3. Through a business combination meeting all of the conditions of section 30-1704, Idaho Code, and this subsection; and

4. Through purchase by the interested shareholder at any price that, if the price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of the purchase, would have satisfied the requirements of paragraphs (a), (b) and (c) of this subsection.

History.

I.C., § 30-1705, as added by 1988, ch. 84, § 3, p. 147; am. 2014, ch. 97, § 18, p. 265.

STATUTORY NOTES

Amendments.

The 2014 amendment, by ch. 97, corrected typographical errors and made minor stylistic changes throughout the section.

Compiler's Notes.

The words enclosed in parentheses so appeared in the law as enacted.

§ 30-1706. Scope. — (1) Nothing contained in this chapter is intended or shall be construed in any way to limit, modify or restrict an issuing public corporation's authority to take any action which the directors may appropriately determine to be in furtherance of the protection of the interests of the corporation and its shareholders, including without limitation the authority to adopt or enter into plans, arrangements or instruments that deny rights, privileges, power or authority to the holder or holders of at least a specified number of shares or percentage of share ownership or voting power in certain circumstances.

(2) The requirements imposed by this chapter are to be in addition to, and not in lieu of, requirements imposed on a transaction by any provision in the articles or the bylaws of the issuing public corporation, or otherwise.

History.

I.C., § 30-1706, as added by 1988, ch. 84, § 3, p. 147.

§ 30-1707. Jurisdiction. — (1) If the jurisdiction under the laws of which the issuing public corporation is organized has adopted or adopts any law comparable to this chapter which imposes special requirements applicable to any business combination, and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent necessary to resolve such inconsistency.

(2) If any jurisdiction other than the jurisdiction under the laws of which the issuing public corporation is organized has adopted or adopts any law comparable to the provisions of this chapter which imposes special requirements applicable to any business combination, and that law contains provisions which are expressly inconsistent with, or cannot practically be applied in a manner consistent with, the provisions of this chapter as applicable to the issuing public corporation, the provisions of this chapter shall be inapplicable to the issuing public corporation to the extent that (i) a greater percentage of shareholders of the issuing public corporation reside in that jurisdiction than in this state, computed in accordance with provisions of subsection 30-1701(14) and then, only to the extent necessary to resolve such inconsistency or (ii) the director of the department of finance determines within three (3) business days from the date on which this chapter's provisions are first applicable to a business combination that the other jurisdiction's law adequately provides for the protection of Idaho shareholders.

History.

I.C., § 30-1707, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Cross References.

Director of department of finance, § 67-2701.

§ 30-1708. Severability. — The provisions of this chapter are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act that can give effect without the invalid provision or application. The invalidity of any provision of this act shall not affect the remaining provisions of this act.

History.

I.C., § 30-1708, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 1988, Chapter 84, which is compiled as §§ 30-1601 to 30-1614 and 30-1701 to 30-1710.

§ 30-1709. Election. — Any publicly held corporation which meets the requirements specified in section 30-1701(11)(b)(i), (ii) and (iii), Idaho Code, may, by action of its board of directors, adopt an amendment to its bylaws electing to be subject to this chapter, provided such corporation has one thousand (1,000) or more shareholders of record in this state, and thereby shall be subject to the provisions of this chapter as an issuing public corporation.

History.

I.C., § 30-1709, as added by 1988, ch. 84, § 3, p. 147.

§ 30-1710. Short title. — This chapter shall be known and may be cited as the "Business Combination Law."

History.

I.C., § 30-1710, as added by 1988, ch. 84, § 3, p. 147.

STATUTORY NOTES

Effective Dates.

Section 4 of S.L. 1988, ch. 84 declared an emergency. Approved March 22, 1988.

Chapter 18
IDAHO ENTITY TRANSACTIONS ACT

Part 1. General Provisions

Sec.

30-18-101 — 30-18-110. [Repealed.]

Part 2. Merger

30-18-201 — 30-18-206. [Repealed.]

Part 3. Interest Exchange

30-18-301 — 30-18-306. [Repealed.]

Part 4. Conversion

30-18-401 — 30-18-406. [Repealed.]

Part 5. Domestication

30-18-501 — 30-18-506. [Repealed.]

Part 6. (Reserved)

Part 7. Miscellaneous Provisions

30-18-701 — 30-18-713. [Repealed.]

Part 1
General Provisions

Idaho Code § 30-18-101—30-18-110

§ 30-18-101 — 30-18-110. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015. For present comparable provisions, see § 30-22-101 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 18, Part 1, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015.

30-18-101. Short title. [I.C., § 30-18-101, as added by 2007, ch. 116, § 1, p. 333.]

30-18-102. Definitions. [I.C., § 30-18-102, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 2, p. 73.]

30-18-103. Relationship of chapter to other laws. [I.C., § 30-18-103, as added by 2007, ch. 116, § 1, p. 333.]

30-18-104. Required notice or approval. [I.C., § 30-18-104, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 3, p. 76.]

30-18-105. Status of filings. [I.C., § 30-18-105, as added by 2007, ch. 116, § 1, p. 333.]

30-18-106. Nonexclusivity. [I.C., § 30-18-106, as added by 2007, ch. 116, § 1, p. 333.]

30-18-107. Reference to external facts. [I.C., § 30-18-107, as added by 2007, ch. 116, § 1, p. 333.]

30-18-108. Alternative means of approval of transactions. [I.C., § 30-18-108, as added by 2007, ch. 116, § 1, p. 333.]

30-18-109. Appraisal rights. [I.C., § 30-18-109, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 4, p. 76.]@t 30-18-110. Excluded entities and transactions. [I.C., § 30-18-110, as added by 2007, ch. 116, § 1, p. 333.]

Part 2
Merger

§ 30-18-201 — 30-18-206. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015. For present comparable provisions, see § 30-22-201 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 18, Part 2, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015.

30-18-201. Merger authorized. [I.C., § 30-18-201, as added by 2007, ch. 116, § 1, p. 333.]

30-18-202. Plan of merger. [I.C., § 30-18-202, as added by 2007, ch. 116, § 1, p. 333.]

30-18-203. Approval of plan of merger. [I.C., § 30-18-203, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 5, p. 76.]

30-18-204. Amendment or abandonment of plan of merger — Statement of abandonment. [I.C., § 30-18-204, as added by 2007, ch. 116, § 1, p. 333.]

30-18-205. Statement of merger — Effective date. [I.C., § 30-18-205, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 6, p. 77.]

30-18-206. Effect of merger. [I.C., § 30-18-206, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 7, p. 78.]

Part 3
Interest Exchange

§ 30-18-301 — 30-18-306. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015. For present comparable provisions, see § 30-22-301 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 18, Part 3, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015.

30-18-301. Interest exchange authorized. [I.C., § 30-18-301, as added by 2007, ch. 116, § 1, p. 333.]

30-18-302. Plan of interest exchange. [I.C., § 30-18-302, as added by 2007, ch. 116, § 1, p. 333.]

30-18-303. Approval of plan of interest exchange. [I.C., § 30-18-303, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 8, p. 80.]

30-18-304. Amendment or abandonment of plan of interest exchange — Statement of abandonment. [I.C., § 30-18-304, as added by 2007, ch. 116, § 1, p. 333.]

30-18-305. Statement of interest exchange — Effective date. [I.C., § 30-18-305, as added by 2007, ch. 116, § 1, p. 333.]

30-18-306. Effect of interest exchange. [I.C., § 30-18-306, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 9, p. 81.]

Part 4
Conversion

§ 30-18-401 — 30-18-406. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015. For present comparable provisions, see § 30-22-401 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 18, Part 4, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015.

30-18-401. Conversion authorized. [I.C., § 30-18-401, as added by 2007, ch. 116, § 1, p. 333.]

30-18-402. Plan of conversion. [I.C., § 30-18-402, as added by 2007, ch. 116, § 1, p. 333.]

30-18-403. Approval of plan of conversion. [I.C., § 30-18-403, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 10, p. 82.]

30-18-404. Amendment or abandonment of plan of conversion — Statement of abandonment. [I.C., § 30-18-404, as added by 2007, ch. 116, § 1, p. 333.]

30-18-405. Statement of conversion — Effective date. [I.C., § 30-18-405, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 11, p. 83.]

30-18-406. Effect of conversion. [I.C., § 30-18-406, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 12, p. 83.]

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Part 5
Domestication

§ 30-18-501 — 30-18-506. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015. For present comparable provisions, see § 30-22-501 et seq.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 18, Part 5, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015.

30-18-501. Domestication authorized. [I.C., § 30-18-501, as added by 2007, ch. 116, § 1, p. 333.]

30-18-502. Plan of domestication. [I.C., § 30-18-502, as added by 2007, ch. 116, § 1, p. 333.]

30-18-503. Approval of plan of domestication. [I.C., § 30-18-503, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 13, p. 85.]

30-18-504. Amendment or abandonment of plan of domestication — Statement of abandonment. [I.C., § 30-18-504, as added by 2007, ch. 116, § 1, p. 333.]

30-18-505. Statement of domestication — Effective date. [I.C., § 30-18-505, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 14, p. 86.]

30-18-506. Effect of domestication. [I.C., § 30-18-506, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 15, p. 87.]

Part 6
(Reserved)

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Part 7
Miscellaneous Provisions

§ 30-18-701 — 30-18-713. [Repealed.]

Repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015.

STATUTORY NOTES

Compiler's Notes.

Title 30, Chapter 18, Part 7, which comprised the following sections, was repealed by S.L. 2015, ch. 243, § 3, effective July 1, 2015.

30-18-701. Consistency of application. [I.C., § 30-18-701, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-703.

30-18-702. Relation to electronic signatures in global and national commerce act. [I.C., § 30-18-702, as added by 2007, ch. 116, § 1, p. 333; am. 2008, ch. 36, § 16, p. 88.] For present comparable provisions, see § 30-21-704.

30-18-703. Requirements for filing of documents. [I.C., § 30-18-703, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-201.

30-18-704. Forms. [I.C., § 30-18-704, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-202.

30-18-705. Filing, service and copying fees. [I.C., § 30-18-705, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-214.

30-18-706. Effective time and date of document. [I.C., § 30-18-706, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-203.

30-18-707. Correcting filed document. [I.C., § 30-18-707, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-205.

30-18-708. Filing duty of secretary of state. [I.C., § 30-18-707, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-206.

30-18-709. Appeal from refusal to file a document. [I.C., § 30-18-709, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-206.

30-18-710. Evidentiary effect of copy of filed document. [I.C., § 30-18-710, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-207.

30-18-711. Penalty for signing false document. [I.C., § 30-18-711, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-211.

30-18-712. Powers of secretary of state. [I.C., § 30-18-712, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-206.

30-18-713. Savings clause. [I.C., § 30-18-713, as added by 2007, ch. 116, § 1, p. 333.] For present comparable provisions, see § 30-21-705.

Chapter 19
SUCCESSOR CORPORATION ASBESTOS-RELATED LIABILITY FAIRNESS ACT

Sec.

§ 30-1901. Short title. — This act shall be known and may be cited as the "Successor Corporation Asbestos-Related Liability Fairness Act."

History.

I.C., § 30-1901, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, Chapter 193, which is codified as §§ 30-1901 to 30-1907.

S.L. 2012, Chapter 193 became law without the signature of the governor.

§ 30-1902. Definitions. — As used in this section, the following terms shall mean:

(1) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution or other relief arising out of, based on, or in any way related to asbestos, including: (a) The health effects of exposure to asbestos, including a claim for: (i) Personal injury or death;

(ii) Mental or emotional injury;

(iii) Risk of disease or other injury; or (iv) The costs of medical monitoring or surveillance; (b) Any claim made by, or on behalf of, any person exposed to asbestos, or a representative, spouse, parent, child or other relative of the person; and (c) Any claim for damage or loss caused by the installation, presence, or removal of asbestos.

(2) "Corporation" means a corporation for profit, including a domestic corporation organized under the laws of this state or a foreign corporation organized under laws other than the laws of this state.

(3) "Successor" means a corporation that assumes or incurs or has assumed or incurred successor asbestos-related liabilities that is a successor and became a successor before January 1, 1972, or is any of that successor corporation's successors.

(4) "Successor asbestos-related liabilities" means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, that are related in any way to asbestos claims and were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation with or into another corporation, or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined pursuant to section 30-1905, Idaho Code, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged, by or on behalf of the corporation, or by a successor

of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction.

(5) "Transferor" means a corporation from which the successor asbestos-related liabilities are or were assumed or incurred.

History.

I.C., § 30-1902, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

S.L. 2012, Chapter 193 became law without the signature of the governor.

§ 30-1903. Applicability. — (1) The limitations in section 30-1904, Idaho Code, shall apply to any successor corporation.

(2) The limitations of section 30-1904, Idaho Code, shall not apply to:

(a) Worker's compensation benefits paid by, or on behalf of, an employer to an employee under the provisions of title 72, Idaho Code, or a comparable worker's compensation law of another jurisdiction;

(b) Any claim against a corporation that does not constitute a successor asbestos-related liability;

(c) Any obligation under the national labor relations act, 29 U.S.C. section 151 et seq., as amended, or under any collective bargaining agreement; or

(d) A successor that, after a merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products that were the same as those products previously manufactured, distributed, removed, or installed by the transferor.

History.

I.C., § 30-1903, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

S.L. 2012, Chapter 193 became law without the signature of the governor.

§ 30-1904. Limitations on successor asbestos-related liabilities. — (1) Except as further limited in subsection (2) of this section, the cumulative successor asbestos-related liabilities of a successor corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The successor corporation does not have responsibility for successor asbestos-related liabilities in excess of this limitation.

(2) If the transferor has assumed or incurred successor asbestos-related liabilities in connection with a prior merger or consolidation with a prior transferor, then the fair market value of the total assets of the prior transferor determined as of the time of the earlier merger or consolidation shall be substituted for the limitation set forth in subsection (1) of this section for purposes of determining the limitation of liability of a successor corporation.

History.

I.C., § 30-1904, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

S.L. 2012, Chapter 193 became law without the signature of the governor.

§ 30-1905. Establishing fair market value of total gross assets. — (1) A successor corporation may establish the fair market value of total gross assets for the purpose of the limitations under section 30-1904, Idaho Code, through any method reasonable under the circumstances, including:

(a) By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arms-length transaction; or (b) In the absence of other readily available information from which the fair market value can be determined, by reference to the value of the assets recorded on a balance sheet.

(2) Total gross assets include intangible assets.

(3) To the extent total gross assets include any liability insurance that was issued to the transferor whose assets are being valued for purposes of this section, the applicability, terms, conditions and limits of such insurance shall not be affected by this statute, nor shall this statute otherwise affect the rights and obligations of an insurer, transferor or successor under any insurance contract and/or any related agreements, including, without limitation, preenactment settlements resolving coverage-related disputes, and the rights of an insurer to seek payment for applicable deductibles, retrospective premiums or self-insured retentions or to seek contribution from a successor for uninsured or self-insured periods or periods where insurance is uncollectible or otherwise unavailable. Without limiting the foregoing, to the extent total gross assets include any such liability insurance, a settlement of a dispute concerning any such liability insurance coverage entered into by a transferor or successor with the insurers of the transferor before the effective date of this act shall be determinative of the total coverage of such liability insurance to be included in the calculation of the transferor's total gross assets.

History.

I.C., § 30-1905, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

The phrase “the effective date of this act” near the end of subsection (3) refers to the effective date of S.L. 2012, Chapter 193, which was effective July 1, 2012.

S.L. 2012, Chapter 193 became law without the signature of the governor.

§ 30-1906. Adjustment. — (1) Except as provided in subsections (2) through (4) of this section, the fair market value of total gross assets at the time of the merger or consolidation shall increase annually at a rate equal to the sum of:

(a) The prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the merger or consolidation, unless the prime rate is not published in that edition of the Wall Street Journal, in which case any reasonable determination of the prime rate on the first day of the year may be used; and (b) One percent (1%).

(2) The rate enumerated in subsection (1) of this section shall not be compounded.

(3) The adjustment of the fair market value of total gross assets shall continue as provided in subsection (1) of this section until the date the adjusted value is first exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by, or on behalf of, the successor corporation or a predecessor or by, or on behalf of, a transferor after the time of the merger or consolidation for which the fair market value of total gross assets is determined.

(4) No adjustment of the fair market value of total gross assets shall be applied to any liability insurance that may be included in the definition of total gross assets by subsection (3) of section 30-1905, Idaho Code.

History.

I.C., § 30-1906, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

S.L. 2012, Chapter 193 became law without the signature of the governor.

§ 30-1907. Scope of chapter — Application. — (1) The courts of this state shall construe the provisions of this act liberally with regard to successors.

(2) This act shall apply to all asbestos claims filed against a successor on or after the effective date of this act and to any pending asbestos claims against a successor in which trial has not commenced as of the effective date of this act, except that any provisions of these sections which would be unconstitutional if applied retroactively shall be applied prospectively.

History.

I.C., § 30-1907, as added by 2012, ch. 193, § 1, p. 520.

STATUTORY NOTES

Compiler's Notes.

The term "this act" refers to S.L. 2012, Chapter 193, which is codified as §§ 30-1901 to 30-1907.

The phrase "the effective date of this act" in subsection (2) refers to the effective date of S.L. 2012, Chapter 193, which was effective July 1, 2012.

S.L. 2012, Chapter 193 became law without the signature of the governor.

Chapter 20
IDAHO BENEFIT CORPORATION ACT

Sec.

§ 30-2001. Application and effect of this chapter. — (1) This chapter may be known and cited as the "Idaho Benefit Corporation Act."

(2) This chapter shall be applicable to all benefit corporations.

(3) The existence of a provision of this chapter shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation. This chapter shall not affect a statute or rule of law that is applicable to a business corporation that is not a benefit corporation.

(4) Except as otherwise provided in this chapter, the Idaho business corporation act shall be generally applicable to all benefit corporations. A benefit corporation may be subject simultaneously to this chapter and other chapters of this title. The provisions of this chapter shall control over other provisions of this title, including chapters 1 and 13 of this title.

(5) A provision of the articles of incorporation or bylaws of a benefit corporation may not limit, be inconsistent with or supersede a provision of this chapter.

History.

I.C., § 30-2001, as added by 2015, ch. 217, § 1, p. 673.

STATUTORY NOTES

Cross References.

Idaho business corporation act, § 30-29-101 et seq.

Compiler's Notes.

Chapters 1 and 13 of title 30, referred to at the end of subsection (4) were repealed by S.L. 2015, ch. 243, § 1, and S.L. 2015, ch. 251, § 2, effective July 1, 2015. For present comparable provisions, see § 30-21-101 et seq. and 30-29-101 et seq.

§ 30-2002. Definitions. — In this chapter:

(1) "Benefit corporation" means a business corporation that has elected to become subject to this chapter and the status of which as a benefit corporation has not been terminated.

(2) "Benefit director" means the director designated as the benefit director of a benefit corporation under section 30-2008, Idaho Code.

(3) "Benefit enforcement proceeding" means any claim, action or proceeding for failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose as set forth in its articles, or violation of any obligation, duty or standard of conduct under this chapter.

(4) "Benefit officer" means the individual designated as the benefit officer of a benefit corporation under section 30-2010, Idaho Code.

(5) "General public benefit" means a material positive impact on society and the environment, taken as a whole, as assessed under a third-party standard, resulting from the business and operations of a benefit corporation.

(6) "Independent" means having no material relationship with a benefit corporation or a subsidiary of the benefit corporation; provided however, that serving as a benefit director or benefit officer does not by itself preclude a person from being independent. A material relationship between an individual and a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if any of the following apply:

(a) The individual is or has been within the last three (3) years an employee other than a benefit officer of the benefit corporation or a subsidiary.

(b) An immediate family member of the individual is or has been within the last three (3) years an executive officer other than a benefit officer of the benefit corporation or a subsidiary.

(c) There is beneficial or record ownership of five percent (5%) or more of the outstanding shares of the benefit corporation, calculated as if all

outstanding rights to acquire equity interests in the benefit corporation had been exercised, by:

(i) The individual; or

(ii) An entity:

1. Of which the individual is a director, an officer or a manager; or

2. In which the individual owns beneficially or of record five percent (5%) or more of the outstanding equity interests, calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.

(7) “Minimum status vote” means:

(a) In the case of a business corporation, in addition to any other required approval or vote, the satisfaction of the following conditions:

(i) The shareholders of every class or series shall be entitled to vote as a separate voting group on the corporate action regardless of a limitation stated in the articles of incorporation or bylaws on the voting rights of any class or series.

(ii) The corporate action must be approved by vote of the shareholders of each class or series entitled to cast at least two-thirds (2/3) of the votes that all shareholders of the class or series are entitled to cast on the action.

(b) In the case of a domestic entity other than a business corporation, in addition to any other required approval, vote or consent, the satisfaction of the following conditions:

(i) The holders of every class or series of equity interest in the entity that are entitled to receive a distribution of any kind from the entity shall be entitled to vote on or consent to the action regardless of any otherwise applicable limitation on the voting or consent rights of any class or series.

(ii) The action must be approved by vote or consent of the holders entitled to cast at least two-thirds (2/3) of the votes or consents that all of those holders are entitled to cast on the action.

(8) “Publicly traded corporation” means a business corporation that has shares listed on a national securities exchange or traded in a market maintained by one (1) or more members of a national securities association.

(9) “Specific public benefit” includes:

(a) Providing low-income or underserved individuals or communities with beneficial products or services;

(b) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

(c) Protecting or restoring the environment;

(d) Improving human health;

(e) Promoting the arts, sciences or advancement of knowledge;

(f) Increasing the flow of capital to entities with a purpose to benefit society or the environment; or

(g) Conferring any other particular benefit on society or the environment.

(10) “Subsidiary” means, in relation to a person, an entity in which the person owns beneficially or of record fifty percent (50%) or more of the outstanding equity interests, calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.

(11) “Third-party standard” means a recognized standard for defining, reporting and assessing corporate social and environmental performance that is:

(a) Comprehensive in that it assesses the effect of the business and its operations on the interests listed in section 30-2007(1), Idaho Code;

(b) Developed by an entity that is not controlled by the benefit corporation;

(c) Credible in that it is developed by an entity that both has access to necessary expertise to assess overall corporate social and environmental performance, and uses a balanced multi-stakeholder approach to develop the standard, including a reasonable public comment period; and

(d) Transparent in that information about the standard is publicly available, including information about:

(i) The criteria and weighting of such criteria used in the standard;

(ii) The identity of those who developed or revised the standard; and

(iii) An accounting of the revenue and sources of financial support for the entity that developed the standard, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest.

History.

I.C., § 30-2002, as added by 2015, ch. 217, § 1, p. 673.

§ 30-2003. Incorporation. — A benefit corporation shall be incorporated in accordance with part 2, chapter 29, title 30, Idaho Code, but its articles of incorporation must also state that it is a benefit corporation.

History.

I.C., § 30-2003, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 47, § 6, p. 98.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, updated the statutory reference.

§ 30-2004. Election of benefit corporation status. — (1) An existing business corporation may become a benefit corporation under this chapter by amending its articles of incorporation so that they contain a statement that the corporation is a benefit corporation. In order to be effective, the amendment must be adopted by at least the minimum status vote.

(2)(a) Except as provided in paragraph (b) of this subsection, if a domestic entity that is not a benefit corporation is a party to a merger or conversion or the exchanging entity in an interest exchange and the surviving or converted entity in the merger, conversion or interest exchange is to be a benefit corporation, the plan of merger, conversion or interest exchange must be approved by the domestic entity by at least the minimum status vote.

(b) Paragraph (a) of this subsection does not apply in the case of a corporation that is a party to a merger if the shareholders of the corporation are not entitled to vote on the merger pursuant to section 30-29-1105, Idaho Code.

History.

I.C., § 30-2004, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 47, § 7, p. 98.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, updated the statutory reference in paragraph (2)(b).

§ 30-2005. Termination of status. — (1) A benefit corporation may terminate its status as such and cease to be subject to this chapter by amending its articles of incorporation to delete the provision adopting benefit corporation status. In order to be effective, the amendment must be adopted by at least the minimum status vote.

(2)(a) Except as provided in paragraph (b) of this subsection, if a plan of merger, conversion or share exchange would have the effect of terminating the status of a business corporation as a benefit corporation, the plan must be adopted by at least the minimum status vote in order to be effective.

(b) Paragraph (a) of this subsection does not apply in the case of a corporation that is a party to a merger if the shareholders of the corporation are not entitled to vote on the merger pursuant to section 30-29-1105, Idaho Code.

(3) Any sale, lease, exchange or other disposition of all or substantially all of the assets of a benefit corporation, unless the transaction is in the usual and regular course of business, shall not be effective unless the transaction is approved by at least the minimum status vote.

History.

I.C., § 30-2005, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 47, § 8, p. 98.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, updated the statutory reference in paragraph (2)(b).

§ 30-2006. Corporate purposes. — (1) A benefit corporation shall have a purpose of creating general public benefit. This purpose is in addition to its purpose under section 30-29-301, Idaho Code.

(2) The articles of incorporation of a benefit corporation may identify one (1) or more specific public benefits that it is the purpose of the benefit corporation to create in addition to its purposes under section 30-29-301, Idaho Code, and subsection (1) of this section. The identification of a specific public benefit under this subsection does not limit the purpose of a benefit corporation to create general public benefit under subsection (1) of this subsection.

(3) The creation of general public benefit and specific public benefits under subsections (1) and (2) of this section is in the best interests of the benefit corporation.

(4) A benefit corporation may amend its articles of incorporation to add, amend or delete the identification of a specific public benefit that it is the purpose of the benefit corporation to create. In order to be effective, the amendment must be adopted by at least the minimum status vote.

(5) A professional corporation that is a benefit corporation does not violate section 30-29-1303(b), Idaho Code, by having the purpose to create general public benefit or a specific public benefit.

History.

I.C., § 30-2006, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 47, § 9, p. 98; am. 2019, ch. 90, § 172, p. 220.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, updated the statutory references in subsections (1), (2), and (5).

The 2019 amendment, by ch. 90, substituted “section 30-29-1303(b), Idaho Code” for “section 30-29-1303(2), Idaho Code” near the middle of

subsection (5).

§ 30-2007. Standard of conduct for directors. — (1) In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board and individual directors of a benefit corporation shall consider the effects of any action or inaction on:

(a) The shareholders of the benefit corporation;

(b) The employees of the benefit corporation;

(c) The subsidiaries and suppliers of the benefit corporation;

(d) The interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;

(e) Community and social factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;

(f) The local and global environment;

(g) The short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and

(h) The ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.

(2) In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board and individual directors of a benefit corporation may also consider any other pertinent factors or the interests of any group that they deem appropriate.

(3) The board of directors, committees of the board and individual directors of a benefit corporation need not give priority to a particular interest or factor referred to in subsection (1) or (2) of this section over any other interest or factor unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors

related to its accomplishment of its general public benefit or of a specific public benefit purpose identified in its articles of incorporation.

(4) The consideration of interests and factors in the manner required by this section does not constitute a violation of section 30-29-830, Idaho Code.

(5) Except as provided in the articles of incorporation, a director is not personally liable for monetary damages for:

(a) Any action or inaction in the course of performing the duties of a director under subsection (1) of this section if the director performed the duties of office in compliance with section 30-29-830, Idaho Code, and this section; or

(b) Failure of the benefit corporation to pursue or create general public benefit or specific public benefit.

(6) A director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

History.

I.C., § 30-2007, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 47, § 10, p. 98.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, updated the statutory references in subsection (4) and paragraph (5)(a).

§ 30-2008. Benefit director. — (1) The board of directors of a benefit corporation that is a publicly traded corporation shall, and the board of any other benefit corporation may, include a director who shall be designated the benefit director, and shall have, in addition to the powers, duties, rights and immunities of the other directors of the benefit corporation, the powers, duties, rights and immunities provided in this chapter.

(2) The benefit director shall be elected and may be removed in the manner provided in sections 30-29-803 through 30-29-809, Idaho Code. Except as provided in subsection (6) of this section, the benefit director shall be an individual who is independent. The benefit director may serve as the benefit officer at the same time as serving as the benefit director. The articles of incorporation or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection.

(3) The benefit director shall prepare and the benefit corporation shall include in the annual benefit report to shareholders required by section 30-2012, Idaho Code, the opinion of the benefit director on the following:

(a) Whether the benefit corporation acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the report;

(b) Whether the directors and officers complied with sections 30-2007 and 30-2009, Idaho Code, respectively; and

(c) If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed to act or comply in the manner described in paragraphs (a) and (b) of this subsection, a description of the ways in which the benefit corporation or its directors or officers failed to act or comply.

(4) The act or inaction of an individual in the capacity of a benefit director shall constitute for all purposes an act or inaction of that individual in the capacity of a director of the benefit corporation.

(5) Regardless of whether the articles of incorporation or bylaws of a benefit corporation include a provision eliminating or limiting the personal

liability of directors authorized by section 30-29-202, Idaho Code, a benefit director shall not be personally liable for an act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct or a knowing violation of law.

(6) The benefit director of a professional corporation organized under chapter 13, title 30, Idaho Code, does not need to be independent.

History.

I.C., § 30-2008, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 47, § 11, p. 98.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, updated the statutory references in subsections (2) and (5).

Compiler's Notes.

Chapter 13, title 30, Idaho Code, referred to in subsection (6) was repealed by S.L. 2015, chapter 251, effective July 1, 2015.

§ 30-2009. Standard of conduct for officers. — (1) Each officer of a benefit corporation shall consider the interests and factors as provided in section 30-2007, Idaho Code, if the officer has discretion to act with respect to a matter, and it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit identified in the articles of incorporation.

(2) The consideration of interests and factors as provided in subsection (1) of this section shall not constitute a violation of sections 30-29-841 and 30-29-842, Idaho Code.

(3) Except as provided in the articles of incorporation or bylaws, an officer is not personally liable for monetary damages for:

(a) An action or inaction as an officer in the course of performing the duties of an officer under subsection (1) of this section if the officer performed the duties of the position in compliance with sections 30-29-841 and 30-29-842, Idaho Code, and this section; or

(b) Failure of the benefit corporation to pursue or create general public benefit or specific public benefit.

(4) An officer does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

History.

I.C., § 30-2009, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 47, § 12, p. 98.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, updated the statutory references in subsection (2) and paragraph (3)(a).

§ 30-2010. Benefit officer. — A benefit corporation may have an officer designated the benefit officer. The benefit officer shall have:

(1) The powers and duties relating to the purpose of the corporation to create general public benefit or specific public benefit provided by the bylaws or, absent controlling provisions by the bylaws, by resolutions or orders of the board of directors; and

(2) The duty to prepare the benefit report required in section 30-2012, Idaho Code.

History.

I.C., § 30-2010, as added by 2015, ch. 217, § 1, p. 673.

§ 30-2011. Right of action. — (1) Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to the corporation's failure to pursue or create general public benefit or a specific public benefit set forth in its articles of incorporation, or the corporation's violation of an obligation, duty or standard of conduct under this chapter.

(2) A benefit corporation shall not be liable for monetary damages under this chapter for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

(3) A benefit enforcement proceeding may be commenced or maintained directly by the benefit corporation, or derivatively by:

(a) A person or group of persons that owned beneficially or of record at least two percent (2%) of the total number of shares of a class or series outstanding at the time of the act or omission complained of;

(b) A director;

(c) A person or group of persons that owned beneficially or of record five percent (5%) or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of; or

(d) Other persons as specified in the articles of incorporation or bylaws of the benefit corporation.

(4) For purposes of this section, a person is the beneficial owner of shares or equity interests if the shares or equity interests are held in a voting trust or by a nominee on behalf of the beneficial owner.

History.

I.C., § 30-2011, as added by 2015, ch. 217, § 1, p. 673.

§ 30-2012. Preparation of annual benefit report. — (1) A benefit corporation shall prepare an annual benefit report including the following:

(a) A narrative description of:

(i) The ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created;

(ii) The ways in which the benefit corporation pursued a specific public benefit that the articles of incorporation describe as the purpose of the benefit corporation to create, and the extent to which the specific public benefit was created;

(iii) Any circumstances that hindered the creation by the benefit corporation of either general public benefit or specific public benefit; and

(iv) The process and rationale for selecting or changing the third-party standard used to prepare the benefit report.

(b) An assessment of the overall social and environmental performance of the benefit corporation under a third-party standard applied consistently with any application of that standard in prior benefit reports, or accompanied by an explanation of the reasons for any inconsistent application, or the change to that standard from the one used in the immediate prior report.

(c) The name of the benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed.

(d) The compensation paid by the benefit corporation during the year to each director in the capacity of a director.

(e) The opinion of the benefit director described in section 30-2008(3), Idaho Code.

(f) A statement of any connection between the organization that established the third-party standard, or its directors, officers or any holder of five percent (5%) or more of the governance interests in the

organization, and the benefit corporation or its directors, officers or any holder of five percent (5%) or more of the outstanding shares of the benefit corporation, including any financial or governance relationship that might materially affect the credibility of the use of the third-party standard.

(g) If the benefit corporation has dispensed with or restricted the discretion or powers of the board of directors, a description of the persons who exercise the powers, duties, and rights and who have the immunities of the board of directors, and the benefit director.

(2) If, during the year covered by a benefit report, a benefit director resigned from or refused to stand for reelection to the position of benefit director, or was removed from the position of benefit director, and the benefit director furnished the benefit corporation with any written correspondence concerning the circumstances surrounding the resignation, refusal or removal, the benefit report shall include that correspondence as an exhibit.

(3) Neither the benefit report nor the assessment of the performance of the benefit corporation in the benefit report required in subsection (1) of this section needs to be audited or certified by a third party.

History.

I.C., § 30-2012, as added by 2015, ch. 217, § 1, p. 673.

§ 30-2013. Availability of annual benefit report. — (1) A benefit corporation shall send its annual benefit report to each shareholder either one hundred twenty (120) days following the end of the fiscal year of the benefit corporation, or at the same time that the benefit corporation delivers any other annual report to its shareholders, whichever is earlier.

(2) A benefit corporation shall post all of its benefit reports on the public portion of its website, if any; but the compensation paid to directors and financial or proprietary information included in the benefit reports may be omitted from the benefit reports as posted.

(3) If a benefit corporation does not have a website, the benefit corporation shall provide a copy of its most recent benefit report, without charge, to any person who requests a copy, provided however, that the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the copy of the benefit report provided.

History.

I.C., § 30-2013, as added by 2015, ch. 217, § 1, p. 673; am. 2016, ch. 157, § 1, p. 428.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 157, deleted former subsection (4), which read: "Concurrently with the delivery of the benefit report to shareholders under subsection (1) of this section, the benefit corporation shall deliver a copy of the benefit report to the secretary of state for filing, provided however, that the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the benefit report as delivered to the secretary of state. The secretary of state shall charge a fee for filing a benefit report, such fee to be set in a rule promulgated by the secretary".

Chapter 21
IDAHO UNIFORM BUSINESS ORGANIZATIONS CODE

Part 1. Preliminary Provisions

Part 2. Filing

Part 3. Name of Entity

Part 4. Registered Agent of Entity

Part 5. Foreign Entities

Part 6. Administrative Dissolution

Part 7. Miscellaneous Provisions

Part 8. Assumed Business Names

Part 9. Professional Entities

Part 1
Preliminary Provisions

§ 30-21-101. Short titles. — (a) This act may be cited as the "Idaho Uniform Business Organizations Code."

(b) This chapter [part] may be cited as the "Idaho Uniform Business Organizations Code — Preliminary Provisions."

(c) Part 4 of this chapter may be cited as the "Idaho Registered Agent of Entity Act."

(d) Part 8 of this chapter may be cited as the "Idaho Assumed Business Names Act."

History.

I.C., § 30-21-101, as added by 2015, ch. 243, § 7, p. 758.

STATUTORY NOTES

Meaning of "this act". The term "this act" in this section is defined in § 30-21-102(1) as being the Idaho uniform business organizations code. As enacted by S.L. 2015, Chapter 243, chapter 21, title 30, Idaho Code, carries the heading "Idaho Uniform Business Organizations Code." But, as drafted by the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), the uniform business organizations code is intended to be much more than what is codified in chapter 21, title 30, Idaho Code.

As explained in the Prefatory Note below, the vision of ULC is that the uniform business organizations code should include all of what is codified in chapters 21 through 27, Idaho Code, and chapter 21 should be headed "General Provisions," as it contains definitions and provisions applicable to chapters 22 through 27, Idaho Code. (Chapters 29 and 30, Idaho Code, were amended and renumbered from former chapters 1 and 3, Idaho Code, by S.L. 2015, Chapter 243, but those chapters have not been addressed by

ULC, so the applicability of the provisions of chapter 21, Idaho Code, to those chapters should be closely scrutinized.)

So, while “this act” is defined in § 30-21-102(1) as being the contents of chapter 21, title 30, Idaho code, and, without that definition, would have been defined as all sections enacted or amended by S.L. 2015, Chapter 243, chapters 21 through 30, title 30, Idaho Code, the operative meaning of the term is more and less than either of those alternatives. Instances of “this act” in chapters 21 through 27, title 30, Idaho Code, will be referenced to this note. Instances of “this act” in chapter 29, Idaho Business Corporation Act, and chapter 30, Idaho Nonprofit Corporation Act, have been interpreted to be references to those individual acts and have been edited to convey that a reference to “this act” should, in fact, be to “this chapter.”

The bracketed insertion in subsection (b) was added by the compiler to correct the enacting legislation.

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Official Comment

PREFATORY NOTE

Since the early 1990s, the Uniform Law Conference (ULC) has promulgated, or in several cases revised, eight unincorporated business entity acts:

Revised Uniform Partnership Act (1997)

Revised Uniform Limited Partnership Act (2001)

Revised Uniform Limited Liability Company Act (2006)

Model Registered Agents Act (2006)

Uniform Limited Cooperative Association Act (2007)

Model Entity Transactions Act (2007)

Revised Uniform Unincorporated Nonprofit Association Act (2008)

Uniform Statutory Trust Entity Act (2009).

In 2006, the ULC authorized a project to integrate all these eight acts into the Uniform Business Organization Code, using the same type of hub-and-spoke structure used in the Uniform Commercial Code. The project, known as the Harmonization of Business Entity Acts Project (Harmonization Project), involved four steps: (1) the creation of the Hub, which contains provisions such as definitions, filing requirements, etc., which appear in almost all of the eight statutes; (2) harmonizing and updating the eight acts, which also continue to exist as stand-alone acts; (3) making the stand-alone acts "Code-ready" by removing from each act all provisions contained in the Hub and all provisions contained in the Model Entity Transactions Act; and (4) compiling the Code, by converting the Code-ready acts into separate articles of the Code.

The ULC originally approved the Hub, which is Article 1 of the Uniform Business Organizations Code (Code), in 2011. Article 1 contains basic definitions and provisions concerning filing requirements, entity names, registered agents (based on the Model Registered Agents Act), foreign entities, and administrative dissolution. The harmonization of the unincorporated entities acts phase of the Harmonization Project was completed and approved in 2013. The integration of the various Code-ready acts into the Code was completed in 2015.

It is contemplated that in the future the ULC and the American Bar Association Business Law Section will approve the inclusion of the Model Business Corporation Act and the Model Nonprofit Corporation Act into the Code. Articles 9 and 10 of the Code are listed as "Reserved" for this purpose.

The two corporate acts are promulgated by the American Bar Association Business Law Section. The Code has already benefitted by the ABA's involvement with the drafting of the Hub, META, and MORAA. Because these acts cover corporate as well as unincorporated entities, their respective drafting projects were sponsored jointly by the ULC and the ABA.

States can choose to enact the entire Code, or substantial portions of it, for example Articles 1 through 5 (the Hub, META, UPA, ULPA, and ULLCA) in a single bill or enact the individual stand-alone harmonized

entity acts. States may also choose to enact one or more of the stand-alone entity acts and then enact the Code.

Enacting the Code is not difficult, particularly by a state that already has one or more of the major stand-alone entity acts, such as the ULLCA. The issues warranting specific review are basically the same in all the articles of the Code. Thus, one bar association or legislative study review committee can review all the articles of the Code that are included in the proposed act. This review process is much more efficient than having separate review committees for each act.

Moreover, because the language in parallel provisions is the same in all the articles of the Code dealing with specific entities, it is a simple process to make sure that amendments to one provision are made in all the articles with similar provisions. Similarly, if a state has enacted the Code an amendment can be made in the filing provisions or in the other provisions in Article 1 and it will no longer be necessary to make sure that the amendment is made in all the state's other entity acts — a process that often does not occur, leading to unintended inconsistent provisions in the state's entity acts.

§ 30-21-102. Definitions. — In this act, except as otherwise provided in definitions of the same terms in other articles of this act:

(1) "Act" means the Idaho uniform business organizations code.

(2) "Annual report" means the report required by section 30-21-213, Idaho Code.

(3) "Business corporation" means a domestic business corporation incorporated under or subject to chapter 29, title 30, Idaho Code, or a foreign business corporation.

(4) "Business trust" means a trust formed under the statutory law of another state that is not a foreign statutory trust and does not have a predominately donative purpose.

(5) "Commercial registered agent" means a person listed under section 30-21-405, Idaho Code.

(6) "Common-law business trust" means a common-law trust that does not have a predominately donative purpose.

(7) "Debtor in bankruptcy" means a person that is the subject of:

(A) An order for relief under 11 U.S.C. or a comparable order under a successor statute of general application; or

(B) A comparable order under federal, state or foreign law governing insolvency.

(8) "Distributional interest" means the right under an unincorporated entity's organic law and organic rules to receive distributions from the entity.

(9) "Domestic," with respect to an entity, means governed as to its internal affairs by the law of this state.

(10) "Effective date," when referring to a record filed by the secretary of state, means the time and date determined in accordance with section 30-21-203, Idaho Code.

(11) "Entity":

(A) Means:

(i) A business corporation;

(ii) A nonprofit corporation;

(iii) A general partnership, including a limited liability partnership;

(iv) A limited partnership, including a limited liability limited partnership;

(v) A limited liability company;

(vi) A general cooperative association;

(vii) A limited cooperative association;

(viii) An unincorporated nonprofit association;

(ix) A statutory trust, business trust, or common-law business trust; or

(x) Any other person that has:

(I) A legal existence separate from any interest holder of that person; or

(II) The power to acquire an interest in real property in its own name; and

(B) Does not include:

(i) An individual;

(ii) A trust with a predominately donative purpose or a charitable trust;

(iii) An association or relationship that is not listed in paragraph (A) of this subsection and is not a partnership under the rules stated in section 30-23-202(c), Idaho Code, or a similar provision of the law of another jurisdiction;

(iv) A decedent's estate; or

(v) A government or a governmental subdivision, agency or instrumentality.

(12) "Entity filing" means a record delivered to the secretary of state for filing pursuant to this act.

(13) “Filed record” means a record filed by the secretary of state pursuant to this act.

(14) “Filing entity” means an entity whose formation requires the filing of a public organic record. The term does not include a limited liability partnership.

(15) “Foreign,” with respect to an entity, means governed as to its internal affairs by the law of a jurisdiction other than this state.

(16) “General cooperative association” means a foreign general cooperative association.

(17) “General partnership” means a domestic general partnership formed under or subject to chapter 23 of this act or a foreign general partnership. The term includes a limited liability partnership.

(18) “Governance interest” means a right under the organic law or organic rules of an unincorporated entity, other than as a governor, agent, assignee or proxy, to:

(A) Receive or demand access to information concerning, or the books and records of, the entity;

(B) Vote for or consent to the election of the governors of the entity; or

(C) Receive notice of or vote on or consent to an issue involving the internal affairs of the entity.

(19) “Governor” means:

(A) A director of a business corporation;

(B) A director or trustee of a nonprofit corporation;

(C) A general partner of a general partnership;

(D) A general partner of a limited partnership;

(E) A manager of a manager-managed limited liability company;

(F) A member of a member-managed limited liability company;

(G) A director of a general cooperative association;

(H) A director of a limited cooperative association;

(I) A manager of an unincorporated nonprofit association;

(J) A trustee of a statutory trust, business trust or common-law business trust; or

(K) Any other person under whose authority the powers of an entity are exercised and under whose direction the activities and affairs of the entity are managed pursuant to the organic law and organic rules of the entity.

(20) "Interest" means:

(A) A share in a business corporation;

(B) A membership in a nonprofit corporation;

(C) A governance interest in a general partnership;

(D) A governance interest in a limited partnership;

(E) A governance interest in a limited liability company;

(F) A share in a general cooperative association;

(G) A member's interest in a limited cooperative association;

(H) A membership in an unincorporated nonprofit association;

(I) A beneficial interest in a statutory trust, business trust or common-law business trust; or

(J) A governance interest or distributional interest in any other type of unincorporated entity.

(21) "Interest holder" means:

(A) A shareholder of a business corporation;

(B) A member of a nonprofit corporation;

(C) A general partner of a general partnership;

(D) A general partner of a limited partnership;

(E) A limited partner of a limited partnership;

(F) A member of a limited liability company;

(G) A shareholder of a general cooperative association;

(H) A member of a limited cooperative association;

(I) A member of an unincorporated nonprofit association;

(J) A beneficiary or beneficial owner of a statutory trust, business trust or common-law business trust; or

(K) Any other direct holder of an interest.

(22) “Jurisdiction,” used to refer to a political entity, means the United States, a state, a foreign country, or a political subdivision of a foreign country.

(23) “Jurisdiction of formation” means the jurisdiction whose law includes the organic law of an entity.

(24) “Limited cooperative association” means a foreign limited cooperative association.

(25) “Limited liability company” means a domestic limited liability company formed under or subject to chapter 25, title 30, Idaho Code, or a foreign limited liability company.

(26) “Limited liability limited partnership” means a domestic limited liability limited partnership formed under or subject to chapter 24, title 30, Idaho Code, or a foreign limited liability limited partnership.

(27) “Limited liability partnership” means a domestic limited liability partnership registered under or subject to chapter 23, title 30, Idaho Code, or a foreign limited liability partnership.

(28) “Limited partnership” means a domestic limited partnership formed under or subject to chapter 24, title 30, Idaho Code, or a foreign limited partnership. The term includes a limited liability limited partnership.

(29) “Noncommercial registered agent” means a person that is not a commercial registered agent and is:

(A) An individual or domestic or foreign entity that serves in this state as the registered agent of an entity; or

(B) An individual who holds the office or other position in an entity which is designated as the registered agent pursuant to section 30-21-404(a)(2)(B), Idaho Code.

(30) “Nonfiling entity” means an entity whose foundation [formation] does not require the filing of a public organic record.

(31) “Nonprofit corporation” means a domestic nonprofit corporation incorporated under or subject to chapter 30, title 30, Idaho Code, or a foreign nonprofit corporation.

(32) “Nonregistered foreign entity” means a foreign entity that is not registered to do business in this state pursuant to a statement of registration filed by the secretary of state.

(33) “Organic law” means the law of an entity’s jurisdiction of formation governing the internal affairs of the entity.

(34) “Organic rules” means the public organic record and private organic rules of an entity.

(35) “Person” means an individual, business corporation, nonprofit corporation, partnership, limited partnership, limited liability company, general cooperative association, limited cooperative association, unincorporated nonprofit association, statutory trust, business trust, common-law business trust, estate trust, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(36) “Principal office” means the principal executive office of an entity, whether or not the office is located in this state.

(37) “Private organic rules” means the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all its interest holders, and are not part of its public organic record, if any. The term includes:

(A) The bylaws of a business corporation;

(B) The bylaws of a nonprofit corporation;

(C) The partnership agreement of a general partnership;

(D) The partnership agreement of a limited partnership;

(E) The operating agreement of a limited liability company;

(F) The bylaws of a general cooperative association;

(G) The bylaws of a limited cooperative association;

(H) The governing principles of an unincorporated nonprofit association; and

(I) The trust instrument of a statutory trust or similar rules of a business trust or common-law business trust.

(38) "Proceeding" includes a civil action, arbitration, mediation, administrative proceeding, criminal prosecution and investigatory action.

(39) "Professional entity" means an entity formed for the sole and specific purpose of rendering professional services, allied professional services, and services ancillary to the professional services and that has as its interest holders only:

(A) Natural persons who themselves are duly licensed or otherwise legally authorized to render one (1) or more of the same professional services as the professional entity; and

(B) Other professional entities.

(40) "Professional service" means any type of service to the public that can be rendered by a member of any profession within the purview of the member's profession.

(41) "Property" means all property, whether real, personal, or mixed or tangible or intangible, or any right or interest therein.

(42) "Public organic record" means the record, the filing of which by the secretary of state is required to form an entity, and any amendment to or restatement of that record. The term includes:

(A) The articles of incorporation of a business corporation;

(B) The articles of incorporation of a nonprofit corporation;

(C) The certificate of limited partnership of a limited partnership;

(D) The certificate of organization of a limited liability company;

(E) The articles of incorporation of a general cooperative association;

(F) The articles of organization of a limited cooperative association; and

(G) The certificate of trust of a statutory trust or similar record of a business trust.

(43) “Receipt,” as used in this chapter, means actual receipt. “Receive” has a corresponding meaning.

(44) “Record,” used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(45) “Registered agent” means an agent of an entity that is authorized to receive service of any process, notice, or demand required or permitted by law to be served on the entity. The term includes a commercial registered agent and a noncommercial registered agent.

(46) “Registered foreign entity” means a foreign entity that is registered to do business in this state pursuant to a statement of registration filed by the secretary of state.

(47) “Sign” means with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic symbol, sound or process.

(48) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(49) “Statutory trust” means a trust formed under the statutory law of a jurisdiction other than this state.

(50) “Transfer” includes:

(A) An assignment;

(B) A conveyance;

(C) A sale;

(D) A lease;

(E) An encumbrance, including a mortgage or security interest;

(F) A gift; and

(G) A transfer by operation of law.

(51) "Type of entity" means a generic form of entity:

(A) Recognized at common law; or

(B) Formed under an organic law, whether or not some entities formed under that law are subject to provisions of that law that create different categories of the form of entity.

(52) "Unincorporated nonprofit association" means a domestic unincorporated nonprofit association formed under or subject to chapter 27, title 30, Idaho Code, or a nonprofit association formed under or subject to the law of a jurisdiction other than this state that would be an unincorporated nonprofit association if formed under or subject to the law of this state.

(53) "Written" means inscribed on a tangible medium. "Writing" has a corresponding meaning.

History.

I.C., § 30-21-102, as added by 2015, ch. 243, § 7, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Compiler's Notes.

The bracketed insertion in subsection (30) was added by the compiler to correct the enacting legislation and to conform to the uniform act.

Official Comment

The definitions in this section apply generally throughout the Code unless a particular term is defined differently in another article. Some of the definitions describe attributes that are significant in some forms of entity and not in others. For example, the concepts of separate "distributional" and "governance" interests are inherent in unincorporated entities but have no counterpart in corporations.

"Commercial registered agent." [(5)] — A commercial registered agent is an individual or entity that is in the business of serving as a registered agent in the state and that files a listing statement under Section 1-405. Being listed as a commercial registered agent is voluntary and persons serving as registered agents are not required to be listed under Section 1-405. The benefits to the registered agent of being listed under Section 1-405, however, are substantial and most registered agents will elect to be so listed. Although this definition and Section 1-405 do not expressly require that a foreign entity that is listed as a commercial registered agent be qualified to do business in the state, the activity of serving as a registered agent is one that requires such registration.

"Distributional interest" [(8)] — This term is similar to the concept of a "transferable interest" found in the organic laws of several types of unincorporated entities, but has a broader meaning because the scope of this Code includes entities in addition to those whose organic law uses the term "transferable interest."

"Domestic." [(9)] — The term "domestic", when used in the Code with respect to an entity, means an entity whose internal affairs are governed by the organic laws of the adopting state. Except in the case of general partnerships and unincorporated nonprofit associations, this will mean an entity that is formed, organized, or incorporated under domestic law. In the case of a general partnership organized under Article 3, it will mean a general partnership whose governing law under Section 3-104 is the law of the adopting state. Under Section 3-104 the governing law is determined by the location of the partnership's principal office, except for limited liability partnerships where the governing law is the state where the statement of qualification is filed. It is a factual question whether the activities and organization of an unincorporated nonprofit association make it a domestic or foreign entity.

"Entity." [(11)] — This definition determines the overall scope of the Code.

This definition is intended to include all forms of private organizations, regardless of whether organized for profit, and artificial legal persons other than those excluded by paragraphs (B)(i)-(v).

This definition does not exclude regulated entities such as public utilities, banks and insurance companies. If any of those types of entities is organized under a separate statute, the state must decide whether that statute should be one of the spokes of the Code. If the statute is not included in the Code, entities formed under it will be automatically excluded from this article by Section 1-103. But in that case, a separate decision must be made as to whether to permit entities formed under it to participate in transactions under Article 2. Particular types of entities may also be excluded from the Code by listing them in optional Section 1-106.

Trusts with a predominantly donative purpose and charitable trusts are subject generally to the Uniform Trust Code (Last Amended 2010) and have been excluded from the definition of "entity," thus excluding them from the Code. Trusts that carry on a business, however, such as a Massachusetts trust, real estate investment trust, Illinois land trust, or other common law or statutory business trusts are "entities."

Section 7-106 gives an unincorporated nonprofit association the power to acquire an estate in real property and thus an unincorporated nonprofit association organized in a state that has adopted Article 7 will be an "entity." At common law, an unincorporated nonprofit association was not a legal entity and did not have the power to acquire real property. Most states that have not adopted the UUNAA (2008) (Last Amended 2013) have nonetheless modified the common law rule, but states that have not adopted the UUNAA (2008) (Last Amended 2013) should analyze whether they should modify the definition of "entity" to add an express reference to unincorporated nonprofit associations.

There is some question as to whether a partnership subject to the UPA (1914) is an entity or merely an aggregation of its partners. That question has been resolved by Section 3-201, which makes clear that a general partnership is an entity with its own separate legal existence. Section 8 of the UPA (1914) gives partnerships subject to it the power to acquire estates in real property and thus such a partnership will be an "entity." As a result, all general partnerships will be "entities" regardless of whether the state in which they are organized has adopted the UPA (1997) (Last Amended 2013) or the UPA (1914).

Paragraph (B)(i) of this definition excludes a sole proprietorship from the concept of "entity."

Paragraph (B)(iii) of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not a partnership under Section 3-202(c) or Section 7 of UPA (1914). In that connection, 3-202(c) provides in part:

> In determining whether a partnership is formed, the following rules apply:
>
> (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
>
> (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

A virtually identical provision appears in Section 7(3)-(4) of the UPA (1914).

Paragraph (B)(iv) of this definition excludes decedent's estates for the same policy reason as trusts with a predominantly donative purpose and charitable trusts.

Paragraph (B)(v) excludes governmental subdivisions, agencies, and instrumentalities because they are not properly within the scope of the Code.

Limited liability partnerships and limited liability limited partnerships are "entities" because they are general partnerships and limited partnerships, respectively, that have made the additional required election claiming LLP or LLLP status. A limited liability partnership is not, therefore, a separate type of entity from the underlying general partnership, nor is a limited liability limited partnership a separate type of entity from the underlying limited partnership that has elected limited liability partnership status.

"Filing entity." [(14)] — Whether an entity is a filing entity is determined by reference to whether its legal existence requires the filing of a record with the state filing office. While the Code refers to the

"formation" of an entity, it is intended to encompass corporations which are "incorporated" and limited liability companies which are "organized" as well as entities such as limited partnerships which are "formed" under their organic law. Business trusts (sometimes referred to as "statutory trusts") present a special problem. In some states a business trust is a filing entity or common law relationship, while in other states business trusts are only recognized by common law. Under section 201(a) of the Uniform Statutory Trust Entity Act (2009) (Last Amended 2013) (§ 8-201(a) of the Code), a statutory trust entity formed under that act is formed by delivery of a certificate of trust to the appropriate filing office, and is a filing entity.

The term does not include a limited liability partnership because an election filed by a general partnership claiming that status (*e.g.*, a statement of qualification under Section 3-901) is not required to form the underlying partnership. A limited liability limited partnership, on the other hand, is a filing entity because formation of the underlying limited partnership requires the filing of a certificate of limited partnership.

"Foreign." [(15)] — The term "foreign," when used in the Code with respect to an entity, includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by the UPA (1914) is a domestic or foreign partnership. A UPA (1914) partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of partnerships under Article 3 that have not registered as limited liability partnerships will be governed by Section 3-104(2).

"Governance interest." [(18)] — A governance interest is typically only part of the interest that a person will hold in an unincorporated entity and is usually coupled with a distributional interest (or economic rights). Memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests and memberships in other nonprofit entities may not include either governance interests or distributional interests. In some unincorporated business entities, there is a more limited right to transfer governance interests than there is to transfer distributional interests. An interest holder in such an unincorporated

business entity who transfers only a distributional interest and retains the governance interest will also retain the status of an interest holder. Whether a transferee who acquires only a distributional interest will acquire the status of an interest holder is determined by the definition of "interest holder."

Governors of an entity have the kinds of rights listed in the definition of "governance interest" by reason of their position with the entity. For a governor to have a "governance interest," however, requires that the governor also have those rights for a reason other than the governor's status as such. A manager who is not a member in a limited liability company, for example, will not have a governance interest, but a manager who is a member will have a governance interest arising from the ownership of a membership interest.

"Governor." [(19)] — This term has been chosen to provide a way of referring to a person who has the authority under an entity's organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of entities. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

"Interest." [(20)] — In the usual case, the interest held by an interest holder will include both a governance interest and a distributional interest (or economic rights). Members in nonprofit corporations or unincorporated nonprofit associations generally do not have any distributional interest because they do not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders for purposes of the Code.

“Interest holder.” [(21)] — The Code does not refer to “equity” interests or “equity” owners or holders because the term “equity” could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but only have a right to vote on its internal affairs.

“Noncommercial registered agent.” [(29)] — A noncommercial registered agent is a person that serves as an agent for service of process but that is not listed under Section 1-405. All agents for service of process that are not commercial registered agents are noncommercial registered agents.

“Organic law.” [(33)] — Organic law means statutes other than the Code that govern the internal affairs of an entity, as well as the applicable provisions of the Code.

Entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.*, CAL. CORP. CODE § 2115 (Foreign Corporations), N.Y. NOT-FOR-PROFIT-CORP. §§ 1318-1321 (Liabilities of Directors and Officers of Foreign Corporations), 15 PA. CONS. STAT. § 6145 (Applicability of Certain Safeguards to Foreign Corporations). Such a “sticky fingers” law is not included within the definition of “organic law” for purposes of the Code because those laws are not part of the law of the entity’s jurisdiction of formation.

“Person.” [(35)] — The term “person” has the standard meaning of that term in uniform acts at the time this Code was promulgated.

“Private organic rules.” [(37)] — The term private “organic rules” is intended to include all governing rules of an entity that are binding on all of its interest holders, whether or not in record form, except for the provisions of the entity’s public organic document, if any. The term is intended to include agreements in “record” form as well as oral partnership agreements and oral operating agreements among LLC members.

“Public organic record.” [(42)] — A “public organic record” is a record that is required to be filed publicly to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of partnership authority filed under Section 3-303 or any of the other statements that may be filed under Article 3 since those statements do not

create a new entity. Similarly, the term does not include a statement of authority filed under Section 5-302 relating to a limited liability company. A limited liability partnership is the same entity as the partnership that files a statement of qualification under Section 3-901 to become a limited liability partnership and thus the statement is not a public organic record. A statement of authority filed under Section 7-107 relating to an unincorporated nonprofit association or a statement appointing an agent filed under Section 7-129 is also not a public organic record. Where a public organic record has been amended or restated, the term means the public organic record as last amended or restated.

In those states where a deed of trust or other instrument is publicly filed to create a business trust, that filing will constitute a public organic record. But in those states where a business trust is not created by a public filing, the deed of trust or similar record will be part of the private organic rules of the business trust.

"Receipt." [43] — Section 15 of the Uniform Electronic Transactions Act, which provides rules as to when an electronic record is sent and received, applies to electronic records under this Code.

"Record." [(44)] — The term "record" has the standard meaning of that term in uniform acts at the time this Code was promulgated.

"Registered agent." [(45)] — This term is used in the Code to refer to agents for service of process in contexts where it is not necessary to differentiate between commercial registered agents and noncommercial registered agents.

"Sign." [(47)] — The term "sign" has the standard meaning of that term in uniform acts at the time this Code was promulgated.

"State." [(48)] — The term "state" has the standard meaning of that term in uniform acts at the time this Code was promulgated.

"Transfer." [(50)] — The term "transfer" is broadly defined to include all types of conveyances of interests in property.

"Type of entity." [(51)] — The term "type of entity" has been developed in an attempt to distinguish different legal forms of entities. It is sometimes difficult to decide whether one is dealing with a different form of entity or a variation of the same form. For example, a limited partnership, although it

has been defined as a partnership, is a different type of entity from a general partnership, while a limited liability partnership is not a different type of entity from a general partnership. In some states cooperative corporations are categories of business corporations or nonprofit corporations, while in other states cooperatives are a separate type of entity.

§ 30-21-103. Applicability of part. — This part applies to an entity formed under or subject to this act.

History.

I.C., § 30-21-103, as added by 2015, ch. 243, § 7, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

See the comment to Section 1-102(11) ("entity").

§ 30-21-104. Delivery of record. — (a) Except as otherwise provided in this act, permissible means of delivery of a record includes delivery by hand, mail, conventional commercial practice, and electronic transmission.

(b) Delivery to the secretary of state is effective only when a record is received by the secretary of state.

History.

I.C., § 30-21-104, as added by 2015, ch. 243, § 7, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Subsection (a) lists permissible means of delivery but, except for delivery to the filing office, does not determine when delivery occurs.

Permissible means of delivery are not limited to those listed in subsection (a) because subsection (a) by its terms is a nonexclusive list. Conventional commercial practice includes the use of private delivery or courier services. What constitutes conventional commercial practice may change over time.

Under subsection (b), delivery to the Secretary of State or other state filing office is effective only upon actual receipt. The effectiveness of records delivered other than to the filing office will be controlled by provisions in other articles of the Code and may vary depending on the type of entity to which the records relate and manner in which the records are delivered.

§ 30-21-105. Rules and procedures. — The secretary of state may:

(1) Adopt rules to administer this act in accordance with the administrative procedure act; and (2) Prescribe procedures that are reasonably necessary to perform the duties required of the secretary of state under this act and are not required by the administrative procedure act to be adopted as rules.

History.

I.C., § 30-21-105, as added by 2015, ch. 243, § 7, p. 758.

STATUTORY NOTES

Cross References.

Administrative procedure act, § 67-5201 et seq.

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment This section grants the Secretary of State or other state filing office the authority necessary for the efficient performance of the filing and other duties imposed on the filing office by the Code but is not intended as a grant of general authority to establish public policy. The most important aspects of a modern entity statute relate to the creation and maintenance of relationships among persons interested in or involved with an entity; these relationships should be a matter of concern to the parties involved and not subject to regulation or interpretation by the filing office. Further, even in situations where it is claimed that an entity has been formed or is being operated for purposes that may violate the public policies of the state, the filing office generally should not be the governmental official that determines the scope of public policy through administration of the filing responsibilities under the Code. Rather, the attorney general may seek to enjoin the illegal conduct or to dissolve involuntarily the offending entity. See Section 1-206(a) which makes clear that the duty of the filing office to file documents under the Code is "ministerial."

§ 30-21-106. Reserved.

History.

I.C., § 30-21-106, as added by 2015, ch. 243, § 7, p. 758.

Part 2
Filing

Idaho Code § 30-21-201

§ 30-21-201. Entity filing requirements. — (a) To be filed by the secretary of state pursuant to this act, an entity filing must be received by the secretary of state, comply with this act, and satisfy the following:

(1) The entity filing must be required or permitted by this act.

(2) The entity filing must be physically delivered in written form unless and to the extent the secretary of state permits electronic delivery of entity filings.

(3) The words in the entity filing must be in English, and numbers must be in Arabic or Roman numerals, but the name of the entity need not be in English if written in English letters or Arabic or Roman numerals.

(4) The entity filing must be signed by or on behalf of a person authorized or required under this chapter to sign the filing.

(5) The entity filing must state the name and capacity, if any, of each individual who signed it, either on behalf of the individual or the person authorized or required to sign the filing, but need not contain a seal, attestation, acknowledgment or verification.

(b) If law other than this chapter prohibits the disclosure by the secretary of state of information contained in an entity filing, the secretary of state shall file the entity filing if the filing otherwise complies with this chapter but may redact the information.

(c) When an entity filing is delivered to the secretary of state for filing, any fee required under this part and any fee, tax, interest, or penalty required to be paid under this part or law other than this act must be paid in a manner permitted by the secretary of state.

(d) The secretary of state may require that an entity filing delivered in written form be accompanied by an identical or conformed copy.

History.

I.C., § 30-21-201, as added by 2015, ch. 243, § 8, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

The records filed under the Code are referred to as "entity filings" in order to encompass filings under corporation laws, which are typically referred to as "articles," and filings under limited partnership and other unincorporated entity laws, which are typically referred to as "certificates."

1. Form of records. Section 1-104(b) provides that delivery of an entity filing to the Secretary of State or other state filing office is effective only upon actual receipt by the filing office.

An entity filing must be in typewritten or printed form unless the filing office permits delivery by electronic transmission. The types of electronic transmission that may be used will be determined by the filing office and are intended to include the evolving methods of electronic delivery, including facsimile transmissions, electronic transmissions between computers and filings through delivery of storage media. The text of an entity filing must be in the English language (except to the limited extent permitted by subsection (a)(3)).

The filing office is not authorized to prescribe forms (except to the extent permitted by Section 1-202) and as a result may not reject entity filings on the basis of form if they contain the information called for by the specific statutory requirement and meet the minimal formal requirements of this section.

2. Signature. To be filed a record must be signed by the appropriate person. Who is an appropriate person will be determined by an entity's organic law. See the definition of "sign" in Section 1-102(44) for a description of the manner in which a record may be "signed."

The requirement in some state statutes that entity filings must be acknowledged or verified as a condition for filing has been eliminated. These requirements serve little purpose in connection with entity filings. On

the other hand, many organizations, like lenders or title companies, may desire that specific records include acknowledgements, verifications, or seals; subsection (a)(4) does not prohibit the addition of these forms of execution and their use is not intended to affect the eligibility of the record for filing.

3. Contents. A record must be filed by the filing office if it contains the information required by the Code. In view of the very limited discretion granted to filing offices under this section and Section 1-206(a) which defines the role of the filing office as "ministerial," Section 1-206(e) provides that no presumption arises from the fact that the filing office accepted a document or filing. See the comment to Section 1-206.

§ 30-21-202. Forms. — (a) The secretary of state may provide forms for entity filings required or permitted to be made by this act, but, except as otherwise provided in subsection (b) of this section, their use is not required.

(b) The secretary of state may require that a cover sheet for an entity filing and an annual report be on forms prescribed by the secretary of state.

History.

I.C., § 30-21-202, as added by 2015, ch. 243, § 8, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

As described in the comments to Section 1-201, records are entitled to filing if they meet the substantive and formal requirements of the Code. In these circumstances it is not appropriate to vest the filing office with general authority to establish mandatory forms for use under the Code. This section authorizes (but does not require) the filing office to prepare forms suitable for filing under the Code. However, the use of these forms is permissive and cannot be required by the filing office. The filing office is authorized to prescribe forms for annual / biennial reports, however, and for cover sheets for entity filings.

§ 30-21-203. Effective dates and times. — Except as otherwise provided in this act and subject to section 30-21-205(d), Idaho Code, an entity filing is effective:

(1) On the date and at the time of its filing by the secretary of state as provided in section 30-21-206, Idaho Code;

(2) On the date of filing and at the time specified in the entity filing as its effective time, if later than the time under subsection (1) of this section;

(3) If permitted by this act, at a specified delayed effective date and time, which may not be more than ninety (90) days after the date of filing; or

(4) If a delayed effective date as permitted by this act is specified, but no time is specified, at 12:01 a.m. on the date specified, which may not be more than ninety (90) days after the date of filing.

History.

I.C., § 30-21-203, as added by 2015, ch. 243, § 8, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Records accepted for filing become effective at the date and time of filing, as recorded by the filing office, or at another specified time on that date, unless a permissible delayed effective date is stated in the record.

Section 1-206(b) requires the filing office to maintain some means of recording the date and time of delivery of an entity filing and to record that date and time as the date and time of filing. That provision gives express statutory authority to the common practice of most filing offices of ignoring processing time and treating a record as filed as of the date and time it is delivered for filing even though it may not be reviewed and accepted for filing until several days after delivery. That section contemplates that time of delivery, as well as the date, will be routinely recorded.

Under paragraph (1) of this section, in the absence of provision for a delayed effective date, an entity filing becomes effective on the date and time of filing by the filing office. Since under 1-206(b) the date and time of filing is the recorded date and time of delivery of the entity filing, together these provisions eliminate any doubt about situations involving same-day transactions in which a record, for example, a statement of merger, is delivered for filing on the morning of the day the merger is to become effective.

This section does not authorize or contemplate the establishment of a retroactive effective date before the date of filing.

A record that states an effective date beyond the 90-day limit provided in paragraph (3) or (4) is not a record that "satisfies this [act]" under Section 1-206(a) and will properly be rejected for filing.

§ 30-21-204. Withdrawal of filed record before effectiveness. — (a) Except as otherwise provided in this act, a record delivered to the secretary of state for filing may be withdrawn before it takes effect by delivering to the secretary of state for filing a statement of withdrawal.

(b) A statement of withdrawal must:

(1) Be signed by each person that signed the record being withdrawn, except as otherwise agreed by those persons;

(2) Identify the record to be withdrawn; and

(3) If signed by fewer than all the persons that signed the record being withdrawn, state that the record is withdrawn in accordance with the agreement of all the persons that signed the record.

(c) On filing by the secretary of state of a statement of withdrawal, the action or transaction evidenced by the original filed record does not take effect.

History.

I.C., § 30-21-204, as added by 2015, ch. 243, § 8, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Only records that have not yet taken effect may be withdrawn under this section. If a record has taken effect, it may be corrected under Section 1-205 if the requirements of that section are satisfied. Otherwise, the record must be amended in accordance with the applicable provisions of the Code or, if the record relates to the formation of an entity, the existence of the entity may be terminated in accordance with the applicable provisions of the Code.

If a signatory of a record being withdrawn has died or is incompetent, Section 1-209 provides for a substitute signatory.

§ 30-21-205. Correcting filed record. — (a) A person on whose behalf a filed record was delivered to the secretary of state for filing may correct the record if:

(1) The record at the time of filing was inaccurate; (2) The record was defectively signed; or

(3) The electronic transmission of the record to the secretary of state was defective.

(b) To correct a filed record, a person on whose behalf the record was delivered to the secretary of state must deliver to the secretary of state for filing a statement of correction.

(c) A statement of correction:

(1) May not state a delayed effective date; (2) Must be signed by the person correcting the filed record; (3) Must identify the filed record to be corrected; (4) Must specify the inaccuracy or defect to be corrected; and (5) Must correct the inaccuracy or defect.

(d) A statement of correction is effective as of the effective date of the filed record that it corrects except as to persons relying on the uncorrected filed record and adversely affected by the correction. As to those persons, the statement of correction is effective when filed.

History.

I.C., § 30-21-205, as added by 2015, ch. 243, § 8, p. 758.

Official Comment

This section permits making corrections in entity filings without re-filing the entire record. Under subsection (d), the correction relates back to the original effective date of the entity filing being corrected, except as to persons relying on the original entity filing and adversely affected by the correction. As to these persons, the effective date of the statement of correction is the date the statement is filed.

An entity filing may be corrected either because it contains an inaccuracy or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original record for filing). In addition, an entity filing may be corrected if its electronic transmission was defective. This is intended to cover the situation where an electronic filing is made but, due to a defect in transmission, the filed record is later discovered to be inconsistent with the record intended to be filed. If no filing is made because of a defect in transmission, a statement of correction may not be used to make a retroactive filing. Therefore, an entity making an electronic filing should take steps to confirm that the filing was received by the filing office.

A provision in an entity filing setting an effective date may be corrected under this section, but the corrected effective date must comply with the requirements of the Code limiting delayed effective dates to within 90 days after filing. A corrected effective date is thus measured from the date of the original filing of the record being corrected, i.e., it cannot be before the date of filing of the record or more than 90 day thereafter.

If a signatory of a record being withdrawn has died or is incompetent, Section 1-209 provides for a substitute signatory.

§ 30-21-206. Duty of secretary of state to file — Review of refusal to file. — (a) The secretary of state shall file an entity filing delivered to the secretary of state for filing that satisfies this act. The duty of the secretary of state under this section is ministerial.

(b) When the secretary of state files an entity filing, the secretary of state shall record it as filed on the date and at the time of its delivery. After filing an entity filing, the secretary of state shall deliver to the person that submitted the filing a copy of the filing with an acknowledgment of the date and time of filing.

(c) If the secretary of state refuses to file an entity filing, the secretary of state, not later than five (5) business days after the filing is delivered, shall:

(1) Return the entity filing or notify the person that submitted the filing of the refusal; and

(2) Provide a brief explanation in a record of the reason for the refusal.

(d) If the secretary of state refuses to file an entity filing, the person that submitted the filing may petition the district court to compel its filing. The filing and the explanation of the secretary of state of the refusal to file must be attached to the petition. The court may decide the matter in a summary proceeding.

(e) The filing of or refusal to file an entity filing does not:

(1) Affect the validity or invalidity of the filing in whole or in part; or

(2) Create a presumption that the information contained in the filing is correct or incorrect.

History.

I.C., § 30-21-206, as added by 2015, ch. 243, § 8, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

1. Filing duty in general. Under this section the filing office is required to file an entity filing if it "satisfies this [Code]" (*i.e.*, both this article and the article that constitutes the organic law of the entity, as well as Article 2 if the entity filing relates to a transaction under that article). The purpose of this language is to limit the discretion of the filing office to a ministerial role in reviewing the contents of entity filings. If the entity filing submitted is in the form prescribed and contains the information required by Section 1-201 and the other applicable provision of the Code, the filing office must file it. Consistently with this approach, subsection (a) states explicitly that the filing duty of the filing office is ministerial and subsection (e) provides that the filing of an entity filing by the filing office does not affect the validity or invalidity of any provision contained in the filing and does not create any presumption with respect to any provision. Persons adversely affected by provisions in an entity filing may test their validity in a proceeding appropriate for that purpose. A presumption should not be drawn about the validity of the provision from the fact that the filing office accepted the entity filing for filing.

2. Mechanics of filing. Subsection (b) provides that when the filing office files an entity filing, the filing office records it as filed on the date and time of delivery to the filing office, retains the original record for the state's records, and delivers a copy of the record to the entity or its representative with an acknowledgement of the date and time of filing. In the case of a record transmitted electronically, delivery may be made by electronic transmission. The copy returned will be the exact or conformed copy if one has been required by the filing office, or will be a copy made by the filing office if an exact or conformed copy was not required. Of course, a person desiring a certified copy of any filed record may obtain it from the office of the filing office by paying the fee prescribed in Section 1-214.

3. Elimination of certificates and similar records. Subsection (b) provides that acceptance of a filing is evidenced merely by the delivery by the filing office of a copy of the entity filing with an acknowledgment of the date and time of filing. The Code does not provide for the filing office to issue a formal certificate of filing. A copy of the filed record together with an acknowledgment of the date and time of filing should sufficiently indicate that the entity filing has been accepted for filing.

4. Rejection of document by filing office. Because of the simplification of formal filing requirements and the limited discretion granted to the filing office by the Code, it is probable that rejection of entity filings will occur only rarely. Subsection (c) provides that if the filing office does reject an entity filing, the filing office must return it to the person that submitted the filing within 15 days [5 business days in Idaho] together with a brief written explanation of the reason for rejection. In the case of an entity filing delivered by electronic transmission, rejection of the filing may be made electronically by the filing office or by a mailing to the entity.

5. Effect of filing or rejection. Subsection (e) provides that the filing of a record by the filing office does not affect the validity or invalidity of any provision contained in the record and does not create a presumption with respect to any information in the record. Likewise, the refusal to file a record creates no presumption that any of the information in the record is incorrect. Persons adversely affected by a statement in a filed record may contest the statement in a proceeding appropriate for that purpose.

§ 30-21-207. Evidentiary effect of copy of filed record. — A certification from the secretary of state accompanying a copy of a filed record is conclusive evidence that the copy is an accurate representation of the original record on file with the secretary of state.

History.

I.C., § 30-21-207, as added by 2015, ch. 243, § 8, p. 758.

Official Comment

The limited effect of a certificate issued by the filing office under this section is consistent with the ministerial filing obligation imposed on the filing office under the Code. See Section 1-206(a) which states the ministerial nature of the duties of the filing office under the Code, but contrast Section 1-208(c) which provides for a broader effect for a certificate of good standing or registration.

§ 30-21-208. Certificate of good standing or registration. — (a) On request of any person, the secretary of state shall issue a certificate of good standing for a domestic filing entity or a certificate of registration for a registered foreign entity.

(b) A certificate under subsection (a) of this section must state:

(1) The domestic filing entity's name or the registered foreign entity's name used in this state;

(2) In the case of a domestic filing entity:

(A) That its public organic record has been filed and has taken effect;

(B) The date the public organic record became effective;

(C) That the records of the secretary of state do not reflect that the entity has been dissolved;

(3) In the case of a registered foreign entity, that it is registered to do business in this state.

(c) Subject to any qualification stated in the certificate, a certificate issued by the secretary of state under subsection (a) of this section may be relied upon as conclusive evidence of the facts stated in the certificate.

History.

I.C., § 30-21-208, as added by 2015, ch. 243, § 8, p. 758.

Official Comment

This section establishes a procedure by which anyone may obtain a conclusive certificate from the filing office that the records of the filing office either (i) do not indicate that a particular domestic entity has ceased to exist or (ii) indicate that a particular foreign entity is registered to do business in the state. The certificate will probably be a standardized form. The filing office is to make those determinations from public records only and is not expected to make a more extensive investigation.

This section refers only to fees, taxes, interest, and penalties collected by the filing office. In some states other agencies may report to the filing office that franchise or other taxes have been paid; in those state, this information may be included in the certificate. In states where this procedure does not unduly delay the issuance of certificates, this section may be revised appropriately. Subsection (b)(4)(B) [not adopted in Idaho] limits the scope of the statement in the certificate that all fees, taxes, interest, and penalties have been paid to those where nonpayment affects the existence or registration to do business of the entity.

§ 30-21-209. Signing of entity filing. — (a) Signing an entity filing is an affirmation under the penalties of perjury that the facts stated in the filing are true in all material respects.

(b) A record filed under this act may be signed by an agent. Whenever this act requires a particular individual to sign an entity filing and the individual is deceased or incompetent, the filing may be signed by a legal representative of the individual.

(c) A person that signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.

History.

I.C., § 30-21-209, as added by 2015, ch. 243, § 8, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

As provided in Section 1-102(47), "sign" includes any manual, facsimile, conformed, or electronic signature.

Subsection (a) — This subsection makes it a criminal offense for any person to sign an entity filing that the person knows is false in any material respect.

Subsection (b) — The filing office will not check the bona fides of a person purporting to have signed a record in a representative capacity. This subsection expressly authorizes taking action through an agent so as to provide context for Subsection (c) and for the avoidance of doubt. No negative inference should be drawn about using agents to take other action under this article.

Subsection (c) — As a matter of agency law, a person who signs in a representative capacity gives a "warranty of authority." Restatement (Third) of Agency § 6.10 (2006) (Agent's Implied Warranty of Authority).

§ 30-21-210. Signing and filing pursuant to judicial order. — (a) If a person required by this act to sign or deliver a record to the secretary of state for filing under this act does not do so, any other person that is aggrieved may petition the district court to order:

(1) The person to sign the record; (2) The person to deliver the record to the secretary of state for filing; or (3) The secretary of state to file the record unsigned.

(b) If the petitioner under subsection (a) of this section is not the entity to which the record pertains, the petitioner shall make the entity a party to the action.

(c) A record filed under subsection (a)(3) of this section is effective without being signed.

History.

I.C., § 30-21-210, as added by 2015, ch. 243, § 8, p. 758.

Official Comment

This section gives the court the flexibility to order either that a record be signed or that the record be filed by the filing office unsigned. That later circumstance may arise, for example, in a situation where the person who should sign the record is not subject to the jurisdiction of the court. This section also makes clear that the court may order a person with control over a record that has been signed to deliver the record to the filing office for filing.

§ 30-21-211. Liability for inaccurate information in filed record. — If a record delivered to the secretary of state for filing under this act and filed by the secretary of state contains inaccurate information, a person that suffers a loss by reliance on the information may recover damages for the loss from a person that signed the record or caused another to sign it on the person's behalf and knew at the time the record was signed that the information was inaccurate.

History.

I.C., § 30-21-211, as added by 2015, ch. 243, § 8, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section relates to liability to third parties for inaccurate information in a filed record. Section 1-209 provides for criminal liability where the facts in a filed record are not true in all material respects. In addition, an aggrieved person may seek a remedy under Section 1-210.

Specific rules on the responsibilities of certain persons for the accuracy of the information in the records of the state filing office about an entity are found in some organic laws. *See, e.g.*, Sections 4-204 (limited partnerships), 5-205 (limited liability companies), and 8-205 (statutory trusts).

§ 30-21-212. Delivery by secretary of state. — Except as otherwise provided by section 30-21-412, Idaho Code, or by law of this state other than this chapter, the secretary of state may deliver a record to a person by delivering it:

(1) In person to the person that submitted it for filing; (2) To the principal office address of the person; (3) By means of electronic transmission, pursuant to the uniform electronic transactions act, chapter 50, title 28, Idaho Code; (4) To another address the person provides to the secretary of state for delivery; or (5) To the address of the person's registered agent.

History.

I.C., § 30-21-212, as added by 2015, ch. 243, § 8, p. 758; am. 2017, ch. 144, § 1, p. 340.

STATUTORY NOTES

Amendments.

The 2017 amendment, by ch. 144, inserted present subsection (3) and redesignated the subsequent subsections accordingly.

Official Comment

This section provides several options for how the filing office may deliver a record in response to a request for the record or after the filing office has filed it.

§ 30-21-213. Annual report for secretary of state. — (a) A domestic filing entity, domestic limited liability partnership, or registered foreign entity shall deliver to the secretary of state for filing an annual report that states:

(1) The name of the entity and its jurisdiction of formation;

(2) The information required by section 30-21-404(a), Idaho Code;

(3) The street and mailing addresses of the entity's principal office; and

(4) The name of at least one (1) governor.

(b) Information in an annual report must be current as of the date the report is signed by the entity.

(c) The annual report must be delivered to the secretary of state for filing each year before the end of the month during which the public organic record of a domestic filing entity became effective, the statement of qualification of a domestic limited liability partnership became effective, or a foreign filing entity registered to do business in this state. Beginning one (1) year after the public organic record of a domestic filing entity became effective, the statement of qualification of a domestic limited liability partnership became effective, or a foreign filing entity registered to do business in this state, and each year thereafter, the annual report must be received in the office of the secretary of state not later than the close of business on the final day of the applicable month. If the secretary of state finds that such report conforms to the requirements of this chapter, he shall file the same.

(d) If an annual report does not contain the information required by this section, the secretary of state shall promptly notify the reporting entity in a record and return the report for correction.

(e) If an annual report contains the name or address of a registered agent that differs from the information shown in the records of the secretary of state immediately before the report becomes effective, the differing information is considered a statement of change under section 30-21-407, Idaho Code.

History.

I.C., § 30-21-213, as added by 2015, ch. 243, § 8, p. 758.

Official Comment

The requirement that the report include the name of at least one governor of the entity will be a new requirement for some entities in some states. There has been increasing pressure from law enforcement for access to more information about the ownership and control of legal entities. The identification of a governor for each entity will give law enforcement the ability to contact a person with some knowledge about the affairs of the entity.

§ 30-21-214. Fees. — (a) The secretary of state shall collect the following fees for copying and certifying the copy of any filed record:

(1) Twenty-five cents (25¢) per page for copying; and

(2) Ten dollars ($10.00) for the certification.

(b) The secretary of state shall collect the following fees when an entity filing is delivered for filing: (1) Statement of merger $30.00

(2) Statement of withdrawal $30.00

(3) Statement of interest exchange $30.00

(4) Statement of abandonment $30.00

(5) Statement of conversion $30.00

(6) Statement of domestication $30.00

(7) Annual report .... No fee

(8) Articles of incorporation of a business corporation $100.00

(9) Articles of incorporation of a nonprofit corporation $30.00

(10) Statement of qualification of a limited liability partnership $100.00

(11) Certificate of amendment to certificate of assumed business name $10.00

(12) Certificate of amendment to certificate of assumed business name with only an address change .... No fee (13) Certificate of assumed business name $25.00

(14) Certificate of cancellation of a certificate of assumed business name .... No fee (15) Certificate of limited partnership of a limited partnership $100.00

(16) Certificate of organization of a limited liability company $100.00

(17) Other public organic documents or a statement not otherwise specified herein $30.00

(18) Commercial registered agent listing statement $100.00

(19) Commercial registered agent termination statement $20.00

(20) Commercial registered agent statement of change $30.00

(21) Registered agent statement of resignation .... No fee
(22) Statement designating a registered agent $20.00

(23) Foreign entity registration statement $100.00

(24) Amendment of foreign entity registration statement $30.00

(25) Statement of withdrawal of foreign entity registration statement $20.00

(26) Statement of correction $30.00

(27) Application for reinstatement following administrative dissolution $30.00

(28) Statement of dissolution of a limited liability company .... No fee (29) Statement of partnership authority $100.00

(30) Certificate of existence $10.00

(31) Application for use of deceptively similar name $20.00

(32) Application for reserved name $20.00

(33) Notice of transfer of reserved name $20.00

(34) Application for registered name $60.00

(35) Application for renewal of registered name $60.00

(36) Amendment of articles of incorporation $30.00

(37) Restatement of articles of incorporation with amendment of articles $30.00

(38) Articles of dissolution .... No fee

(39) Articles of revocation of dissolution $30.00

(40) Certificate of administrative action $10.00

(41) Certificate of judicial dissolution .... No fee (42) Statement of termination .... No fee

(c) The withdrawal under section 30-21-204, Idaho Code, of a filed record before it is effective or the correction of a filed record under section 30-21-205, Idaho Code, does not entitle the person on whose behalf the record was filed to a refund of the filing fee.

(d) The secretary of state shall collect a surcharge of forty dollars ($40.00) for providing evidence of filing an entity filing within eight (8) working hours after the entity filing is delivered, either in person or electronically, for filing.

(e) The secretary of state shall collect a surcharge of one hundred dollars ($100) for providing evidence of filing an entity filing that is submitted to the secretary of state before 1:00 p.m. mountain time and that requests expedited service within the same working day that the filing is submitted.

(f) The secretary of state shall collect a surcharge of twenty dollars ($20.00) for filing any form that is not generated by the secretary of state's electronic filing system and that requires manual data entry; provided, however, that no surcharge for manual data entry shall be collected under this subsection for any form that is not available for online filing by the secretary of state's electronic filing system.

History.

I.C., § 30-21-214, as added by 2015, ch. 243, § 8, p. 758; am. 2017, ch. 34, § 1, p. 54; am. 2018, ch. 25, § 1, p. 45; am. 2019, ch. 204, § 1, p. 623.

STATUTORY NOTES

Amendments.

The 2017 amendment, by ch. 34, in subsection (b), deleted former paragraph (25), which read: "Notice of cancellation of foreign entity registration statement . . . . No fee", deleted former paragraph (31), which read: "Combined statement of partnership authority and qualification of limited liability partnership . . . . $100.00", and deleted former paragraph (43), which read: "Certificate of reinstatement . . . . No fee", and redesignated former paragraphs (26) to (45) as present paragraphs (25) to (42), inserted "partnership" in paragraph (29), substituted "No fee" for "$30.00" in paragraph (38); and substituted "action . . . . $10.00" for "dissolution . . . . No fee" in paragraph (40).

The 2018 amendment, by ch. 25, substituted "No fee" for "$30.00" in paragraph (b)(42); and rewrote subsection (e), which formerly read: "The secretary of state shall collect a surcharge of twenty dollars ($20.00) for filing any non-typed record or any record that is not on a standard form prescribed by the secretary of state, except no surcharge will be collected for a non-typed certificate of assumed business name or a certificate of amendment to certificate of assumed business name."

The 2019 amendment, by ch. 204, in subsection (d), substituted "forty dollars ($40.00)" for "twenty dollars ($20.00)" near the beginning and inserted "either in person or electronically" near the end; inserted present subsection (e) and redesignated former subsection (e) as subsection (f); and added the proviso at the end of that subsection.

Effective Dates.

Section 2 of S.L. 2018, ch. 25 provided that the amendment of this section by section 1 of that act should take effect on and after October 31, 2018.

Official Comment

This section establishes the filing fees for all documents that may be delivered to the filing office for filing under the Code.

Part 3
Name of Entity

« Title 30 •, « Ch. 21 », « Pt. 3 », • § 30-21-301 »

Idaho Code § 30-21-301

§ 30-21-301. Permitted names. — (a) Except as otherwise provided in subsection (d) or (f) of this section, the name of a domestic filing entity or domestic limited liability partnership, and the name under which a foreign entity may register to do business in this state, must be distinguishable on the records of the secretary of state from any:

(1) Name of an existing domestic filing entity which at the time is not administratively dissolved for more than six (6) months;

(2) Name of a limited liability partnership whose statement of qualification is in effect;

(3) Name under which a foreign entity registered to do business in this state under part 5 of this chapter;

(4) Name reserved under section 30-21-303, Idaho Code; or

(5) Name registered under section 30-21-304, Idaho Code.

(b) If an entity consents in a record to the use of its name and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is distinguishable on the records of the secretary of state from any name in any category of names in subsection (a) of this section, the name of the consenting entity may be used by the person to which the consent was given.

(c) Except as otherwise provided in subsection (d) of this section, in determining whether a name is the same as or not distinguishable on the records of the secretary of state from the name of another entity, words, phrases, or abbreviations indicating the type of entity, such as "corporation," "corp.," "incorporated," "Inc.," "professional corporation," "PC," "P.C.," "professional association," "PA," "P.A.," "Limited," "Ltd.," "limited partnership," "LP," "L.P.," "limited liability partnership," "LLP," "L.L.P.," "registered limited liability partnership," "RLLP," "R.L.L.P.," "limited liability limited partnership," "LLLP," "L.L.L.P.," "registered

limited liability limited partnership," "RLLLP," "R.L.L.L.P.," "limited liability company," "LLC" or "L.L.C." may not be taken into account.

(d) An entity may consent in a record to the use of a name that is not distinguishable on the records of the secretary of state from its name except for the addition of a word, phrase, or abbreviation indicating the type of entity or as provided in subsection (c) of this section. In such a case, the entity need not change its name pursuant to subsection (b) of this section.

(e) An entity name may not contain language falsely stating or implying government affiliation or stating or implying that the entity is organized for a purpose other than that permitted by this act.

(f) An entity may use a name that is not distinguishable from a name described in subsection (a)(1) through (5) of this section if the entity delivers to the secretary of state a certified copy of a final judgment of a court of competent jurisdiction establishing the right of the entity to use the name in this state.

(g) Nothing in this section shall abrogate or limit the law as to unfair competition or unfair practice in the use of trade names, nor derogate from the common law, the principles of equity, or the statutes of this state or of the United States with respect to the right to acquire and protect trade names.

(h) The use of a name in violation of this part shall not affect or vitiate the entity existence, but the courts of this state, having equity jurisdiction, may, upon the application of the state, or of any person interested or affected, enjoin such entity in violation from doing business under any name assumed in violation of this part.

History.

I.C., § 30-21-301, as added by 2015, ch. 243, § 9, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section adopts the “distinguishable on the records” test for availability of an entity name and rejects the “deceptively similar” test widely used in the past.

§ 30-21-302. Name requirements for certain types of entities. — (a) The name of a business corporation must contain the word "corporation," "incorporated," "company," or "limited," or the abbreviation "Corp.," "Inc.," "Co.," or "Ltd.," or words or abbreviations of similar import in another language; provided however, that if the word "company" or its abbreviation is used it shall not be immediately preceded by the word "and" or by an abbreviation of or symbol representing the word "and." If the business corporation is a professional entity, the name may alternatively contain the word "chartered," "professional association," or "professional corporation," or the abbreviation "P.A.," "P.C.," or "CHTD" or words or abbreviations of similar import in another language.

(b) The name of a limited partnership may contain the name of any partner. The name of a limited partnership that is not a limited liability limited partnership must contain the phrase "limited partnership" or the abbreviation "L.P." or "LP" and may not contain the phrase "limited liability limited partnership" or "registered limited liability limited partnership" or the abbreviation "L.L.L.P.," "LLLP," "R.L.L.L.P.," or "RLLLP." If the limited partnership is a limited liability limited partnership, the name must contain the phrase "limited liability limited partnership" or the abbreviation "L.L.L.P.," "LLLP," "R.L.L.L.P.," or "RLLLP" and may not contain the abbreviation "L.P." or "LP." If the limited partnership is a professional entity, the name may include the word "professional" before the word "limited" or the letter "P" at the beginning of any of the permitted abbreviations.

(c) The name of a limited liability partnership must contain the words "limited liability partnership" or "registered limited liability partnership" or the abbreviation "L.L.P.," "R.L.L.P.," "LLP," or "RLLP." If the limited liability partnership is a professional entity, the name may include the word "professional" before the word "limited" or the letter "P" at the beginning of any of the permitted abbreviations.

(d) The name of a limited liability company must contain the phrase "limited liability company" or "limited company" or the abbreviation "L.L.C.," "LLC," "L.C.," or "LC." "Limited" may be abbreviated as "Ltd.,"

and “company” may be abbreviated as “Co.” If the limited liability company is a professional entity, the name may include the word “professional” before the word “limited” or the letter “P” at the beginning of any of the permitted abbreviations.

(e) The name of a limited cooperative association must contain the words “limited cooperative association” or “limited cooperative” or the abbreviation “L.C.A.” or “LCA.” “Limited” may be abbreviated as “Ltd.” “Cooperative” may be abbreviated as “Co-op.,” “Coop.,” “Co op,” or “Coop.” “Association” may be abbreviated as “Assoc.,” “Assoc,” “Assn.,” or “Assn.”

(f) The name of a statutory trust may contain the words “company,” “association,” “club,” “foundation,” “fund,” “institute,” “society,” “union,” “syndicate,” “limited,” or “trust,” or words or abbreviations of similar import, and may contain the name of a beneficial owner, a trustee, or any other person.

History.

I.C., § 30-21-302, as added by 2015, ch. 243, § 9, p. 758.

Official Comment 1. Corporations. Subsection (a) is derived from Model Business Corporation Act, § 4.01(a). The Model Nonprofit Corporation Act does not require the name of a nonprofit corporation to include a corporate designator.

2. Limited Partnerships. Subsection (b)(1)) is derived from Uniform Limited Partnership Act (2001) (Last Amended 2013), § 114(a)-(c). The 1976/1985 version of the Uniform Limited Partnership Act prohibited the use of a limited partner’s name in the name of a limited partnership except in unusual circumstances. That approach derived from the 1916 version of the Uniform Limited Partnership Act and has become antiquated. In 1916, most business organizations were either unshielded (*e.g.*, general partnerships) or partially shielded (*e.g.*, limited partnerships), and it was reasonable for third parties to believe that an individual whose own name appeared in the name of a business would “stand behind” the business. Today most businesses have a full shield (*e.g.*, corporations, limited liability companies, most limited liability partnerships), and corporate, LLC and LLP statutes generally pose no barrier to the use of an owner’s name in the

name of the entity. The Code eliminates the restriction on the use of a name of a limited partner and puts limited partnerships on equal footing with these other "shielded" entities.

3. Limited Liability Partnerships. Subsection (c) is derived from Uniform Partnership Act (1997) (Last Amended 2013), § 902(b).

4. Limited Liability Companies. Subsection (d) is derived from Uniform Limited Liability Company Act (2006) (Last Amended 2013), § 112(a).

5. Limited Cooperative Associations. Subsection (e) is derived from Uniform Limited Cooperative Association Act (2007) (Last Amended 2013), § 113(b).

6. Statutory Trusts. Subsection (f) is derived from Uniform Statutory Trust Entity Act (2009) (Last Amended 2013), § 213(a). That act does not require the name of a statutory trust to include a traditional limited liability designator. Such a requirement would be inconsistent with current practice under the Delaware Statutory Trust Act and other business trust entity statutes. For example, the names of mutual funds typically do not contain a limited liability appellation, though Section 35(d) of the Investment Company Act of 1940, which is applicable to a statutory trust that is a registered investment company, prohibits "materially deceptive or misleading" names. 15 U.S.C. § 80a-34(d). See also Rule 35d-1, 17 C.F.R. § 270.35d-1 (listing types of names that have been deemed "materially deceptive or misleading").

§ 30-21-303. Reservation of name. — (a) A person may reserve the exclusive use of an entity name by delivering an application to the secretary of state for filing. The application must state the name and address of the applicant and the name to be reserved. If the secretary of state finds that the entity name is available, the secretary of state shall reserve the name for the applicant's exclusive use for one hundred twenty (120) days.

(b) The owner of a reserved entity name may transfer the reservation to another person by delivering to the secretary of state a signed notice in a record of the transfer that states the name and address of the transferee.

History.

I.C., § 30-21-303, as added by 2015, ch. 243, § 9, p. 758.

Official Comment

This section does not provide for the renewal of a name reservation for successive 120 day periods. A new reservation may be filed upon the expiration of a reservation, but by requiring a new filing this section creates the possibility that another party may timely submit a reservation for the same name. It was considered appropriate to allow for that possibility so that the procedure in this section cannot be used to block a name indefinitely. Compare Section 1-304 which authorizes a renewable registration of certain names.

§ 30-21-304. Registration of name. — (a) A foreign filing entity or foreign limited liability partnership not registered to do business in this state under part 5 of this chapter may register its name, or an alternate name adopted pursuant to section 30-21-506, Idaho Code, if the name is distinguishable on the records of the secretary of state from the names that are not available under section 30-21-301, Idaho Code.

(b) To register its name or an alternate name adopted pursuant to section 30-21-506, Idaho Code, a foreign filing entity or foreign limited liability partnership must deliver to the secretary of state for filing an application stating the entity's name, the jurisdiction and date of its formation, and any alternate name adopted pursuant to section 30-21-506, Idaho Code. If the secretary of state finds that the name applied for is available, the secretary of state shall register the name for the applicant's exclusive use.

(c) The registration of a name under this section is effective for one (1) year after the date of registration.

(d) A foreign filing entity or foreign limited liability partnership whose name registration is effective may renew the registration for successive one (1) year periods by delivering, not earlier than three (3) months before the expiration of the registration, to the secretary of state for filing a renewal application that complies with this section. When filed, the renewal application renews the registration for a succeeding one (1) year period.

(e) A foreign filing entity or foreign limited liability partnership whose name registration is effective may register as a foreign filing entity or foreign limited liability partnership under the registered name or consent in a signed record to the use of that name by another entity.

History.

I.C., § 30-21-304, as added by 2015, ch. 243, § 9, p. 758.

Official Comment

Unlike the reservation of a name under Section 1-303, a registration of a name under this section may be renewed for successive periods thus

permitting a name to be protected for a period longer than the initial registration period. Use of the procedure in this section is limited, however, to the names of foreign filing entities and foreign limited liability partnerships that are not registered to do business in the state. The purpose of this section is to permit a foreign entity to make sure its name will be available in the event it should choose to register in the state at some time in the future.

Part 4
Registered Agent of Entity

Idaho Code § 30-21-401

§ 30-21-401. Definitions. — In this part:

(1) "Designation of agent" means a statement designating a registered agent delivered to the secretary of state for filing under:

(A) Section 30-27-129, Idaho Code, the "Uniform Unincorporated Nonprofit Association Act"; or

(B) Section 30-21-411, Idaho Code, by a nonregistered foreign entity or domestic nonfiling entity.

(2) "Registered agent filing" means:

(A) The public organic record of a domestic filing entity;

(B) A statement of qualification of a domestic limited liability partnership;

(C) A registration statement filed pursuant to section 30-21-503, Idaho Code; or

(D) A designation of agent.

(3) "Represented entity" means:

(A) A domestic filing entity;

(B) A domestic limited liability partnership;

(C) A registered foreign entity;

(D) A domestic or foreign unincorporated nonprofit association for which a designation of agent is in effect;

(E) A domestic nonfiling entity for which a designation of agent is in effect; or

(F) A nonregistered foreign entity for which a designation of agent is in effect.

History.

I.C., § 30-21-401, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

"Designation of agent." [(1)] — A designation of agent is an optional filing that may be made by an entity that does not otherwise make a public filing in the state naming an agent for service of process. If a state has not enacted the Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013), paragraph (A) of this definition should be omitted.

"Registered agent filing." [(2)] — Some states require that filings in addition to those listed in this definition, such as articles of amendment or articles of merger, state the registered agent information of the entity making the filing. In states where that is the case, this definition should be amended to add the following additional provision:

> "(E) any other filing with the [Secretary of State] under an entity's organic law that must include the information required by Section 1-404(a)."

"Represented entity." [(3)] — This definition is used in this part as a way of referring to all of the various types of entities that have registered agents.

§ 30-21-402. Entities required to designate and maintain registered agent. — The following shall designate and maintain a registered agent in this state:

(1) A domestic filing entity; (2) A domestic limited liability partnership; and (3) A registered foreign entity.

History.

I.C., § 30-21-402, as added by 2015, ch. 243, § 10, p. 758.

Official Comment The Model Registered Agents Act (2006) (Last Amended 2013), from which this part of Article 1 is derived, does not contain a provision mandating which entities must designate a registered agent, leaving that to the state's specific entity acts.

When an organic law for a filing entity is integrated into the Code, the provision specifying the contents of the public organic record for that type of filing entity will require a statement of the registered agent for that entity but the organic law will not include an express requirement to have a registered agent.

§ 30-21-403. Addresses in filing. — If a provision of this part other than section 30-21-410(a)(4), Idaho Code, requires that a record state an address, the record must state:

(1) A street address in this state; and

(2) A mailing address in this state if different from the address described in subsection (1) of this section.

History.

I.C., § 30-21-403, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

When this part requires that a filing state an address, the address used must always be a geographic location. Where a person uses a post office box as its mailing address, paragraph (2) requires that the post office box address also be stated.

This section is derived from Model Registered Agent Act (2006) (Last Amended 2013) § 4.

§ 30-21-404. Designation of registered agent. — (a) A registered agent filing must be signed by the represented entity and state:

(1) The name of the entity's commercial registered agent; or

(2) If the entity does not have a commercial registered agent:

(A) The name and address of the entity's noncommercial registered agent; or

(B) The title of an office or other position with the entity, if service of process, notices, and demands are to be sent to whichever individual is holding that office or position, and the address to which process, notices or demands are to be sent.

(b) The designation of a registered agent pursuant to subsection (a)(1) or (2)(A) of this section is an affirmation of fact by the represented entity that the agent has consented to serve.

(c) The secretary of state shall make available in a record as soon as practicable a daily list of filings that contain the name of a registered agent. The list must:

(1) Be available for at least fourteen (14) calendar days;

(2) List in alphabetical order the names of the registered agents; and

(3) State the type of filing and name of the represented entity making the filing.

History.

I.C., § 30-21-404, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

Subsection (a)(1) gives an entity the option of listing just the name of its commercial registered agent in a registered agent filing and omitting the address of the registered agent. If the commercial registered agent subsequently changes its address, that change will be reflected in the filing made by the agent under Section 1-405, as amended under Section 1-409,

but no change will be necessary in the registered agent filing of any of the entities represented by the commercial registered agent. The address of an entity's commercial registered agent may be ascertained from the records of the Secretary of State or other state filing office by consulting its listing under Section 1-405.

The address of an entity's noncommercial registered agent is usually not a business address of the represented entity. On the other hand, subsection (a)(2)(B) permits an entity to designate a person within the organization, such as its general counsel, to serve as its registered agent; and in that circumstance the address of the registered agent may very well be a business address of the represented entity.

The addresses required by subsection (a) to be stated in a registered agent filing must satisfy the requirements in Section 1-403.

Subsection (b) avoids the need to include with a registered agent filing a consent of the registered agent to serve as such.

Subsection (c) creates a procedure that will permit registered agents to determine if they have been named in filings of which they were not aware by periodically consulting the list prepared by the filing office. Subsection (c) requires the registered agents to be listed in alphabetical order to facilitate the use of the list by registered agents and also to indicate the type of filing (e.g., articles of incorporation, certificates of limited partnership, appointments of agents under Section 1-411, etc.) in which each registered agent is named.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 5.

§ 30-21-405. Listing of commercial registered agent. — (a) A person may become listed as a commercial registered agent by delivering to the secretary of state for filing a commercial registered agent listing statement signed by the person which states:

(1) The name of the individual or the name of the entity, type of entity, and jurisdiction of formation of the entity;

(2) That the person is in the business of serving as a commercial registered agent in this state; and

(3) The address of a place of business of the person in this state to which service of process, notices, and demands being served on or sent to entities represented by the person may be delivered.

(b) A commercial registered agent listing statement may include the information regarding acceptance by the agent of service of process, notices, and demands in a form other than a written record as provided in section 30-21-412(d), Idaho Code.

(c) If the name of a person delivering to the secretary of state for filing a commercial registered agent listing statement is not distinguishable on the records of the secretary of state from the name of another commercial registered agent listed under this section, the person shall adopt a fictitious name that is distinguishable and use that name in its statement and when it does business in this state as a commercial registered agent.

(d) The secretary of state shall note the filing of a commercial registered agent listing statement in the index of filings maintained by the secretary of state for each entity represented by the agent at the time of the filing. The statement has the effect of amending the registered agent filing for each of those entities to:

(1) Designate the person becoming listed as a commercial registered agent as the commercial registered agent of each of those entities; and

(2) Delete the name and address of the former agent from the registered agent filing of each of those entities.

History.

I.C., § 30-21-405, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

This section is a substantial simplification of practice because it removes the need to amend the filed record of every entity represented by a commercial registered agent when the agent changes its address.

Subsection (a)(3) only permits a commercial registered agent to list one address where service of process and other notices may be sent to entities represented by the agent. This may require a change in practice for registered agents who have previously maintained more than one address in a state and have permitted represented entities to choose which address they would use in their registered agent filings. A corporation, for example, located in one part of a state might include in its articles of incorporation an address for its registered agent which is the address of an office of the agent located close to the corporation and which is different than the address used by a corporation in another part of the state which has the same registered agent but uses a different office of the agent. In the example given, the registered agent will need to pick just one address in the state where all service of process will be sent to it. If a commercial registered agent wishes to maintain more than one office in a state where service of process will be received by it, it can accomplish that result by organizing separate entities to conduct its business in the state and filing separate statements for each entity under this section.

The address required by subsection (a)(3) to be stated in a commercial registered agent listing statement must satisfy the requirements of Section 1-403.

Subsection (d) is a transitional provision that deals with the effect on the entities represented by a registered agent at the time the agent is first listed under this section. The effect is to amend the registered agent filing of each such entity to delete the address of the registered agent consistent with Section 1-404(a)(1).

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 6.

§ 30-21-406. Termination of listing of commercial registered agent. — (a) A commercial registered agent may terminate its listing as a commercial registered agent by delivering to the secretary of state for filing a commercial registered agent termination statement signed by the agent that states:

(1) The name of the agent as listed under section 30-21-405, Idaho Code; and

(2) That the agent is no longer in the business of serving as a commercial registered agent in this state.

(b) A commercial registered agent termination statement takes effect at 12:01 a.m. on the thirty-first day after the day on which it is filed by the secretary of state.

(c) The commercial registered agent promptly shall furnish each entity represented by the agent notice in a record of the filing of the commercial registered agent termination statement.

(d) When a commercial registered agent termination statement takes effect, the commercial registered agent ceases to be the registered agent for each entity formerly represented by it. Until an entity formerly represented by a terminated commercial registered agent designates a new registered agent, service of process may be made on the entity pursuant to section 30-21-412, Idaho Code. Termination of the listing of a commercial registered agent under this section does not affect any contractual rights a represented entity has against the agent or that the agent has against the entity.

History.

I.C., § 30-21-406, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

This section provides a procedure for a commercial registered agent to withdraw from the business of providing registered agent services. Use of the procedure in this section will terminate the status of the registered agent as the agent for service of process of all the entities represented by the

agent. Thus, the procedure in this section differs from the procedure in Section 1-410, which permits a registered agent to resign with respect to just a single represented entity instead of resigning generally with respect to all of its represented entities.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 7.

§ 30-21-407. Change of registered agent by entity. — (a) A represented entity may change the information on file under section 30-21-404(a), Idaho Code, by delivering to the secretary of state for filing a statement of change signed by the entity which states:

(1) The name of the entity; and

(2) The information that is to be in effect as a result of the filing of the statement of change.

(b) The interest holders or governors of a domestic entity need not approve the filing of: (1) A statement of change under this section; or (2) A similar filing changing the registered agent or registered office, if any, of the entity in any other jurisdiction.

(c) A statement of change under this section designating a new registered agent is an affirmation of fact by the represented entity that the agent has consented to serve.

(d) As an alternative to using the procedure in this section, a represented entity may change the information on file under section 30-21-404(a), Idaho Code, by amending its most recent registered agent filing in a manner provided by the law of this state other than this act for amending the filing.

History.

I.C., § 30-21-407, as added by 2015, ch. 243, § 10, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

A change in the identity of the registered agent of a represented entity or a change of the office address of a registered agent are usually routine matters that do not affect the rights of the interest holders of the represented entity. This section permits those changes to be made without a formal amendment of an entity's public organic document, without approval of its

interest holders, and, indeed, even without formal approval by its governors (i.e., the persons managing the entity's affairs, such as the board of directors of a corporation).

Subsection (c) avoids the need to file with a statement of change a consent of the new registered agent being designated.

Subsection (d) makes clear that the procedures in this section are not exclusive. A common way in which an entity changes its registered agent or registered office is to include the change in an amendment of its public organic document or in its annual/biennial report.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 8.

§ 30-21-408. Change of name or address by noncommercial registered agent. — (a) If a noncommercial registered agent changes its name or its address in effect with respect to a represented entity under section 30-21-404(a), Idaho Code, the agent shall deliver to the secretary of state for filing, with respect to each entity represented by the agent, a statement of change signed by the agent which states:

(1) The name of the entity;

(2) The name and address of the agent in effect with respect to the entity; (3) If the name of the agent has changed, the new name; (4) If the address of the agent has changed, the new address; and (b) A noncommercial registered agent promptly shall furnish the represented entity with notice in a record of the delivery to the secretary of state for filing of a statement of change and the changes made in the statement.

History.

I.C., § 30-21-408, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

This section permits a noncommercial registered agent to change the name and address of the agent that appears in the registered agent filing of an entity represented by the agent. Because the noncommercial registered agent is not listed under Section 1-405, the agent will not be able to use the procedures in Section 1-409 which permit commercial registered agents to make only one filing to change their name and address for all entities represented by them. Thus the noncommercial registered agent will need to make a filing under this section for each entity represented by the agent.

An address included in a statement of change must satisfy the requirements in Section 1-403.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 9.

§ 30-21-409. Change of name, address, type of entity, or jurisdiction of formation by commercial registered agent. — (a) If a commercial registered agent changes its name, its address as listed under section 30-21-405(a), Idaho Code, its type of entity, or its jurisdiction of formation, the agent shall deliver to the secretary of state for filing a statement of change signed by the agent which states:

(1) The name of the agent as listed under section 30-21-405(a), Idaho Code;

(2) If the name of the agent has changed, the new name;

(3) If the address of the agent has changed, the new address; and

(4) If the agent is an entity:

(i) If the type of entity of the agent has changed, the new type of entity; and

(ii) If the jurisdiction of formation of the agent has changed, the new jurisdiction of formation.

(b) The filing by the secretary of state of a statement of change under subsection (a) of this section is effective to change the information regarding the agent with respect to each entity represented by the agent.

(c) A commercial registered agent shall promptly furnish to each entity represented by it a notice in a record of the filing by the secretary of state of a statement of change relating to the name or address of the agent and the changes made in the statement.

(d) If a commercial registered agent changes its address without delivering for filing a statement of change as required by this section, the secretary of state may cancel the listing of the agent under section 30-21-405, Idaho Code. A cancellation under this subsection has the same effect as a termination under section 30-21-406, Idaho Code. Promptly after canceling the listing of an agent, the secretary of state shall serve notice in a record in the manner provided in section 30-21-412(b) or (c), Idaho Code, on:

(1) Each entity represented by the agent, stating that the agent has ceased to be the registered agent for the entity and that, until the entity designates a new registered agent, service of process may be made on the entity as provided in section 30-21-412, Idaho Code; and

(2) The agent stating that the listing of the agent has been canceled under this section.

History.

I.C., § 30-21-409, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

This section permits a commercial registered agent to make a single filing that has the effect of changing the name or address of the agent for all of the entities represented by it.

An address included in a statement of change must satisfy the requirements in Section 1-403.

Subsection (d) provides a procedure by which the filing office may cancel the listing of a commercial registered agent when the filing office learns that the agent has changed its address without amending its listing as a commercial registered agent. When the filing office acts to cancel the listing of a commercial registered agent, the filing office is required to notify both (i) the entities represented by the agent that they no longer have a valid registered agent and (ii) the agent that it no longer is listed as a commercial registered agent. Unlike in the case of a resignation under Section 1-410, which is initiated by the registered agent and thus does not require a notice from the filing office to the agent, notice by the filing office to the agent is needed under this section so that the agent has notice that its representation of the entities it previously represented has been terminated.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 10.

§ 30-21-410. Resignation of registered agent. — (a) A registered agent may resign as agent for a represented entity by delivering to the secretary of state for filing a statement of resignation signed by the agent which states:

(1) The name of the entity;

(2) The name of the agent;

(3) That the agent resigns from serving as registered agent for the entity; and

(4) The address of the entity to which the agent will send the notice required by subsection (c) of this section.

(b) A statement of resignation takes effect on the earlier of:

(1) 12:01 a.m. on the thirty-first day after the day on which it is filed by the secretary of state; or

(2) The designation of a new registered agent for the represented entity.

(c) A registered agent shall promptly furnish to the represented entity notice in a record of the date on which a statement of resignation was filed.

(d) When a statement of resignation takes effect, the person that resigned ceases to have responsibility under this part for any matter thereafter tendered to it as agent for the represented entity. The resignation does not affect any contractual rights the entity has against the agent or that the agent has against the entity.

(e) A registered agent may resign with respect to a represented entity whether or not the entity is in good standing.

History.

I.C., § 30-21-410, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

Resignation under this section may be accomplished solely by action of the registered agent and does not require the cooperation or consent of the represented entity. Whether a resignation violates a contract between the

registered agent and the represented entity is beyond the scope of this part and subsection (d) preserves whatever claims a represented entity may have against its registered agent for a wrongful termination. Even if a resignation were to violate such a contract, the resignation would still be effective if the provisions of this section are followed.

Resignation under this section relates only to the entity named in the statement of resignation. Thus, the procedure in this section differs from the procedure in Section 1-406 which terminates the status of the agent as agent for all of the entities represented by it.

The requirements of Section 1-403 with respect to addresses do not apply to subsection (a)(4) because the registered agent may not have all the required information available.

Subsection (b) delays the effectiveness of a statement of resignation for 31 days to allow the notice of the resignation that must be sent under subsection (c) to reach the represented entity and to allow the represented entity to arrange for a substitute registered agent.

Subsection (e) makes clear that a registered agent may resign with respect to an entity that is not in good standing and supersedes the contrary administrative practice in some states of refusing to accept any filings with respect to an entity that is not in good standing until the problem with the entity's standing is cured.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 11.

§ 30-21-411. Designation of registered agent by nonregistered foreign entity or nonfiling domestic entity. — (a) A nonregistered foreign entity or domestic nonfiling entity may deliver to the secretary of state for filing a statement designating a registered agent signed by the entity that states:

(1) The name, type of entity, and jurisdiction of formation of the entity; and

(2) The information required by section 30-21-404(a), Idaho Code.

(b) A statement under subsection (a) of this section is effective for five (5) years after the date of filing unless canceled or terminated earlier.

(c) A statement under subsection (a) of this section must be signed by a person authorized to manage the affairs of the nonregistered foreign entity or domestic nonfiling entity. The signing of the statement is an affirmation of fact that the person is authorized to manage the affairs of the entity and that the agent has consented to serve.

(d) Designation of a registered agent under subsection (a) of this section does not register a nonregistered foreign entity to do business in this state.

(e) A statement under subsection (a) of this section may not be rejected for filing because the name of the entity signing the statement is not distinguishable on the records of the secretary of state from the name of another entity appearing on those records. The filing of such a statement does not make the name of the entity signing the statement unavailable for use by another entity.

(f) An entity that delivers to the secretary of state for filing a statement under subsection (a) of this section designating a registered agent may cancel the statement by delivering to the secretary of state for filing a statement of cancellation that states the name of the entity and that the entity is canceling its designation of a registered agent in this state.

(g) A statement under subsection (a) of this section for a nonregistered foreign entity terminates on the date the entity becomes a registered foreign entity.

History.

I.C., § 30-21-411, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

Filing under this section is elective, and no inference should be drawn from the failure of an entity to make such a filing.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 12.

§ 30-21-412. Service of process, notice or demand on entity. — (a) A represented entity may be served with any process, notice or demand required or permitted by law by serving its registered agent.

(b) If a represented entity ceases to have a registered agent, or if its registered agent cannot with reasonable diligence be served, the entity may be served by registered or certified mail, return receipt requested, or by similar commercial delivery service, addressed to the entity at the entity's principal office. The address of the principal office of a domestic filing entity, domestic limited liability partnership, or registered foreign entity must be as shown in the entity's most recent annual report filed by the secretary of state. Service is effected under this subsection on the earliest of:

(1) The date the entity receives the mail or delivery by the commercial delivery service;

(2) The date shown on the return receipt, if signed by the entity; or

(3) Five (5) days after its deposit with the United States postal service or commercial delivery service, if correctly addressed and with sufficient postage or payment.

(c) If process, notice or demand cannot be served on an entity pursuant to subsection (a) or (b) of this section, service may be made by handing a copy to the individual in charge of any regular place of business or activity of the entity if the individual served is not a plaintiff in the action.

(d) Service of process, notice, or demand on a registered agent must be in a written record, but service may be made on a commercial registered agent in other forms and subject to such requirements as the agent has stated in its listing under section 30-21-405, Idaho Code, that it will accept.

(e) Service of process, notice or demand may be made by other means under law other than this act.

History.

I.C., § 30-21-412, as added by 2015, ch. 243, § 10, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Subsection (b) offers three alternative methods for establishing the date service is effected, a date important for determining the time frame in which an entity must respond to the process, notice, or demand served. Under subsection (b)(1), service is effected on the date or receipt by the entity of the mail or commercial delivery. Under subsection (b)(2), service is effected on the date shown on the return receipt, if signed on behalf of the entity. Under subsection (b)(3), service is effected five days after it is deposited with the Postal Service or with a commercial delivery service, if correctly addressed and with correct postage or payment. Service is effective at the earliest of the three listed circumstances. But for the party effecting service there are difficulties of proof under the first two circumstances. Under subsection (b)(1) the exact date of the receipt by the entity of mail or commercial delivery is peculiarly within the knowledge of the entity. Under subsection (b)(2) the return receipt must be signed on behalf of the entity. That requirement is designed to assure that the service is actually received by the entity. The problem is that the signature on the return receipt may not always show unambiguously that the signer was acting for the entity and was authorized to do so. As a practical matter, therefore, parties effecting service under subsection (b) may find it most convenient to rely on subsection (3) and to maintain their own records so that the date of deposit in the mails or with a commercial delivery service can easily be established.

Subsection (c) provides a means for serving process on an entity that cannot be served under subsection (a) or (b). Some entity organic laws require that service of process in that circumstance be made on the filing office, but that leaves unanswered the question of what the filing office should do with the process. Compare Fed. R. Civ. Proc. 4(h)(1) which permits service to be made on an officer or managing or general agent of an entity.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 13.

§ 30-21-413. Duties of registered agent. — The only duties under this part of a registered agent that has complied with this part are:

(1) To forward to the represented entity at the address most recently supplied to the agent by the entity any process, notice or demand pertaining to the entity which is served on or received by the agent;

(2) To provide the notices required by this act to the entity at the address most recently supplied to the agent by the entity;

(3) If the agent is a noncommercial registered agent, to keep current the information required by section 30-21-404(a), Idaho Code, in the most recent registered agent filing for the entity; and

(4) If the agent is a commercial registered agent, to keep current the information listed for it under section 30-21-405(a), Idaho Code.

History.

I.C., § 30-21-413, as added by 2015, ch. 243, § 10, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section is limited to prescribing the duties of a registered agent under this part. An agent may undertake other responsibilities to a represented entity, such as by contract or course of dealing, but those duties will be determined under other law.

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 14.

§ 30-21-414. Jurisdiction and venue. — The designation or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state. The address of the agent does not determine venue in an action or a proceeding involving the entity.

History.

I.C., § 30-21-414, as added by 2015, ch. 243, § 10, p. 758.

Official Comment

This section makes clear that the address of a registered agent does not determine venue. This section may be inconsistent with other law or procedural rules in a state, and thus existing law on venue should be reviewed when this article is considered for adoption in a state. *Compare Cooper v. Chevron U.S.A., Inc.*, 132 N.M. 382, 49 P.3d 61 (N.M. 2002) (applying New Mexico statute permitting venue "in the county where the statutory agent designated by the foreign corporation resides").

This section is derived from Model Registered Agents Act (2006) (Last Amended 2013) § 15.

Part 5
Foreign Entities

Idaho Code § 30-21-501

§ 30-21-501. Governing law. — (a) The law of the jurisdiction of formation of an entity governs:

(1) The internal affairs of the entity;

(2) The liability that a person has as an interest holder or governor for a debt, obligation, or other liability of the entity;

(3) The liability of a series of a limited liability company, a statutory trust, or any other unincorporated entity.

(b) A foreign entity is not precluded from registering to do business in this state because of any difference between the law of the entity's jurisdiction of formation and the law of this state.

(c) Registration of a foreign entity to do business in this state does not authorize the foreign entity to engage in any activities or affairs or exercise any power that the domestic entity of the type to which it most closely corresponds may not engage in or exercise in this state.

(d) A foreign professional entity rendering services in this state shall be subject to the laws of this state and the code of ethics or professional responsibility that are applicable to the profession in which such professional entity is rendering services in this state.

History.

I.C., § 30-21-501, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

Subsection (a) provides that the laws of the jurisdiction of formation of a foreign entity, rather than the laws of this state, govern both the internal affairs of the entity and the liability of its interest holders and governors for the obligations of the entity.

The limited liability company and statutory trust entity statutes of several states authorized those entities to create series. According to those statutes, if series are properly created, a debt, obligation, or liability associated with the property of a particular series is enforceable only against property of that series, and not against the property of the limited liability company or statutory trust entity generally or any other series thereof. Subsection (a)(3) respects that type of internal shield, not just in limited liability companies and statutory trust entities but also in any other form of unincorporated entity that is authorized to create series. Subsection (a)(3) does not address, however, the myriad of other unsettled issues pertaining to series.

Subsections (b) and (c) together make clear that although a foreign entity may not be denied registration simply because of a difference between the laws of its jurisdiction of formation and the laws of this state, the foreign entity may not engage in any activity or exercise any power in this state that a domestic entity of the same type may not engage in or exercise. Thus subsection (c) puts a registered foreign entity on the same, but no better, footing as a domestic entity.

§ 30-21-502. Registration to do business in this state. — (a) A foreign filing entity or foreign limited liability partnership may not do business in this state until it registers with the secretary of state under this chapter.

(b) A foreign filing entity or foreign limited liability partnership doing business in this state may not maintain an action or proceeding in this state unless it is registered to do business in this state.

(c) The failure of a foreign filing entity or foreign limited liability partnership to register to do business in this state does not impair the validity of a contract or act of the foreign filing entity or foreign limited liability partnership or preclude it from defending an action or proceeding in this state.

(d) A limitation on the liability of a series of foreign unincorporated entity or an interest holder or governor of a foreign filing entity or of a partner of a foreign limited liability partnership is not waived solely because the foreign unincorporated entity or any series thereof, foreign filing entity or foreign limited liability partnership does business in this state without registering.

(e) Section 30-21-501(a) and (b), Idaho Code, applies even if a foreign entity fails to register under this chapter.

History.

I.C., § 30-21-502, as added by 2015, ch. 243, § 11, p. 758.

CASE NOTES

Effect of non-registration.

Standing.

Effect of Non-Registration.

This section requires a foreign entity to register with the state in order to conduct business within Idaho. However, an entity's failure to register only affects its capacity to sue. The entity's contract formations, or its defense in

any arising litigation, remains unimpaired. McGimpsey v. D&L Ventures, Inc., — Idaho —, 443 P.3d 219 (2019).

Standing.

Delaware corporation had standing to bring an action seeking an easement over property because the transacting of business did not include the ownership of real property, and there was no allegation of any other business conducted in Idaho. Capstar Radio Operating Co. v. Lawrence, 143 Idaho 704, 152 P.3d 575 (2007) (decided under former § 30-1-1502).

Official Comment

The purpose of subsection (b) is to induce foreign entities to register without imposing harsh or erratic sanctions. Often the failure to register is a result of inadvertence or bona fide disagreement as to the scope of Section 1-505 which is necessarily imprecise; and the imposition of harsh sanctions in those situations is inappropriate.

The sanction in subsection (b) of closing the courts of the state to suits brought by foreign entities that should have registered is not a punitive one. Subsection (c) makes clear that the failure to register does not impair the validity of an entity's acts and subsection (d) preserves the effectiveness of any liability shields applicable under the entity's organic law. If an entity should have registered and failed to do so, it may still enforce its contracts simply by registering.

Subsection (b) does not prevent a foreign entity that has failed to register from "defending" an action or proceeding. The distinction between "maintaining" and "defending" an action or proceeding under subsection (b) is determined on the basis of whether affirmative relief is sought. A nonregistered foreign entity may interpose any defense or permissive or mandatory counterclaim to defeat a claimed recovery, but may not obtain an affirmative judgment based on the counterclaim unless it has registered.

§ 30-21-503. Foreign registration statement. — (a) To register to do business in this state, a foreign filing entity or foreign limited liability partnership must deliver a foreign registration statement to the secretary of state for filing. The statement must be signed by the entity and state:

(1) The name of the foreign filing entity or foreign limited liability partnership and, if the name does not comply with section 30-21-301, Idaho Code, an alternate name adopted pursuant to section 30-21-506(a), Idaho Code;

(2) The type of entity and, if it is a foreign limited partnership, whether it is a foreign limited liability limited partnership;

(3) The entity's jurisdiction of formation;

(4) The street and mailing addresses of the entity's principal office and, if the law of the entity's jurisdiction of formation requires the entity to maintain an office in that jurisdiction, the street and mailing addresses of the office;

(5) The information required by section 30-21-404(a), Idaho Code; and

(6) The name and mailing address of at least one (1) governor.

(b) A foreign filing entity or foreign limited liability partnership must deliver to the secretary of state with a foreign registration statement a certificate of existence or a record of similar import signed by the secretary of state or other official having custody of the entity's public organic record in the entity's jurisdiction of formation.

History.

I.C., § 30-21-503, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

The foreign registration statement provides certain basic information about the foreign entity to ensure that citizens of the state have access to that information in their dealings with the foreign entity. The statement also

facilitates making the foreign entity subject to the jurisdiction of the courts of the state.

Once registered, a foreign entity must file an annual/biennial report under Section 1-213.

§ 30-21-504. Amendment of foreign registration statement. — (a) A registered foreign entity shall sign and deliver to the secretary of state for filing an amendment to its foreign registration statement if there is a change in:

(1) The name of the entity;

(2) The type of entity, including, if it is a foreign limited partnership, whether the entity became or ceased to be a foreign limited liability limited partnership;

(3) The entity's jurisdiction of formation;

(4) An address required by section 30-21-503(4), Idaho Code; or

(5) The information required by section 30-21-404(a), Idaho Code.

(b) A registered foreign entity must deliver to the secretary of state with an amendment to its foreign registration statement for a change under subsection (a)(1), (2) or (3) of this section, a certificate of existence or a record of similar import signed by the secretary of state or other official having custody of the entity's public organic record in the entity's jurisdiction of formation.

History.

I.C., § 30-21-504, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

This section works in tandem with the annual / biennial report required by Section 1-213 to keep the information of record in the office of the filing office about a registered foreign entity up to date.

§ 30-21-505. Activities not constituting doing business. — (a) Activities of a foreign filing entity or foreign limited liability partnership that do not constitute doing business in this state under this chapter include:

(1) Maintaining, defending, mediating, arbitrating, or settling an action or proceeding;

(2) Carrying on any activity concerning its internal affairs, including holding meetings of its interest holders or governors;

(3) Maintaining accounts in financial institutions;

(4) Maintaining offices or agencies for the transfer, exchange and registration of securities of the entity or maintaining trustees or depositories with respect to those securities;

(5) Selling through independent contractors;

(6) Soliciting or obtaining orders by any means if the orders require acceptance outside this state before they become contracts;

(7) Creating or acquiring indebtedness, mortgages or security interests in property;

(8) Securing or collecting debts or enforcing mortgages or security interests in property securing the debts, and holding, protecting or maintaining property so acquired;

(9) Conducting an isolated transaction that is not in the course of similar transactions;

(10) Owning, without more, property; and

(11) Doing business in interstate commerce.

(b) A person does not do business in this state solely by being an interest holder or governor of a foreign entity that does business in this state.

(c) This section does not apply in determining the contacts or activities that may subject a foreign filing entity or foreign limited liability partnership to service of process, taxation or regulation under the law of this state other than this act.

History.

I.C., § 30-21-505, as added by 2015, ch. 243, § 11, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

The Code does not attempt to formulate an inclusive definition of what constitutes doing business in a state. Rather, the concept is defined in a negative fashion by subsections (a) and (b), which state that certain activities do not constitute doing business. In general terms, any conduct more regular, systematic, or extensive than that described in subsection (a) constitutes doing business and requires the foreign entity to register to do business. Typical conduct requiring registration includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general purposes. But the passive owning of real estate for investment purposes does not constitute doing business. *See* subsection (a)(10).

The test of "doing business" defined in a negative way in subsections (a) and (b) applies only to the question whether the entity's contacts with the state are such that it must register under this part. It is not applicable to other questions such as whether the entity is amenable to service of process under state "long-arm" statutes or liable for state or local taxes. An entity that has registered (or is required to register) will generally be subject to suit and state taxation in the state, while an entity that is subject to service of process or state taxation in a state will not necessarily be required to register.

The list of activities set forth in subsection (a) is not exhaustive.

1. Engaging in Litigation

A foreign entity is not "doing business" solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, recover possession of personal property, obtain the appointment of a receiver,

intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies. Similarly, a foreign entity is not required to register merely because it files a complaint with a governmental agency or participates in an administrative proceeding within the state.

2. Internal Affairs

A foreign entity does not "do business" within a state under this section merely because some of its internal affairs occur within a state. Thus, an entity may hold meetings of its governors or interest holders within a state without first registering. It also may maintain offices or agencies within a state relating solely to the transfer, exchange or registration of its interests without registering. Other activities relating to the internal affairs of the entity that do not constitute doing business under this section include having officers or representatives who reside within or are physically present in the state; while there, the officers or representatives may make executive decisions relating to the internal affairs of the entity without imposing on the entity the requirement that it register, if these activities are not so regular and systematic as to cause the residence to be viewed as a business office.

3. Sales through Independent Contractors

Under subsection (a)(5), a foreign entity need not register if it sells goods in the state through independent contractors. These transactions are viewed as transactions by the independent contractors, not by the entity itself even though the entity sets some limits or ground rules for its contractors. If these controls are sufficiently pervasive, however, the entity may be deemed to be selling for itself in intrastate commerce, and not through the independent contractors and therefore engaged in doing business in the state.

4. Creating, Acquiring, or Collecting Debts

The mere act of making a loan by a foreign entity that is not in the business of making loans does not constitute doing business in the state in which the loan is made. On the same theory a foreign entity may obtain security for the repayment of a loan, and foreclose or enforce the lien or security interest to collect the loan, without being deemed to be doing

business. Similarly, a refunding or "roll over" of a loan or its adjustment or compromise does not involve doing business.

5. Isolated Transactions

The concept of "doing business" involves regular, repeated, and continuing business contacts of a local nature. A single agreement or isolated transaction within a state does not constitute doing business if there is no intention to repeat the transaction or engage in similar transactions. The Code does not impose the limitation found in some statutes, such as Section 15.01(b)(10) of the Model Business Corporation Act, that the isolated transaction be completed within 30 days. A foreign entity should not be required to register simply because it engages in an isolated transaction that takes longer than 30 days to complete.

6. Interstate Transactions

A foreign entity is not "doing business" within the meaning of this section if it is transacting business in interstate commerce (subsection (a)(11)) or soliciting or obtaining orders that must be accepted outside the state before they become contracts (subsection (a)(6)). These limitations reflect the provisions of the United States Constitution that grant to the United States Congress exclusive power over interstate commerce, and preclude states from imposing restrictions or conditions upon this commerce. These sections should be construed in a manner consistent with judicial decisions under the United States Constitution. Under these decisions, a foreign entity is not required to register even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. An entity need not register even if it also does work and performs acts within the state incidental to the interstate business, e.g., if it takes or enforces a security interest incidental to these transactions. Nor is it required to register merely because it sends traveling salesmen or solicitors into a state so long as contracts are not made within the state. Similarly, an office may be maintained by an entity in a state without registering if the office's functions relate solely to interstate commerce.

Purchases of goods may of course be in interstate commerce as readily as sales. Thus, the purchase of personal property by a foreign entity for shipment in interstate commerce out of the state does not require the entity to register.

§ 30-21-506. Noncomplying name of foreign entity. — (a) A foreign filing entity or foreign limited liability partnership whose name does not comply with section 30-21-301, Idaho Code, for an entity of its type may not register to do business in this state until it adopts, for the purpose of doing business in this state, an alternate name that complies with section 30-21-301, Idaho Code. A foreign entity that registers under an alternate name under this subsection need not comply with this state's assumed or fictitious name statute. After registering to do business in this state with an alternate name, a foreign entity shall do business in this state under:

(1) The alternate name;

(2) The foreign entity's name with the addition of its jurisdiction of formation; or

(3) Name the foreign entity is authorized to use under this state's assumed or fictitious name statute.

(b) If a registered foreign entity changes its name to one that does not comply with section 30-21-301, Idaho Code, it may not do business in this state until it complies with subsection (a) of this section by amending its registration to adopt an alternate name that complies with section 30-21-301, Idaho Code.

History.

I.C., § 30-21-506, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

A foreign entity must register under its true name if that name satisfies the requirements of Section 1-301. If the true name is unavailable because it is not distinguishable upon the records of the filing office from a name already in use or reserved or registered, the entity may use an alternate name.

Because the alternate name under which a foreign entity registers will be part of the records of the filing office, subsection (a) provides that an assumed or fictitious name filing with respect to the alternate name is not

required. However, the assumed or fictitious name statute will apply to any other name under which the foreign entity does business in the state.

A foreign entity that registers to do business in the state may do business under a fictitious name to the same extent as a domestic entity.

§ 30-21-507. Withdrawal of registration of registered foreign entity. — (a) A registered foreign entity may withdraw its registration by delivering a statement of withdrawal to the secretary of state for filing. The statement of withdrawal must be signed by the entity and state:

(1) The name of the entity and its jurisdiction of formation;

(2) That the entity is not doing business in this state and that it withdraws its registration to do business in this state;

(3) That the entity revokes the authority of its registered agent to accept service on its behalf in this state; and

(4) An address to which service of process may be made under subsection (b) of this section.

(b) After the withdrawal of the registration of an entity, service of process in any action or proceeding based on a cause of action arising during the time the entity was registered to do business in this state may be made pursuant to section 30-21-412, Idaho Code.

History.

I.C., § 30-21-507, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

The statement of withdrawal must set forth an address where service of process may be made on the entity pursuant to Section 1-412. There is no limit on how long the withdrawn entity must keep that address up to date.

§ 30-21-508. Withdrawal deemed on conversion or domestication to domestic filing entity or domestic limited liability partnership. — A registered foreign entity that converts or domesticates to any type of domestic filing entity or to a domestic limited liability partnership is deemed to have withdrawn its registration on the effective date of the conversion or domestication.

History.

I.C., § 30-21-508, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

When a registered foreign entity has converted to a domestic filing entity or domestic limited liability partnership, information about the entity in its capacity as a domestic entity will continue to be of record in the filing office. At that point, there is no further reason for it to be registered and this section automatically treats its prior registration as withdrawn.

§ 30-21-509. Withdrawal on dissolution or conversion to nonfiling entity other than limited liability partnership. — (a) A registered foreign entity that has dissolved and completed winding up or has converted to a domestic or foreign nonfiling entity other than a limited liability partnership shall deliver a statement of withdrawal to the secretary of state for filing. The statement must be signed by the dissolved or converted entity and state:

(1) In the case of a foreign entity that has completed winding up: (A) Its name and jurisdiction of formation; and

(B) That the foreign entity surrenders its registration to do business in this state; and (2) In the case of a foreign entity that has converted to a domestic or foreign nonfiling entity other than a limited liability partnership: (A) The name of the converting foreign entity and its jurisdiction of formation; (B) The type of nonfiling entity to which it has converted and its jurisdiction of formation; (C) That it withdraws its registration to do business in this state and revokes the authority of its registered agent to accept service on its behalf; and (D) A mailing address to which service of process may be made under subsection (b) of this section.

(b) After a withdrawal under this section is effective, service of process in any action or proceeding based on a cause of action arising during the time the foreign filing entity was registered to do business in this state may be made pursuant to section 30-21-412, Idaho Code.

History.

I.C., § 30-21-509, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

When a registered foreign entity has dissolved and completed winding up, or has converted to a nonfiling entity other than a limited liability partnership, there is no further reason for information about it to appear in the records of the filing office. This section thus requires delivery of a statement of withdrawal for the purpose of removing the entity from the rolls of active entities.

§ 30-21-510. Transfer of registration. — (a) If a registered foreign entity merges into a nonregistered foreign entity or converts to a foreign entity required to register with the secretary of state to do business in this state, the foreign entity shall deliver to the secretary of state for filing an application for transfer of registration. The application must be signed by the surviving or converted entity and state:

(1) The name of the registered foreign entity before the merger or conversion;

(2) The type of entity it was before the merger or conversion;

(3) The name of the applicant entity and, if the name does not comply with section 30-21-301, Idaho Code, an alternate name adopted pursuant to section 30-21-506(a), Idaho Code;

(4) The type of entity of the applicant entity and its jurisdiction of formation; and

(5) The following information regarding the applicant entity, if different than the information for the foreign entity before the merger or conversion:

(A) The street and mailing addresses of the principal office of the entity and, if the law of the entity's jurisdiction of formation requires it to maintain an office in that jurisdiction, the street and mailing addresses of that office; and

(B) The information required pursuant to section 30-21-404(a), Idaho Code.

(b) When an application for transfer of registration takes effect, the registration of the registered foreign entity to do business in this state is transferred without interruption to the entity into which it has merged or to which it has been converted.

History.

I.C., § 30-21-510, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

The purpose of this section is to clarify the status of the registered foreign entity in the public records of the state. A filing under this section has the two-fold effect of canceling the authority of the foreign entity to do business in the state while at the same time reregistering it as the new type of foreign entity. If the reregistered foreign entity subsequently wishes to withdraw its registration to do business in the state, it may do so under Section 1-507.

§ 30-21-511. Termination of registration. — (a) The secretary of state may terminate the registration of a registered foreign entity in the manner provided in subsections (b) and (c) of this section if the entity does not:

(1) Deliver its annual report to the secretary of state for filing not later than the date it is due; (2) Have a registered agent as required by section 30-21-402, Idaho Code; or (3) Deliver to the secretary of state for filing a statement of change under section 30-21-407, Idaho Code, not later than thirty (30) days after a change occurs in the name or address of the entity's registered agent.

(b) The secretary of state may terminate the registration of a registered foreign entity by: (1) Filing a notice of termination or noting the termination in the records of the secretary of state; and (2) Delivering a copy of the notice or the information in the notation to the entity's registered agent or, if the entity does not have a registered agent, to the entity's principal office.

(c) The notice must state or the information in the notation under subsection (b) of this section must include: (1) The effective date of the termination, which must be at least sixty (60) days after the date the secretary of state delivers the copy; and (2) The grounds for termination under subsection (a) of this section.

(d) The registration of a registered foreign entity to do business in this state ceases on the effective date of the notice of termination or notation under subsection (b) of this section, unless before that date the entity cures each ground for termination stated in the notice or notation. If the entity cures each ground, the secretary of state shall file a record so stating.

History.

I.C., § 30-21-511, as added by 2015, ch. 243, § 11, p. 758.

Official Comment

This section is analogous to the procedures for administrative dissolution under Part 6.

§ 30-21-512. Action by attorney general. — The attorney general may maintain an action to enjoin a foreign filing entity or foreign limited liability partnership from doing business in this state in violation of this act.

History.

I.C., § 30-21-512, as added by 2015, ch. 243, § 11, p. 758.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment The authority stated here has been part of corporate law for more than a century and has been carried over into the law of unincorporated business entities. Nowadays, the authority is rarely if ever invoked in either realm of entity law.

Part 6
Administrative Dissolution

Idaho Code § 30-21-601

§ 30-21-601. Grounds. — The secretary of state may commence a proceeding under section 30-21-602, Idaho Code, to dissolve a domestic filing entity administratively if the entity does not:

(1) Deliver an annual report to the secretary of state by the date it is due;

(2) Have a registered agent in this state for sixty (60) consecutive days; or

(3) The secretary of state has credible information that the domestic filing entity has failed to notify the secretary of state within sixty (60) days after the occurrence that its registered agent has been changed or that its registered agent has resigned.

History.

I.C., § 30-21-601, as added by 2015, ch. 243, § 12, p. 758.

Official Comment

Administrative dissolution permits the filing office to clear its records of “dead wood” and free up names.

Limited liability partnerships are not filing entities and thus this part does not apply to them. Similar provisions apply to limited liability partnerships under sections 3-903 through 3-905.

§ 30-21-602. Procedure and effect. — (a) If the secretary of state determines that one (1) or more grounds exist under section 30-21-601, Idaho Code, for administratively dissolving a domestic filing entity, the secretary of state shall serve the entity pursuant to section 30-21-212, Idaho Code, with notice in a record of the secretary of state's determination.

(b) If a domestic filing entity, not later than sixty (60) days after service of the notice required by subsection (a) of this section, does not cure or demonstrate to the satisfaction of the secretary of state the nonexistence of each ground determined by the secretary of state, the secretary of state shall administratively dissolve the entity by signing a statement of administrative dissolution that recites the grounds for dissolution and the effective date of dissolution. The secretary of state shall file the statement and serve a copy on the entity pursuant to section 30-21-212, Idaho Code.

(c) A domestic filing entity that is dissolved administratively continues its existence as the same type of entity but may not carry on any activities except as necessary to wind up its activities and affairs and liquidate its assets in the manner provided in its organic law or to apply for reinstatement under section 30-21-603, Idaho Code.

(d) The administrative dissolution of a domestic filing entity does not terminate the authority of its registered agent.

History.

I.C., § 30-21-602, as added by 2015, ch. 243, § 12, p. 758.

Official Comment

Many failures to comply with statutory requirements that may give rise to administrative dissolution occur because of oversight or inadvertence and are usually corrected promptly when brought to the entity's attention. Subsections (a) and (b) therefore provide a mandatory notice by the filing office to each entity subject to administrative dissolution and a 60-day grace period following the notice before the statement of administrative dissolution may be filed.

In most instances, the issue whether the entity is subject to administrative dissolution will not be controverted. If an entity is administratively dissolved, it may petition the filing office for reinstatement under Section 1-603 and, if this is denied, it may appeal to the courts under Section 1-604.

§ 30-21-603. Reinstatement. — (a) A domestic filing entity that is dissolved administratively under section 30-21-602, Idaho Code, may apply to the secretary of state for reinstatement not later than ten (10) years after the effective date of dissolution. The application must be signed by the entity and state:

(1) The name of the entity at the time of its administrative dissolution and, if needed, a different name that satisfies section 30-21-301, Idaho Code;

(2) The address of the principal office of the entity and the information required by section 30-21-404(a), Idaho Code;

(3) The effective date of the entity's administrative dissolution; and

(4) That the grounds for dissolution did not exist or have been cured.

(b) To be reinstated, an entity must pay all fees, taxes, interest, and penalties that were due to the secretary of state at the time of the entity's administrative dissolution and all fees, taxes, interest, and penalties that would have been due to the secretary of state while the entity was dissolved administratively.

(c) If the secretary of state determines that an application under subsection (a) of this section contains the required information, is satisfied that the information is correct, and determines that all payments required to be made to the secretary of state by subsection (b) of this section have been made, the secretary of state shall:

(1) Cancel the statement of administrative dissolution and prepare a statement of reinstatement that states the secretary of state's determination and the effective date of reinstatement;

(2) File the statement of reinstatement; and

(3) Serve a copy on the entity.

(d) When reinstatement under this section is effective the following rules apply:

(1) The reinstatement relates back to and takes effect as of the effective date of the administrative dissolution.

(2) The domestic filing entity resumes carrying on its activities and affairs as if the administrative dissolution had never occurred.

(3) The rights of a person arising out of an act or omission in reliance on the dissolution before the person knew or had notice of the reinstatement are not affected.

History.

I.C., § 30-21-603, as added by 2015, ch. 243, § 12, p. 758.

CASE NOTES

Retroactive Application.

Where there was no showing of legislative intent to apply new business corporation statute retroactively, the court refused to apply it to a case that was still pending at the time the new act became effective. Scona, Inc. v. Green Willow Trust, 133 Idaho 283, 985 P.2d 1145 (1999) (decided under former § 30-1-1422).

Official Comment

Some states require that reinstatement be sought within two years of administrative dissolution. Other states provide a longer time, or do not impose any time limit. The concern with not imposing any time limit is that the process of reinstatement may be abused by unscrupulous people seeking to reinstate a dormant entity that has been abandoned by its original interest holders and that they wish to appropriate for improper ends. On the other hand, the concern with imposing a time limit is that if those in charge of an entity have neglected to file an annual report or otherwise subjected the entity to administrative dissolution, they may also not realize that the two year period [10 years in Idaho] is running against them and thus do not learn of the administrative dissolution until after it is too late to correct.

Subsection (a) will apply if, before an entity is reinstated, another entity has taken the name of the entity seeking reinstatement.

§ 30-21-604. Judicial review of denial of reinstatement. — (a) If the secretary of state denies a domestic filing entity's application for reinstatement following administrative dissolution, the secretary of state shall serve the entity with a notice in a record that explains the reasons for denial.

(b) Within thirty (30) days after service of a notice of denial of reinstatement under subsection (a) of this section, an entity may appeal from the denial by petitioning the district court of Ada county to set aside the dissolution. The petition must be served on the secretary of state and contain a copy of the secretary of state's notice of dissolution, the company's application for reinstatement, and the secretary of state's notice of denial.

(c) The district court may, if grounds exist, order the secretary of state to reinstate a dissolved entity or take other action the court considers appropriate.

History.

I.C., § 30-21-604, as added by 2015, ch. 243, § 12, p. 758.

Official Comment

Because the grounds for administrative dissolution under Section 1-601 are limited and straight-forward, it is unlikely there will be a dispute about whether an entity has corrected the reasons for its administrative dissolution. But in the event a dissolved entity disagrees with a determination by the filing office to deny the entity's application for reinstatement, this section gives the entity a limited right to seek judicial review of the denial of reinstatement.

Part 7
Miscellaneous Provisions

Idaho Code § 30-21-701

§ 30-21-701. Reservation of power to amend or repeal. — The legislature of this state has power to amend or repeal all or part of this act at any time, and all domestic and foreign entities subject to this act are governed by the amendment or repeal.

History.

I.C., § 30-21-701, as added by 2015, ch. 243, § 13, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Provisions similar to this section have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to this section. This section is a generalized form of the type of provision found in many entity organic laws, the purpose of which is to avoid any possible argument that an entity has contractual or vested rights in any specific statutory provision of its organic law and to ensure that the state may in the future modify its entity statutes as it deems appropriate and require existing entities to comply with the statutes as modified.

All public organic documents of domestic entities organized under the Code and the registration of foreign entities under Part 5 of Article 1 of the Code are subject to the reservation of power set forth in this section. Further, entities formed or registered under earlier statutes superseded by the Code that contained a reservation of power are also subject to the

reservation of power in this section and bound by subsequent amendments to the Code.

Idaho Reporter's Comment.

This section, which is substantively identical to previous I.C. § 30-1-149, makes it clear that the Legislature at all times retains the power to amend or repeal the Act or any part of it. Because there are some old, now obsolete cases which held that corporations formed under certain statutes may acquire contractual rights under those statutes, it has become standard practice in modern corporation acts to negate any implications that corporations or shareholders possess any vested rights in existing law. Further, such a section is in effect mandated by Idaho Constitution, Art. XI, § 2, providing, *inter alia*, that " . . . the legislature shall provide by general law for the organization of corporations hereafter to be created: provided, that any such general law shall be subject to future repeal or alteration by the legislature."

§ 30-21-702. Supplemental principles of law. — Unless displaced by particular provisions of this act, the principles of law and equity supplement this act.

History.

I.C., § 30-21-702, as added by 2015, ch. 243, § 13, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

The supplemental principles of law encompass not only the law of agency, contracts, and estoppel and the law merchant, but all of the other principles listed in UCC Section 1-103: the law relative to capacity to contract, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other common law validating or invalidating causes, such as unconscionability.

§ 30-21-703. Uniformity or consistency of application and construction. — In applying and construing the chapters of this act based on uniform or model acts, consideration must be given to the need to promote uniformity or consistency of the law with respect to its subject matter among states that enact it.

History.

I.C., § 30-21-703, as added by 2015, ch. 243, § 13, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section differs from the usual provision in uniform acts because of the inclusion of the concept of "consistency" — in addition to "uniformity" — of application. In a state that enacts the full Code, it will include articles based on the Model Entity Transactions Act (2007) (Last Amended 2013), Model Business Corporation Act, and Model Nonprofit Corporation Act, which are not uniform acts. The same basic principle of interpretation should apply to those acts as found in the Code.

§ 30-21-704. Relation to electronic signatures in global and national commerce act. — This act modifies, limits, and supersedes the electronic signatures in global and national commerce act, 15 U.S.C. 7001 et seq., but does not modify, limit, or supersede section 101(c) of that act, 15 U.S.C. 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. 7003(b).

History.

I.C., § 30-21-704, as added by 2015, ch. 243, § 13, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section responds to specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

§ 30-21-705. Savings clause. — The repeal of a statute by this act does not affect:

(1) The operation of the statute or any action taken under it before its repeal;

(2) Any ratification, right, remedy, privilege, obligation or liability acquired, accrued or incurred under the statute before its repeal;

(3) Any violation of the statute or any penalty, forfeiture or punishment incurred because of the violation before its repeal; or

(4) Any proceeding, reorganization or dissolution commenced under the statute before its repeal, and the proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had not been repealed.

History.

I.C., § 30-21-705, as added by 2015, ch. 243, § 13, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section continues the prior laws replaced by the Code after the effective date of the Code with respect to a rights accrued and proceedings. But for this section the new law of the Code would displace the old laws in some circumstances. The power of a new act to displace the old statute with respect to conduct occurring before the new act's enactment is substantial. Millard H. Ruud, *The Savings Clause — Some Problems in Construction and Drafting*, 33 Tex. L. Rev. 285, 286-293 (1955). A court generally applies the law that exists at the time it acts.

§ 30-21-706. Severability clause. — If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

History.

I.C., § 30-21-706, as added by 2015, ch. 243, § 13, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

§ 30-21-707. Reserved

History.

I.C., § 30-21-707, as added by 2015, ch. 243, § 13, p. 758.

§ 30-21-708. Effective date. — This act takes effect July 1, 2015, except as otherwise provided.

History.

I.C., § 30-21-708, as added by 2015, ch. 243, § 13, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Part 8
Assumed Business Names

« Title 30 •, « Ch. 21 », « Pt. 8 », • § 30-21-801 »

§ 30-21-801. Short title. — This part may be cited as the "Idaho Assumed Business Names Act."

History.

I.C., § 30-21-801, as added by 2015, ch. 243, § 14, p. 758.

RESEARCH REFERENCES

ALR. — Liability of transferor of business operated under tradename for supplies furnished to successor by one without notice of transfer. 70 A.L.R.3d 1250.

§ 30-21-802. Purpose. — The purpose of this part is to ensure disclosure on the public record of the true names of persons who transact business in Idaho. Compliance with the provisions of this part does not confer any exclusive right to the use of an assumed business name in Idaho.

History.

I.C., § 30-21-802, as added by 2015, ch. 243, § 14, p. 758.

§ 30-21-803. Definitions. — When used in this part, the terms defined in this section shall have the following meanings:

(1) "Assumed business name" means:

(A) Any name other than the true name of any filing entity or limited liability partnership, under which name the entity holds itself out for the transaction of business in the state of Idaho; or

(B) Any name under which any individual, any group of individuals or other persons, or any entity other than a filing entity or limited liability partnership, holds itself out for the transaction of business in the state of Idaho, if that name does not include in full the true names of all individuals and other persons who have a financial interest in the business which is or may be transacted; which name shall not include words or abbreviations which falsely state or imply governmental affiliation or the existence of a filing entity or limited liability partnership.

(2) "Individual" means a natural person.

(3) "Transact business" means to engage in any commercial or other activity that is intended to or likely to produce a financial benefit, whether it is for the purpose of profit to the person who engages in the activity or for the purpose of supporting a charitable, benevolent or other nonprofit function.

(4) "True name" has the following meanings:

(A) When applied to a formally organized or registered entity, the name by which the entity is identified on its public organic record, application for authority to do business or registration statement which is on file with the appropriate governmental entity. As to a foreign formally organized or registered entity which has been required to adopt an assumed business name on its application for authority to do business or its registration statement as a condition of obtaining authority to do business in Idaho, the term "true name" shall include the assumed business name which appears on the application for authority to do business or registration statement.

(B) When applied to an individual, the name that the individual uses to bind himself or herself to legal obligations, or to obtain privileges, licenses or benefits from government. The true name will include the surname and some combination of given names or initials, and may include other identifiers such as “Jr.,” “3d” or “III.”

History.

I.C., § 30-21-803, as added by 2015, ch. 243, § 14, p. 758.

CASE NOTES

Decisions Under Prior Law

Assumed name.

Formally organized or registered entity.

Assumed Name.

Where partnership name consisted of the true surnames of each of the partners, without disclosing their initials or Christian names, and joined by “&” or “and,” it was not an assumed or fictitious name or a designation not showing the true and real names of the persons conducting the business. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

In the absence of statutory prohibition, a corporation may have, and be known to the public by, more than one name, and, in addition to the name given by charter, a corporation may acquire other names by user or reputation, and a contract entered into by or with a corporation, under an assumed name, may be enforced by either party, if corporation’s identity is established. Colorado Milling & Elevator Co. v. Proctor, 58 Idaho 578, 76 P.2d 438 (1938).

A contract made with an individual or a partnership doing business under an assumed or fictitious name is not invalid. Nowels v. Ketchersid Music, Inc., 80 Idaho 486, 333 P.2d 869 (1958).

Although the certificate of assumed or fictitious name was filed after the commencement of the action but before the trial, there was sufficient compliance to permit the maintaining of the action in claim or delivery to recover possession of certain phonographic equipment sold under several

conditional sales contracts, vendor being the real party in interest and being entitled to possession of such property or to the unpaid balance of the purchase price after due demand for payment and default. Nowels v. Ketchersid Music, Inc., 80 Idaho 486, 333 P.2d 869 (1958).

Formally organized or registered entity.

Where business owner failed to file as a foreign limited liability company and was, therefore, not a formally organized or registered entity and had filed no certificate of assumed business under § 53-504, § 53-509(1) did not operate to toll the statute of limitations in a slip and fall case, where plaintiff failed to exercise reasonable diligence in figuring out who to sue. Ketterling v. Burger King Corp., 152 Idaho 555, 272 P.3d 527 (2012).

§ 30-21-804. Name used as assumed business name. — (a) On or after July 1, 2015, an assumed business name:

(1) Must comply with section 30-21-301(a) and (e), Idaho Code; and (2) May not contain any of the words or abbreviations required for an entity under section 30-21-302, Idaho Code; and (3) May not be only the true name of an individual.

(b) The name of a filing entity or limited liability partnership does not have to be distinguishable from an assumed business name in a certificate of assumed business name filed before the entity's public organic record, statement of qualification, or foreign entity registration statement is filed, and the assumed business name is not invalidated by the subsequent filing by the filing entity or limited liability partnership.

History.

I.C., § 30-21-804, as added by 2015, ch. 243, § 14, p. 758; am. 2016, ch. 47, § 13, p. 98.

STATUTORY NOTES

Amendments.

The 2016 amendment, by ch. 47, substituted "July 1, 2015" for "July 1, 2014" in the introductory paragraph of subsection (a).

§ 30-21-805. Filing of certificate required. — (a) Any person who proposes to or intends to transact business in Idaho under an assumed business name shall, before beginning to transact business, deliver to the secretary of state for filing a certificate of assumed business name in a form prescribed by the secretary of state.

(b) A separate certificate of assumed business name must be filed for each assumed business name a person uses.

History.

I.C., § 30-21-805, as added by 2015, ch. 243, § 14, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

CASE NOTES

Decisions Under Prior Law Construction with other statutes.

Statutes of limitation.

Construction with Other Statutes.

Defendant's failure to file a certificate of assumed business name did not implicate the statute of limitation tolling provisions of § 5-229, where the uncontroverted evidence established that at all relevant times plaintiff had on file with the secretary of state a designation of registered agent authorized to receive service of process. Noreen v. Price Dev. Co., 135 Idaho 816, 25 P.3d 129 (Ct. App. 2001).

Statutes of Limitation.

Failure of the corporation to comply with Idaho's Assumed Business Names Act, did not support a tolling of the statute of limitations where slip and fall plaintiff failed to find out where her fall took place and sued the

wrong hotel entirely. Winn v. Campbell, 145 Idaho 727, 184 P.3d 852 (2008).

Where business owner failed to file as a foreign limited liability company and was, therefore, not a formally organized or registered entity and had filed no certificate of assumed business under this section, § 53-509(1) did not operate to toll the statute of limitations in a slip and fall case, where plaintiff failed to exercise reasonable diligence in figuring out who to sue. Ketterling v. Burger King Corp., 152 Idaho 555, 272 P.3d 527 (2012).

§ 30-21-806. Contents of certificate. — The certificate of assumed business name shall include:

(1) The assumed business name as it is used in the transaction of business; (2) The true names and business addresses of every person who has a financial or control interest in the business to be transacted under the assumed business name; (3) The general type of business to be transacted under the assumed business name using categories prescribed on the form by the secretary of state; (4) The signature of each person included on the certificate or the signature of an agent acting on behalf of all persons included on the certificate; and (5) Other information as the secretary of state may require.

History.

I.C., § 30-21-806, as added by 2015, ch. 243, § 14, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

§ 30-21-807. Effect of filing — Duration — Continuation. — (a) A person may conduct business under an assumed business name if a certificate of assumed business name has been filed with the secretary of state and is in effect.

(b) A certificate of assumed business name is in effect upon filing until it is canceled pursuant to section 30-21-809, Idaho Code.

(c) A certificate of assumed business name does not create an entity separate from the person doing business under the assumed business name.

History.

I.C., § 30-21-807, as added by 2015, ch. 243, § 14, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

CASE NOTES

Decisions Under Prior Law Interstate Transactions.

Where business done by company is purely interstate and neither sale nor trade acceptances were completed within state, failure to file certificate of company doing business under fictitious name did not render such trade acceptances prima facie fraudulent. Pacific States Automotive Fin. Corp. v. Addison, 45 Idaho 270, 261 P. 683 (1927).

§ 30-21-808. Amendment of certificate. — (a) If the identity or business address of any person who has a financial or control interest in the business transacted under the assumed business name changes, or if the certificate of assumed business name becomes materially misleading in any other way, the person who transacts that business shall, within ninety (90) days thereafter, file with the secretary of state a certificate of amendment to the certificate of assumed business name in a form prescribed by the secretary of state. The form may be in any medium permitted by the secretary of state.

(b) The certificate of amendment shall specify how the certificate of assumed business name is to be amended and shall be executed in the same manner as required for a certificate of assumed business name.

History.

I.C., § 30-21-808, as added by 2015, ch. 243, § 14, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

§ 30-21-809. Cancellation of certificate. — (a) A person who discontinues use of an assumed business name may cancel its certificate of assumed business name by filing with the secretary of state a certificate of cancellation in a form prescribed by the secretary of state. The form may be in any medium permitted by the secretary of state.

(b) The certificate of cancellation shall be executed in the same manner as required for a certificate of assumed business name.

History.

I.C., § 30-21-809, as added by 2015, ch. 243, § 14, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

§ 30-21-810. Consequences of noncompliance. — (a) Any person who transacts business in Idaho under an assumed business name without having complied with the requirements of this chapter [part] shall not be entitled to maintain any legal action in the courts of this state until the person has filed a certificate of assumed business name as required by this chapter [part].

(b) Any person who suffers a loss because of another person's noncompliance with the requirements of this chapter [part] shall be entitled to recover damages in the amount of the loss and attorney's fees and costs incurred in connection with recovery of damages.

(c) Noncompliance shall be held to include false, misleading or incomplete information in a certificate of assumed business name, as well as failure to file.

History.

I.C., § 30-21-810, as added by 2015, ch. 243, § 14, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions in subsections (a) and (b) were added by the compiler to correct the internal references.

CASE NOTES

Decisions Under Prior Law

Applicability.

The only remedies for or consequences of noncompliance prescribed in the Assumed Business Names Act of 1997 are those provided in this section, and tolling of the statute of limitation on a claim against a

noncomplying business is not a remedy provided by the legislation. Noreen v. Price Dev. Co., 135 Idaho 816, 25 P.3d 129 (Ct. App. 2001).

Failure of the corporation to comply with Idaho's Assumed Business Names Act, § 53-501 et seq., did not support a tolling of the statute of limitations where slip and fall plaintiff failed to find out where her fall took place and sued the wrong hotel entirely. Winn v. Campbell, 145 Idaho 727, 184 P.3d 852 (2008).

Where business owner failed to file as a foreign limited liability company and was, therefore, not a formally organized or registered entity and had filed no certificate of assumed business under § 53-504, subsection (1) did not operate to toll the statute of limitations in a slip and fall case, where plaintiff failed to exercise reasonable diligence in figuring out who to sue. Ketterling v. Burger King Corp., 152 Idaho 555, 272 P.3d 527 (2012).

The failure of a foreign business entity to properly register in the state had no effect on its ability to assign a promissory note and did not affect the validity or enforceability of the promissory note or the personal guarantees attendant to it. JBM, LLC v. Cintorino, 159 Idaho 772, 367 P.3d 167 (2016).

This section provides a cause of action for parties who suffer damages as a result of a party's failure to file a certificate of assumed business name. In a case where a plaintiff has been misled to his or her prejudice resulting in a failure to timely name a proper defendant before the expiration of the statute of limitations, the plaintiff's damages will include the lost opportunity for recovery in the original action. In order to recover in such a case in which personal injury is alleged, the plaintiff must show that he or she would have prevailed in his or her personal injury action and the amount of damages he or she would have recovered, in addition to any other damages that may have been proximately caused by the defendant's breach of its statutory duty. As this is a statutory remedy, a party must bring this action within 3 years of the accrual of the cause of action, pursuant to § 5-218. Gallagher v. Best Western Cottontree Inn, 161 Idaho 542, 388 P.3d 57 (2017).

When a guest's personal injury claim against a hotel was dismissed for failure of the guest's amended complaint to relate back to the guest's timely original complaint, and the hotel's owner had failed to filed an assumed name business certificate, remand was required to allow the trial court to

entertain a motion to amend the complaint to assert a claim under subsection (b). Gallagher v. Best Western Cottontree Inn, 161 Idaho 542, 388 P.3d 57 (2017).

Time for Filing.

Failure to file certificate affects only qualifications of person to sue, and, upon filing certificate, disqualification is removed and action may be maintained on contract made before or after such filing. Gallafent v. Tucker, 48 Idaho 240, 281 P. 375 (1929).

In action to foreclose pledges of personal property brought against partnership, failure of partner, filing cross-complaint in nature of action for accounting, to file certificate required by this law was not objectionable, where plaintiff knew he was dealing with a partnership and knew the true, full name of each partner. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

Although the certificate of assumed or fictitious name was filed after the commencement of the action but before the trial, there was sufficient compliance to permit the maintaining of the action in claim or delivery to recover possession of certain phonographic equipment sold under several conditional sales contracts, vendor being the real party in interest and being entitled to possession of such property or to the unpaid balance of the purchase price after due demand for payment and default. Nowels v. Ketchersid Music, Inc., 80 Idaho 486, 333 P.2d 869 (1958).

Plaintiffs doing business as a realty company brought an action upon a promissory note but did not allege compliance with former law requiring the filing of a certificate of trade name and defendants in their answers specifically pleaded plaintiffs' lack of capacity to maintain such action urging the bar of such former law. The court held that plaintiffs established sufficient compliance with former law to "maintain" the action by filing a supplemental complaint in which they alleged compliance with § 53-501 by the filing of the required certificate on an earlier date. Shinn v. Smith, 81 Idaho 57, 336 P.2d 690 (1959).

Waiver of Objection to Suit.

Noncompliance with former law requiring filing of certificate of trade name was affirmative defense going to plaintiff's capacity to sue, and when failure to allege compliance was not raised by demurrer or answer,

objection was waived. Gallafent v. Tucker, 48 Idaho 240, 281 P. 375 (1929); Shillingford v. Benewah County, 48 Idaho 447, 282 P. 864 (1929).

Part 9
Professional Entities

Idaho Code § 30-21-901

§ 30-21-901. Professional entities. — (a) "Allied professional services" means professional services that are so related in substance that they are frequently offered in conjunction with one another as parts of the same service package to the consumer.

(b) For the purpose of this act, the professions shall include the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, optometry, physical therapy, podiatry, professional geology, psychology, certified or licensed public accountancy, social work, surveying and veterinary medicine, and no others.

(c) This act shall not be deemed to authorize a professional entity to render allied professional services where the laws pertaining to specific professions or the codes of ethics or professional responsibility of any of the professions involved in such a proposed professional entity prohibit such a combination of professional services.

(d) No professional entity may render professional services in this state except through its managers, members, employees and agents who are duly licensed or otherwise legally authorized to render such professional services within this state. The term "employee," as used in this section, does not include clerks, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required.

(e) Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional services or to the standards for professional conduct. Any governor, interest holder, agent, or employee of a professional entity shall remain personally and fully

liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the professional entity to the person for whom such professional services were being rendered. The professional entity shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its governors, interest holders, agents, or employees while they are engaged on behalf of the professional entity in the rendering of professional services.

(f) The relationship of a person, whether as an individual or interest holder of a professional entity, to a professional entity with which such person is associated, whether as governor, interest holder, or employee, shall in no way modify or diminish the jurisdiction over such person of the governmental authority or state agency that licensed, certified or registered such person for a particular profession.

(g) No professional entity may offer an interest to or accept as an interest holder anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the entity was formed or professional entities, all of whose interest holders are duly licensed or otherwise legally authorized to render the same specific professional services as those for which the professional entity was formed. No member of a professional entity shall enter into a voting trust agreement or any other type of agreement vesting another person with the authority to exercise the voting power of his interest.

(h) If any governor, interest holder, agent, or employee of a professional entity who has been rendering professional services within this state accepts employment that, pursuant to existing law, places restrictions or limitations upon his continued rendering of such professional services, he shall be dissociated, and the remaining governors and interest holders of the professional entity shall take such action as is required to terminate such interest.

(i) No member of a professional entity may sell or transfer his interest in such professional entity except to another individual or professional entity eligible to be a member of such professional entity.

(j) The provisions of this section shall not be considered as repealing, modifying or restricting the applicable provisions of law regulating the several professions except insofar as such laws conflict with this section.

History.

I.C., § 30-21-901, as added by 2015, ch. 243, § 15, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

CASE NOTES

Decisions Under Prior Law

Intent.

Provisions relating to professional services corporations clearly contemplate relationships with the corporation outside that of employer-employee, e.g., officer or agent. King v. State, Dep't of Emp., 110 Idaho 312, 715 P.2d 982 (1986).

Former chapter clearly contemplated relationships with the corporation outside that of employer-employee, e.g., officer or agent. King v. State, Dep't of Emp., 110 Idaho 312, 715 P.2d 982 (1986).

Real Estate Agents.

Including real estate agents as rendering professional services would be inconsistent with the legislative intent in establishing a definition of professional services where a real estate agent only had to have a high school equivalent degree and pass a 90-hour classroom or correspondence course, and in order for a service to be professional, it had to be comparable to those occupations listed in terms of specialized higher education. Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004).

Including real estate agents as rendering professional services would be inconsistent with the legislative intent in establishing a definition of

professional services where a real estate agent only had to have a high school equivalent degree and pass a 90-hour classroom or correspondence course, and in order for a service to be professional, it had to be comparable to those occupations listed in terms of specialized higher education. Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004).

Chapter 22
ENTITY TRANSACTIONS

Part 1. General Provisions

Sec.

Part 2. Merger

Part 3. Interest Exchange

Part 4. Conversion

Part 5. Domestication

Part 1
General Provisions

Idaho Code § 30-22-101

§ 30-22-101. Short title. — This chapter may be cited as the "Idaho Model Entity Transactions Act."

History.

I.C., § 30-22-101, as added by 2015, ch. 243, § 17, p. 758.

Official Comment

Except as provided in section 2-110, this article replaces the state's current statutes governing merger, interest exchange, conversion, and domestication transactions.

§ 30-22-102. Definitions. — (a) As used in this chapter:

(1) "Acquired entity" means the entity, all of one (1) or more classes or series of interests that are acquired in an interest exchange.

(2) "Acquiring entity" means the entity that acquires all of one (1) or more classes or series of interests of the acquired entity in an interest exchange.

(3) "Approve" means, in the case of an entity, for its governors and interest holders to take whatever steps are necessary under the entity's organic rules, organic law, and other law to:

(A) Propose a transaction subject to this part [chapter];

(B) Adopt and approve the terms and conditions of the transaction; and

(C) Conduct any required proceedings or otherwise obtain any required votes or consents of the governors or interest holders.

(4) "Conversion" means a transaction authorized by part 4 of this chapter.

(5) "Converted entity" means the converting entity as it continues in existence after a conversion.

(6) "Converting entity" means the domestic entity that approves a plan of conversion pursuant to section 30-22-403, Idaho Code, or the foreign entity that approves a conversion pursuant to the law of its jurisdiction of formation.

(7) "Domesticated entity" means the domesticating entity as it continues in existence after a domestication.

(8) "Domesticating entity" means the domestic entity that approves a plan of domestication pursuant to section 30-22-503, Idaho Code, or the foreign entity that approves a domestication pursuant to the law of its jurisdiction of formation.

(9) "Domestication" means a transaction authorized by part 5 of this chapter.

(10) “Interest exchange” means a transaction authorized by part 3 of this chapter.

(11) “Interest holder liability” means:

(A) Personal liability for a liability of an entity which is imposed on a person:

(i) Solely by reason of the status of the person as an interest holder; or

(ii) By the organic rules of the entity that make one (1) or more specified interest holders or categories of interest holders liable in their capacity as interest holders for all or specified liabilities of the entity; or

(B) An obligation of an interest holder under the organic rules of an entity to contribute to the entity.

(12) “Merger” means a transaction in which two (2) or more merging entities are combined into a surviving entity pursuant to a record filed by the secretary of state.

(13) “Merging entity” means an entity that is a party to a merger and exists immediately before the merger becomes effective.

(14) “Plan” means a plan of merger, plan of interest exchange, plan of conversion or plan of domestication.

(15) “Plan of conversion” means a plan under section 30-22-402, Idaho Code.

(16) “Plan of domestication” means a plan under section 30-22-502, Idaho Code.

(17) “Plan of interest exchange” means a plan under section 30-22-302, Idaho Code.

(18) “Plan of merger” means a plan under section 30-22-202, Idaho Code.

(19) “Protected agreement” means:

(A) A record evidencing indebtedness and any related agreement in effect on July 1, 2007;

(B) An agreement that is binding on an entity on July 1, 2007;

(C) The organic rules of an entity in effect on July 1, 2007; or

(D) An agreement that is binding on any of the governors or interest holders of an entity on July 1, 2007.

(20) "Statement of conversion" means a statement under section 30-22-405, Idaho Code.

(21) "Statement of domestication" means a statement under section 30-22-505, Idaho Code.

(22) "Statement of interest exchange" means a statement under section 30-22-305, Idaho Code.

(23) "Statement of merger" means a statement under section 30-22-205, Idaho Code.

(24) "Surviving entity" means the entity that continues in existence after or is created by a merger under part 2 of this chapter.

(b) The following definitions outside this chapter apply to this chapter:

(1) "Distributional interest" — section 30-21-102(8), Idaho Code.

(2) "Domestic" — section 30-21-102(9), Idaho Code.

(3) "Entity" — section 30-21-102(11), Idaho Code.

(4) "Filing entity" — section 30-21-102(14), Idaho Code.

(5) "Foreign" — section 30-21-102(15), Idaho Code.

(6) "Governance interest" — section 30-21-102(18), Idaho Code.

(7) "Governor" — section 30-21-102(19), Idaho Code.

(8) "Interest" — section 30-21-102(20), Idaho Code.

(9) "Interest holder" — section 30-21-102(21), Idaho Code.

(10) "Jurisdiction" — section 30-21-102(22), Idaho Code.

(11) "Jurisdiction of formation" — section 30-21-102(23), Idaho Code.

(12) "Organic law" — section 30-21-102(33), Idaho Code.

(13) "Organic rules" — section 30-21-102(34), Idaho Code.

(14) “Person” — section 30-21-102(35), Idaho Code.

(15) “Private organic rules” — section 30-21-102(37), Idaho Code.

(16) “Property” — section 30-21-102(41), Idaho Code.

(17) “Public organic record” — section 30-21-102(42), Idaho Code.

(18) “Record” — section 30-21-102(44), Idaho Code.

(19) “Registered foreign entity” — section 30-21-102(46), Idaho Code.

(20) “Sign” — section 30-21-102(47), Idaho Code.

(21) “State” — section 30-21-102(48), Idaho Code.

(22) “Transfer” — section 30-21-102(50), Idaho Code.

(23) “Type of entity” — section 30-21-102(51), Idaho Code.

History.

I.C., § 30-22-102, as added by 2015, ch. 243, § 17, p. 758.

STATUTORY NOTES

Compiler’s Notes.

The bracketed insertion at the end of paragraph (a)(3)(A) was added by the compiler to supply the intended term.

Official Comment

Subsection (a) defines certain terms that are used in this article. Other defined terms used in this article are listed in subsection (b).

“Acquired entity” [(a)(1)] — This definition recognizes that an interest exchange may involve only the acquisition of a particular “class” or “series” of interests in an entity. Model Business Corporation Act § 6.01 does not expressly define “class” or “series.” Because the interests of members in an unincorporated business organization often tend to be distinctive, it may be that each member’s interest will comprise a separate class or series. For an explanation of a new and different meaning of the word “series,” see the comment to Section 301(a). The term “acquired entity” does not encompass series under that new meaning.

"Acquiring entity" [(a)(2)] — An "acquiring entity" is an entity that acquires the interests of the acquired entity in an interest exchange governed by Part 3.

"Approve" [(a)(3)] — The term "approve" encompasses all of the steps necessary for an entity to propose a transaction, adopt and approve the terms and conditions of the transaction, and obtain the necessary action on the transaction by the governors and interest holders of the entity. The term includes procedural requirements such as notice to interest holders, preparation of voting lists, *etc*. The principal laws that will govern approval by an entity of a transaction under this article are the entity's organic law and this article, but regulatory laws may also apply.

"Conversion" [(a)(4)] — The term "conversion" means a transaction authorized by Part 4 pursuant to which an entity of one type is converted into an entity of another type. As used in this article, the term "conversion" does not include a transaction in which an entity changes the jurisdiction in which it is organized but does not change to a different form of entity; that type of transaction is referred to in this article as a "domestication" and is governed by Part 5.

"Converted entity" [(a)(5)] — This term is used in Part 4 to refer to the entity that results from a conversion.

"Converting entity" [(a)(6)] — A converting entity is the entity that becomes the converted entity under Part 4.

"Domesticated entity" [(a)(7)] — This term is used in Part 5 and means the entity that is domesticated pursuant to Part 5. By the nature of the transaction, the domesticated entity will be of the same type as the domesticating entity.

"Domesticating entity" [(a)(8)] — This term is used in Part 5 and means the entity that is domesticated pursuant to Part 5.

"Domestication" [(a)(9)] — The term "domestication" means a transaction of the kind authorized by Part 5 pursuant to which an entity may change its *jurisdiction* of formation *but not its type* so long as the laws of the foreign jurisdiction permit the domestication. The legal effect of the domestication of an entity out of an adopting state will be governed by the laws of both the adopting state and the foreign jurisdiction. Some statutes

include what is described in this article as "domestication" in their definition of a "conversion." *See, e.g.*, Colo. Rev. Stat § 7-90-201(2) and (3). It is intended that the domestication provisions of this article will apply to a transaction that may be characterized under another act as a "conversion" if it meets the definition of "domestication" under this article.

"Interest exchange" [(a)(10)] — The term "interest exchange" means a transaction authorized by Part 3 pursuant to which an entity may acquire interests in another entity. The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself. *See* Section 2-301(a).

"Interest holder liability" [(a)(11)] — This term is used to describe the vicarious liability of an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term includes only personal liability of an interest holder for a debt of the entity imposed on the interest holder either by statute or by the organic rules to the extent authorized pursuant to the organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder liabilities for purposes of this article. Thus, for example, if a state's business corporation law makes shareholders personally liable for unpaid wages because of their status as shareholders, that liability would be an "interest holder liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "interest holder liability" because it is a direct liability and not based on the status of being a shareholder. Similarly, the liability to return an improper distribution is not an interest holder liability because it is a direct liability of the interest holder based on receipt of the distribution.

"Merger" [(a)(12)] — The term means a transaction in which two or more entities are combined into a single entity pursuant to a filing with the filing office. The term "merger" in this act includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities.

"Merging entity" [(a)(13)] — The term "merging entity" refers to each entity that is in existence immediately before a merger and is a party to the merger. It will include the surviving entity if the surviving entity exists before the merger becomes effective. It does not include an entity that

provides consideration to be received by interest holders if that entity is not a party to the merger.

"Plan" [(a)(14)] — The term "plan" is a short-hand way of referring to the plan of merger, interest exchange, conversion, or domestication, as the case may be, depending on which form of transaction is taking place. *See* Sections 2-202 (plan of merger), 2-302 (plan of interest exchange), 2-402 (plan of conversion), and 2-502 (plan of domestication).

"Protected agreement" [(a)(19)] — The term "protected agreement" refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of the article. Thus a revolving line of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of the article. If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication even though the agreement does not mention those other types of transactions. *See* Sections 2-301(d) (interest exchanges), 2-401(c) (conversions), and 2-501(d) (domestications).

"Surviving entity" [(a)(24)] — The term "surviving entity" refers to either a merging entity that survives the merger or the new entity created by the merger.

§ 30-22-103. Relationship of chapter to other laws. — (a) This chapter does not authorize an act prohibited by, and does not affect the application or requirements of, law other than this chapter.

(b) A transaction effected under this chapter may not create or impair any right or obligation on the part of a person under the statutory law of this state relating to a change in control, takeover, business combination, control-share acquisition, or similar transaction involving a domestic merging, acquired, converting, or domesticating business corporation unless:

(1) If the corporation does not survive the transaction, the transaction satisfies any requirements of the law; or

(2) If the corporation survives the transaction, the approval of the plan is by a vote of the shareholders or directors which would be sufficient to create or impair the right, duty or obligation directly under the law.

History.

I.C., § 30-22-103, as added by 2015, ch. 243, § 17, p. 758.

Official Comment

This section works in concert with Section 1-702 (supplemental principles of law).

Subsection (a) — Subsection (a) preserves existing regulatory law in an enacting state in general terms. Enacting states should consider more carefully integrating this article with their various regulatory laws. For example, in some states certain professions are limited in their use of limited liability entities. *See also* Section 2-104.

Laws other than this article that will apply to transactions under this article include, for example, the various uniform fraudulent transfer and fraudulent conveyance acts; state insolvency statutes; federal bankruptcy law; and Articles 8 and 9 of the UCC.

Subsection (b) — Many states have enacted "antitakeover" statutes intended to make it more difficult to acquire control of a publicly-traded corporation. Those statutes often provide that their application to a particular corporation cannot be changed unless the corporation obtains certain specified approvals, such as a vote of disinterested directors or a supermajority vote by the shareholders. The purpose of the special requirements in subsection (b) on varying the application of an antitakeover statute is to protect against a hostile acquirer or group of shareholders seeking to use this article avoid the application of the antitakeover statute.

Subsection (b) protects the application of antitakeover statutes from being affected by a transaction under this article by requiring that the transaction be approved in a manner that would be sufficient to approve changing the application of the antitakeover statute. If a transaction is approved in that manner, there is no policy reason to prohibit the application of the antitakeover statute from being varied by a transaction under this article. If the application of an antitakeover statute cannot be varied by action of an entity subject to it, then a transaction under this article will be permissible only if the antitakeover provision continues to apply after the transaction or the transaction itself is permissible under the antitakeover statute.

§ 30-22-104. Required notice or approval. — (a) A domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer of this state before engaging in a merger transaction of a type covered by this chapter must give the notice or obtain the approval in order to be a party to an interest exchange, conversion, or domestication.

(b) Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this chapter becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise transferred unless, to the extent required by or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the entity obtains an appropriate order of the attorney general specifying the disposition of the property.

(c) A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance that is made to a merging entity that is not the surviving entity and that takes effect or remains payable after the merger inures to the surviving entity.

(d) A trust obligation that would govern property if transferred to the nonsurviving entity applies to property that is transferred to the surviving entity under this section.

History.

I.C., § 30-22-104, as added by 2015, ch. 243, § 17, p. 758.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Official Comment

Subsection (a) — Because at least some of the provisions of this article will be new in most states, it is likely that existing state laws that require

regulatory approval of transactions by businesses such as banks, insurance companies, or public utilities may not be worded in a fashion that will include at least some of the transactions authorized by this article. The purpose of subsection (a) is to ensure that transactions under this article will be subject to the same regulatory approval as mergers. This section is based on whether a merger by a regulated entity requires prior approval because the transactions authorized by this article may be effectuated indirectly in many cases under existing law by establishing a wholly-owned subsidiary of the desired type and then merging into it.

The consequence of violating subsection (a) should be the same as in the case of a merger consummated without the required approval

Subsection (b) — This article applies generally to nonprofit corporations and unincorporated nonprofit associations. As in the case of laws regulating particular industries, a state's laws governing the nondiversion of charitable property to other uses may not cover some of the transactions authorized by this article. To prevent the procedures in this article from being used to avoid restrictions on the use of charitable property held by nonprofit entities, subsection (b) requires approval of the effect of transactions under this article by the appropriate arm of government having supervision of nonprofit entities.

An approval or order obtained under this section may impose conditions or specify the disposition of assets or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this article specifying the effects of a transaction. *See* Sections 2-206 (effect of merger), 2-306 (effect of interest exchange), 2-406 (effect of conversion), and 2-506 (effect of domestication).

Subsections (c) and (d) — These subsections clarify the legal effect of a merger on bequests, *etc*. that were originally made to an entity that does not survive the merger. These issues do not arise in an interest exchange, conversion, or domestication transaction because the entity to which the bequest, etc was made survives in some form after the transaction.

§ 30-22-105. Status of filings. — A filing under this chapter signed by a domestic entity becomes part of the public organic record of the entity if the entity's organic law provides that similar filings under that law become part of the public organic record of the entity.

History.

I.C., § 30-22-105, as added by 2015, ch. 243, § 17, p. 758.

Official Comment

Articles of merger and other similar documents filed under the Model Business Corporation Act are made a part of the articles of incorporation of each domestic business corporation that is a party to the merger by Section 1.40(1) of the Model Business Corporation Act. This section provides that filings under this article will similarly become part of the public organic document of a domestic corporation. It should be noted that some state statutes no longer require filed documents to be "signed" in order to facilitate electronic filing. *See, e.g* ., Colorado Rev. Stat. § 7-90-301 *et seq* . In such cases, this section should be modified to delete the reference to "signed" and merely refer to being filed (or accepted for filing).

§ 30-22-106. Nonexclusivity. — The fact that a transaction under this chapter produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law other than this chapter.

History.

I.C., § 30-22-106, as added by 2015, ch. 243, § 17, p. 758.

Official Comment

This section allows a transaction that has the same end result as one of the transactions governed by this article, but that is accomplished in a manner not within the scope of this article, to be exempt from this article. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities can be accomplished pursuant to sale of assets statutory provisions rather than under Part 2 of this article, even though the end result of the transaction is essentially the same as if the two entities had merged into a third entity.

§ 30-22-107. Reference to external facts. — A plan may refer to facts ascertainable outside the plan if the manner in which the facts will operate upon the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a party to the transaction.

History.

I.C., § 30-22-107, as added by 2015, ch. 243, § 17, p. 758.

Official Comment

This section is based on, but more concise than, Section 1.20(k) of the Model Business Corporation Act.

§ 30-22-108. Alternative means of approval of transactions. — Except as otherwise provided in the organic law or organic rules of a domestic entity, approval of a transaction under this chapter by the affirmative vote or consent of all its interest holders satisfies the requirements of this chapter for approval of the transaction.

History.

I.C., § 30-22-108, as added by 2015, ch. 243, § 17, p. 758.

Official Comment

This section makes it clear that a unanimous vote by the interest holders of an entity constitutes the only approval needed of a transaction under this article. That is consistent with the default rules on approval in Sections 2-203 (approval of a merger), 2-303 (approval of an interest exchange), 2-403 (approval of a conversion), and 2-503 (approval of a domestication).

§ 30-22-109. Appraisal rights. — (a) An interest holder of a domestic merging, acquired, converting, or domesticating entity is entitled to appraisal rights in connection with the transaction if the interest holder would have been entitled to appraisal rights under the entity's organic law in connection with a merger in which the interest of the interest holder was changed, converted or exchanged unless:

(1) The organic law permits the organic rules to limit the availability of appraisal rights; and

(2) The organic rules provide such a limit.

(b) An interest holder of a domestic merging, acquired, converting, or domesticating entity is entitled to contractual appraisal rights in connection with a transaction under this chapter to the extent provided in:

(1) The entity's organic rules;

(2) The plan; or

(3) The case of a business corporation by action of its governors.

(c) If an interest holder is entitled to contractual appraisal rights under subsection (b) of this section and the entity's organic law does not provide procedures for the conduct of an appraisal rights proceeding, part 13, chapter 29, title 30, Idaho Code, applies to the extent practicable or as otherwise provided in the entity's organic rules or the plan.

History.

I.C., § 30-22-109, as added by 2015, ch. 243, § 17, p. 758.

Official Comment

In this section, the term "appraisal rights" is intended to refer to any provision in the entity's organic law providing for the buy-out of an interest holder that objects to a transaction under this article.

Subsection (a) — If an entity's organic law permits the organic rules to limit the availability of appraisal rights, such a provision of the organic rules will apply to the availability of appraisal rights under this section. This

section, however, does not authorize the organic rules to limit the availability of appraisal rights in a transaction under the article if the entity's organic law does not authorize such a provision of the organic rules.

Section 13.02(a)(1)(ii) of the Model Business Corporation Act does not provide for appraisal rights in connection with a merger for shares that remain outstanding after consummation of the merger. Appraisal rights will similarly not be available under Section 2-109(a) for shares that are not changed or converted in connection with a merger.

Subsections (b) and (c) — This article permits a plan to set forth the terms and conditions of a transaction. A domestic entity may thus choose to grant optional appraisal rights as part of the terms of a transaction in circumstances where appraisal rights would not be available under this section. Subsection (b) validates the grant of such contractual appraisal rights. *Cf*. 6 Del. Code §§ 15-120 (general partnerships), 17-212 (limited partnerships), and 18-210 (limited liability companies) which validate "contractual appraisal rights"; and Model Business Corporation Act § 13.02(a)(5) which permits the articles of incorporation, bylaws, or a resolution of the board of directors to confer appraisal rights in contexts in which they would otherwise not be available. Legislative authorization in subsection (b) of the grant of contractual appraisal rights removes any question as to whether a court would have jurisdiction to hear a case in which the parties were attempting to create jurisdiction in the court by private agreement. The procedures to be followed in a contractual appraisal rights proceeding under subsection (b) will be the appraisal rights procedures in the entity's organic law if that law provides such procedures. If the entity's organic law does not provide procedures for conducting an appraisal rights proceeding, subsection (c) makes the appraisal rights procedures in the state's business corporation law applicable unless the entity's organic rules or the plan provide otherwise.

§ 30-22-110. Conflict of laws and excluded transactions. — (a) In the event of any conflict between the provisions of this chapter and the provisions of the following laws, the following laws shall control:

(1) The Idaho bank act, as defined in section 26-101, Idaho Code; (2) The Idaho credit union act, chapter 21, title 26, Idaho Code; (3) Chapters 28, 32, 34, 38 and 48, title 41, Idaho Code; (4) The business and industrial development corporation act, chapter 27, title 26, Idaho Code.

(b) This chapter may not be used to effect a transaction that results in a domestic entity of a type that cannot be formed by the filing of a public organic record with the secretary of state, except for a general partnership and an unincorporated nonprofit association.

History.

I.C., § 30-22-110, as added by 2015, ch. 243, § 17, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Part 2
Merger

Idaho Code § 30-22-201

§ 30-22-201. Merger authorized. — (a) Except as otherwise provided in this section, by complying with this part:

(1) One (1) or more domestic entities may merge with one (1) or more domestic or foreign entities into a domestic or foreign surviving entity; and

(2) Two (2) or more foreign entities may merge into a domestic entity.

(b) Except as otherwise provided in this section, by complying with the provisions of this part applicable to foreign entities, a foreign entity may be a party to a merger under this part or may be the surviving entity in such a merger if the merger is authorized by the law of the foreign entity's jurisdiction of formation.

History.

I.C., § 30-22-201, as added by 2015, ch. 243, § 18, p. 758.

Official Comment

The merger transaction authorized by this part involves the combination of one or more domestic entities with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic surviving entity. Upon the effective date of the merger, all the assets and liabilities of the constituent entities vest in the surviving entity as a matter of law. As such, mergers require the existence of at least two separate entities before the transaction and only one entity may survive the merger. If independent existence of the constituent entities is desired following the conclusion of the transaction, a restructuring transaction other than a merger must be used to accomplish the transfer of assets and liabilities.

Subsection (a) — Subsection (a)(1) states the general rule that subject to subsection (c) one or more domestic entities may merge with or into a

domestic or foreign surviving entity. Subsection (a)(2) provides that two or more foreign entities may merge into a domestic surviving entity so long as the requirements of subsection (b) are met.

Subsection (b) — Subsection (b) provides that a foreign entity may be a party to a merger or may be the surviving entity in a merger only if the merger is authorized by the laws of the foreign entity's jurisdiction of formation.

Tax Considerations — This article authorizes a merger for state entity law purposes. Federal law and other state law will independently determine how a merger transaction will be taxed.

§ 30-22-202. Plan of merger. — (a) A domestic entity may become a party to a merger under this part by approving a plan of merger. The plan must be in a record and contain:

(1) As to each merging entity, its name, jurisdiction of formation, and type of entity;

(2) If the surviving entity is to be created in the merger, a statement to that effect and the entity's name, jurisdiction of formation, and type of entity;

(3) The manner of converting the interests in each party to the merger into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) If the surviving entity exists before the merger, any proposed amendments to:

(A) Its public organic record, if any; and

(B) Its private organic rules that are, or are proposed to be, in a record;

(5) If the surviving entity is to be created in the merger:

(A) Its proposed public organic record, if any; and

(B) The full text of its private organic rules that are proposed to be in a record;

(6) The other terms and conditions of the merger; and

(7) Any other provision required by the law of a merging entity's jurisdiction of formation or the organic rules of a merging entity.

(b) In addition to the requirements of subsection (a) of this section, a plan of merger may contain any other provision not prohibited by law.

History.

I.C., § 30-22-202, as added by 2015, ch. 243, § 18, p. 758.

Official Comment

Subsection (a) — The requirements for the plan of merger are set forth in subsection (a). They are similar to plan of merger provisions in corporation statutes. *See* Model Business Corporation Act § 11.02(c). The requirements stated in this subsection are mandatory.

Subsection (a)(1) — Subsection (a)(1) requires that the plan of merger identify the parties to the merger. The name of a merging entity as it appears in the plan of merger will be its name in its jurisdiction of formation. *See* the comment to Section 205(b)(1) and (2).

Subsection (a)(3) — The language of subsection (a)(3) is similar to Model Business Corporation Act § 11.02(c)(3), and similar provisions in the uniform unincorporated entity acts (*see e.g.*, Uniform Partnership Act (1997) (Last Amended 2013) § 1122(a)(3). Although subsection (a)(3) and these other provisions are all phrased in similar language, what may be done under subsection (a)(3) with respect to providing for continuing interests in the surviving entity for some holders of interests of a class or series of a party to the merger while paying some other form of consideration to other holders of the same class or series of interests in that entity will vary depending on the type of entity involved and the extent to which its organic rules provide for non-uniform treatment of interest holders in a manner that is permissible under its organic law. Similarly the ability to use a merger to reorganize the capital structure of the surviving entity will vary depending on the type of entity involved and whether the entity has appropriately adopted relevant provisions in its organic rules.

If the organic law and organic rules of an unincorporated entity permit a non-uniform "equity shuffle" to be accomplished in a merger involving the unincorporated entity, the minority owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal rights currently afforded to minority stockholders in merging corporate entities. Any perceived unfairness in the shuffle would be addressed either (i) under principles of fiduciary duties and the contractual obligations of good faith and fair dealing, assuming, of course, that such duties and obligations have not been contractually modified or eliminated to the extent permitted by the applicable organic law, or (ii) by the exercise of whatever rights the minority owners may have to veto the transaction or to withdraw or to dissociate and be paid the value of their interests.

The Model Business Corporation Act generally requires that shares of the same class or series be treated in the same manner in a merger unless the corporation has adopted an applicable provision of its articles of incorporation pursuant to Section 6.01(e) of that act providing for variations in the treatment of holders of the same class or series of shares. Thus a determination of what may be done by way of an equity shuffle in the case of a corporation will require reference to its organic law and organic rules.

The consideration paid to the interest holders of the merging parties may be supplied in whole or part by a person who is not a party to the merger.

Subsection (b) — Subsection (b) provides the statutory authority for a merging party to include a provision in a plan of merger that is not specifically listed in subsection (a). One such possibility is contractual appraisal rights as provided in Section 2-109(b).

§ 30-22-203. Approval of merger. — (a) A plan of merger is not effective unless it has been approved:

(1) By a domestic merging entity:

(A) In accordance with the requirements, if any, in its organic law and organic rules for approval of:

(i) In the case of an entity that is not a limited cooperative association, the merger; or

(ii) In the case of a limited cooperative association, a transaction under this chapter;

(B) By all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) In the case of an entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of the merger; or

(ii) In the case of an entity that is a limited cooperative association, neither its organic law nor organic rules provide for approval of a transaction under this chapter; and

(2) In a record, by each interest holder of a domestic merging entity that will have interest holder liability for debts, obligations, and other liabilities that arise after the merger becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

(A) The organic rules of the entity provide in a record for the approval of a merger in which some or all of its interest holders become subject to interest holder liability by the affirmative vote or consent of fewer than all the interest holders; and

(B) The interest holder consented in a record to or voted for that provision of the organic rules or became an interest holder after the adoption of that provision.

(b) A merger under this part involving a foreign merging entity is not effective unless the merger is approved by the foreign entity in accordance

with the law of the foreign entity's jurisdiction of formation.

History.

I.C., § 30-22-203, as added by 2015, ch. 243, § 18, p. 758.

Official Comment

Subsection (a) — Approval under this section includes whatever actions or procedures by the governors and interest holders of an entity are required by its organic law, as modified by its organic rules, to effectuate the merger. In the case of a business corporation, those procedures will include provisions for approval of a "short form" merger without a vote of the shareholders if a merger under this part satisfies the tests for being a short form merger. If the organic rules of an entity prescribe a procedure for the proposal, adoption and/or approval of a merger, the term "approval" includes compliance with all of those rules. *See* the definition of "approve" in Section 2-102(3).

If the organic law of an entity is silent with respect to procedures for approval of a merger, the organic rules may be amended to provide those procedures. Otherwise, the default procedure in subsection (a)(1)(B) requires approval by the interest holders entitled to vote on any matter.

The incorporation into this part of the merger procedures in the organic law of a party to a merger should be construed broadly to include not only express statutory procedures, but also applicable common law principles such as fiduciary duty standards of governors and majority interest holders. Statutory provisions on voting by classes or voting groups in a merger will also be applicable.

Subsection (a)(2) — Subsection (a)(2) deals with the situation where an interest holder of an entity that is a party to a merger will have vicarious liability for the liabilities of the surviving entity that are incurred after the merger is effective. The special approval requirement in subsection (a)(2) will be applicable, for example, to shareholders of a corporation that merges into a general partnership that is not a limited liability partnership if the shareholders become general partners of the surviving general partnership. If such a shareholder were to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect

of exercising appraisal rights is that the shareholder would not become a general partner in the surviving entity; and, in that case, the consent of that shareholder would not be required under subsection (a)(2).

The consent of an interest holder required by subsection (a)(2)(B) may be given either by (i) signing or agreeing generally to the terms of organic rules that include the required provision permitting less than unanimous approval of a merger in which interest holders become subject to owner liability, or (ii) voting for or consenting to an amendment to add such a provision.

Subsection (b) — Where a foreign entity is a party to a merger under this part, subsection (b) defers to the laws of the foreign jurisdiction for the requirements for approval of the merger by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws, such as this article if it has been adopted in the foreign jurisdiction. The laws of the foreign jurisdiction will also control the application of any special approval requirements found in the organic rules of the foreign entity.

§ 30-22-204. Amendment or abandonment of plan of merger. — (a) A plan of merger may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic merging entity may approve an amendment of a plan of merger:

(1) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) By its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the merger is entitled to vote on or consent to any amendment of the plan that will change:

(A) The amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by the interest holders of any party to the plan;

(B) The public organic record, if any, or private organic rules of the surviving entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

(C) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(c) After a plan of merger has been approved and before a statement of merger becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic merging entity may abandon the plan in the same manner as the plan was approved.

(d) If a plan of merger is abandoned after a statement of merger has been delivered to the secretary of state for filing and before the statement becomes effective, a statement of abandonment, signed by a party to the plan, must be delivered to the secretary of state for filing before the statement of merger becomes effective. The statement of abandonment

takes effect on filing, and the merger is abandoned and does not become effective. The statement of abandonment must contain:

(1) The name of each party to the plan of merger;

(2) The date on which the statement of merger was filed; and

(3) A statement that the merger has been abandoned in accordance with this section.

History.

I.C., § 30-22-204, as added by 2015, ch. 243, § 18, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

This section sets out the requirements for amending or abandoning the plan of merger. They are similar to provisions for amending or abandoning mergers found in existing corporation merger statutes. *See* Model Business Corporation Act §§ 11.02(e) and 11.08.

§ 30-22-205. Statement of merger — Effective date of merger. — (a) A statement of merger must be signed by each merging entity and delivered to the secretary of state for filing.

(b) A statement of merger must contain:

(1) The name, jurisdiction of formation, and type of entity of each merging entity that is not the surviving entity;

(2) The name, jurisdiction of formation, and type of entity of the surviving entity;

(3) If the statement of merger is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(4) A statement that the merger was approved by each domestic merging entity, if any, in accordance with this part and by each foreign merging entity, if any, in accordance with the law of its jurisdiction of formation;

(5) If the surviving entity exists before the merger and is a domestic filing entity, any amendment to its public organic record approved as part of the plan of merger;

(6) If the surviving entity is created by the merger and is a domestic filing entity, its public organic record, as an attachment;

(7) If the surviving entity is created by the merger and is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(8) If the surviving entity is a foreign entity that is not a registered foreign entity, a statement designating a registered agent in compliance with section 30-21-411, Idaho Code.

(c) In addition to the requirements of subsection (b) of this section, a statement of merger may contain any other provision not prohibited by law.

(d) If the surviving entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed and may omit any

provision that is not required to be included in a restatement of the public organic record.

(e) A plan of merger that is signed by all the merging entities and meets all the requirements of subsection (b) of this section may be delivered to the secretary of state for filing instead of a statement of merger and on filing has the same effect. If a plan of merger is filed as provided in this subsection, references in this act [chapter] to a statement of merger refer to the plan of merger filed under this subsection.

(f) A statement of merger is effective on the date and time of filing or the later date and time specified in the statement of merger.

(g) If the surviving entity is a domestic entity, the merger is effective when the statement of merger is effective. If the surviving entity is a foreign entity, the merger is effective on the later of:

(1) The date and time provided by the organic law of the surviving entity; or

(2) When the statement is effective.

History.

I.C., § 30-22-205, as added by 2015, ch. 243, § 18, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Meaning of "this act". See heading in notes to § 30-21-101.

Compiler's Notes.

The bracketed insertion in subsection (e) was added by the compiler to supply the probable intended term.

Official Comment

Subsection (a) — When the statement of merger is effective under subsection (f), the merger transaction occurs. The filing of a statement of merger also makes the transaction a matter of public record.

Subsection (b)(1) and (2) — The names of foreign entities set forth in the statement of merger will generally be their names in their jurisdiction of formation, except that if a foreign entity has been required to adopt a different name in order to register to do business in the adopting state, the foreign qualification statute will likely require that when the entity does business in the state it must use the name adopted for purposes of registering to do business. Engaging in a merger under this part will be part of the business done by the entity in the state and the name of the entity set forth in the statement of merger will thus need to be the name under which the entity has registered to do business. Use of the name under which the entity has registered to do business will allow the records in the filing office to associate the registration of the entity to do business with the statement of merger.

Subsection (b)(4) — The statement in subsection (b)(4) that the plan of merger was approved by each entity in accordance with this part necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of each merging entity.

Subsection (b)(6) and (7) — The public organic record of a domestic surviving entity created by the merger that is attached to the statement of merger becomes the original, officially filed text of the public organic record of the surviving entity when the statement of merger takes effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity.

Similarly, a statement of qualification for a domestic limited liability partnership created by the merger that is attached to the statement of merger does not need to be filed separately.

Subsection (d) — Organic laws typically require an initial filing that creates an entity to be signed by the person serving as the incorporator or other organizer. Subsection (d), however, provides that the public organic record of the surviving entity does not need to be signed since it is itself attached to a signed record.

Subsection (d) also permits the public organic record of the surviving entity to omit any provision that is not required to be included in a restatement of the public organic record. Pursuant to this provision, for example, the public organic record of a business corporation created as the

surviving entity in the merger would not need to state the name and address of each incorporator even though that information would be required by Section 2.02(a)(4) of the Model Business Corporation Act if the corporation were being incorporated outside the context of the merger.

Subsection (e) — A plan of merger that contains all the information required in the statement of merger may be filed instead of the statement of merger. The plan must be in a record and signed by each merging party.

Subsection (f) — The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it does so the statement becomes effective at the time and date specified. Subsection (f) is subject to the 90-day delayed effective date filing limitation in subsection (b)(3).

Subsection (g) — A merger in which the surviving entity is a domestic entity takes effect when the statement of merger takes effect. A merger in which the surviving entity is a foreign entity will usually also take effect when the statement of merger takes effect because the practice is to coordinate the filings that need to be made when a merger involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, subsection (g) provides that the merger transaction itself will take effect at the later of (i) when the statement of merger takes effect, and (ii) when the merger takes effect under the law of the foreign jurisdiction. That rule avoids the possibility that the merger will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domestic entity would cease to exist before it has been merged into the foreign entity.

It is only necessary for the filing office to record the effective date of the statement of merger and the filing office does not need to be concerned with the effective date of the merger itself. Persons wishing to determine the effective date of a merger involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

§ 30-22-206. Effect of merger. — (a) When a merger under this part becomes effective:

(1) The surviving entity continues or comes into existence;

(2) Each merging entity that is not the surviving entity ceases to exist;

(3) All property of each merging entity vests in the surviving entity without transfer, reversion or impairment;

(4) All debts, obligations and other liabilities of each merging entity are debts, obligations and other liabilities of the surviving entity;

(5) Except as otherwise provided by law or the plan of merger, all the rights, privileges, immunities, powers and purposes of each merging entity vest in the surviving entity;

(6) If the surviving entity exists before the merger:

(A) All its property continues to be vested in it without transfer, reversion or impairment;

(B) It remains subject to all its debts, obligations and other liabilities; and

(C) All its rights, privileges, immunities, powers and purposes continue to be vested in it;

(7) The name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(8) If the surviving entity exists before the merger:

(A) Its public organic record, if any, is amended to the extent provided in the statement of merger; and

(B) Its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger;

(9) If the surviving entity is created by the merger, its private organic rules are effective and:

(A) If it is a filing entity, its public organic record is effective; and

(B) If it is a limited liability partnership, its statement of qualification is effective; and

(10) The interests in each merging entity which are to be converted in the merger are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of merger and to any appraisal rights they have under section 30-22-109, Idaho Code, and the merging entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of a merging entity, a merger under this part does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation or winding up of the merging entity.

(c) When a merger under this part becomes effective, a person that did not have interest holder liability with respect to any of the merging entities and becomes subject to interest holder liability with respect to a domestic entity as a result of the merger has interest holder liability only to the extent provided by the organic law of that entity and only for those debts, obligations, and other liabilities that arise after the merger becomes effective.

(d) When a merger becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic merging entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The merger does not discharge any interest holder liability under the organic law of the domestic merging entity to the extent the interest holder liability arose before the merger became effective.

(2) The person does not have interest holder liability under the organic law of the domestic merging entity for any debt, obligation, or other liability that arises after the merger becomes effective.

(3) The organic law of the domestic merging entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) of this subsection as if the merger had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by law other than this chapter or the organic rules of the

domestic merging entity with respect to any interest holder liability preserved under paragraph (1) of this subsection as if the merger had not occurred.

(e) When a merger under this part becomes effective, a foreign entity that is the surviving entity may be served with process in this state for the collection and enforcement of any debts, obligations, or other liabilities of a domestic merging entity in accordance with applicable law.

(f) When a merger under this part becomes effective, registration to do business in this state of any foreign merging entity that is not the surviving entity is canceled.

History.

I.C., § 30-22-206, as added by 2015, ch. 243, § 18, p. 758.

Official Comment

With the exception of subsections (c) and (d), this section is similar to statutory provisions on the effect of a merger of a corporation with a corporation. *See* Model Business Corporation Act § 11.07.

Subsections (c) and (d) set forth rules for two circumstances that typically do not exist in a merger where all the entities involved are corporations. Subsection (c) deals with the situation where an interest holder that does not have vicarious liability for the obligations of a merging entity before the merger has interest holder liability after the merger. An example would be a corporate shareholder who agrees to be a general partner in a limited partnership that is the surviving entity in a merger between a corporation and a limited partnership that is not a limited liability limited partnership. Subsection (d) deals with the situation where an interest holder has vicarious liability for the obligations of one of the merging parties before the merger but ceases to have any interest holder liability for the obligations of the surviving entity after the merger is effective. An example would be a general partner in a general partnership that merges into a corporation.

Under Section 2-203(a)(2), a merger cannot have the effect of making an interest holder of a domestic merging entity subject to interest holder liability for the debts, obligations, or other liabilities of any other person or

entity unless the interest holder has executed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent.

Subsection (a) — Subsection (a) states the general understanding that in a merger the assets and liabilities of the merging entities automatically vest in the surviving entity. The surviving entity becomes the owner of all real and personal property of the merged entities and is subject to all debts, obligations, and liabilities of the merging entities. A merger does not constitute a transfer, assignment, or conveyance of any property held by the merging entities prior to the merger. A merger also does not give rise to a claim that a contract with a merging entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger. The contract rights that are vested in the surviving entity include the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the merger. *See also* Section 2-104(c) which deals with the surviving entity's rights in trust obligations of a nonsurviving party in a merger and transactions such as bequests made to a nonsurviving party to a merger that take effect after the merger.

After a merger becomes effective, the law of the surviving entity's jurisdiction of formation governs the surviving entity.

See Sections 2-103(b) and 2-104(b) which modify the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise or any of the parties holds property committed to charitable purposes.

Subsection (a)(7) — All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued. Under subsection (a)(7), the name of the survivor may be, but need not be, substituted in any pending proceeding for the name of a party to the merger whose separate existence ceased as a result of the merger. The substitution may be made whether the survivor is a complainant or a respondent, and may be made at the instance of either the survivor or an opposing party. Such a substitution has no substantive effect because, whether or not the survivor's name is substituted, the survivor

succeeds to the claims, and is subject to the liabilities, of any party to the merger whose separate existence ceased as a result of the merger.

Subsection (a)(8) — The private organic rules of an unincorporated entity typically may be either oral or written. The plan of merger is not required to set forth amendments to oral provisions of the private organic rules of the surviving entity, and thus subsection (a)(8)(B) is limited in scope just to amendments to the private organic rules that are to be in a record, if any.

Subsection (a)(10) — *See* Section 2-109 and the comments to Section 2-109.

Subsection (c) — Subsection (c) sets forth the general rule that an interest holder that was not liable for the liabilities of a merging entity before the merger but will have personal liability for the obligations of the surviving entity after the merger will be personally liable only for the liabilities of a domestic surviving entity that are incurred after the effective date of a merger. When a liability is incurred will be determined by other applicable law.

Subsection (c) is limited to situations in which a person becomes personally liable with respect to a domestic entity. Personal liability with respect to a foreign entity will be controlled by the law of the foreign jurisdiction.

Subsection (d) — Subsection (d) provides four rules with respect to an interest holder who ceases to have interest holder liability after the effective date of the merger:

(1) the interest holder remains personally liable for any obligations that were incurred before the effective date of the merger;

(2) the interest holder does not have any personal liability for obligations of the surviving entity;

(3) the pre-existing personal liability of the interest holder is enforced against the interest holder on the same basis as if the merger had not taken place; and

(4) the interest holder has the same rights of contribution from other interest holders of the merging entity as the interest holder would have had

if the merger had not occurred.

Subsection (e) — When a merger becomes effective, subsection (e) provides that a foreign entity that is the surviving entity may be served with process in this state. The proceedings covered by subsection (e) include a proceeding to enforce the rights of any interest holders of each domestic merging entity who are entitled to and exercise appraisal rights. One of the liabilities that a foreign surviving entity succeeds to is the obligation of a merging entity to pay the amount, if any, to which its interest holders who assert appraisal rights are entitled.

Part 3
Interest Exchange

Idaho Code § 30-22-301

§ 30-22-301. Interest exchange authorized. — (a) Except as otherwise provided in this section, by complying with this part:

(1) A domestic entity may acquire all of one (1) or more classes or series of interests of another domestic entity or a foreign entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing; or

(2) All of one (1) or more classes or series of interests of a domestic entity may be acquired by another domestic entity or a foreign entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing.

(b) Except as otherwise provided in this section, by complying with the provisions of this part applicable to foreign entities a foreign entity may be the acquiring or acquired entity in an interest exchange under this part if the interest exchange is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to an interest exchange, the provision applies to an interest exchange in which the domestic entity is the acquired entity as if the interest exchange were a merger until the provision is amended after July 1, 2007.

History.

I.C., § 30-22-301, as added by 2015, ch. 243, § 19, p. 758.

Official Comment

An interest exchange is the same type of transaction as the share exchange provided for in Section 11.03 of the Model Business Corporation Act. The effect of an interest exchange is that: (1) the separate existence of

the acquired entity is not affected; and (2) the acquiring entity acquires all of the interests of one or more classes or series of the acquired entity. An interest exchange also allows an indirect acquisition through the use of consideration in the exchange that is not provided by the acquiring entity (*e.g.*, consideration from another or related entity).

Neither share exchanges nor interest exchanges are universally recognized in either corporation or unincorporated entity laws. The effect of an interest exchange can be achieved through a triangular merger in which the acquiring entity forms a new subsidiary and the acquired entity is then merged into the new subsidiary. Part 3 allows the transaction to be accomplished directly in a single step, rather than indirectly through the triangular merger route.

Subsection (a) — The acquiring entity is not required to acquire all of the interests in the acquired entity. For example, assume that an LLC with three classes of membership interests enters into an interest exchange with an acquiring entity. The acquiring entity need only acquire all of the ownership interests of one or more classes of the LLC membership interests.

The "classes or series" referenced in Section 301(a) are commonly found in corporation law, and a class or series of shares in a corporation may be the subject of a transaction under this article. *See, e.g.*, MBCA § 6.02. Specific provisions authorizing classes and series are less common in unincorporated entity law; but if classes or series of interests are created in an unincorporated entity, the interests of one or more of those classes or series may be the subject of a transaction under this article. *See* 6 Del. Code §§ 15-407 (general partnerships), 17-208 (limited partnerships), and 18-215 (limited liability companies).

Some states have authorized the creation of "series" entities in which assets and liabilities of the entity may be segregated in different "series" and different interests may be associated with each series. *See, e.g.*, 6 Del. Code § 18-215 (series limited liability company). If the adopting state has authorized series entities, a series in such an entity may be the subject of an interest exchange. This section also authorizes a domestic entity to acquire a series of a foreign series entity regardless of whether the adopting state has authorized domestic series entities.

Subsection (b) — Subsection (b) allows a foreign entity to effectuate an interest exchange with a domestic entity if the interest exchange is authorized by the organic law of the foreign entity.

Subsection (c) — This subsection deals with rights of parties to protected agreements (defined in Section 2-102(19)) when an interest exchange takes place. Because the concept of an interest exchange is relatively new, a person contracting with an entity or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this article should not be charged with the consequences of not having dealt with the concept of an interest exchange in the context of those special rights. Similarly, when the governance structure of an entity has been negotiated before the enactment of this article, the concept of an interest exchange may not have been reflected in any special governance arrangements; for example, special approval rights may have been provided for fundamental transactions, but those rights fail to include language that would make them applicable to an interest exchange. Subsection (c) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, an entity is a party to a contract that provides that the entity cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to an interest exchange in which the entity is the exchanging entity. If the entity fails to obtain the consent, the result will be that the other party will have the same rights it would have had if the entity were to participate in a merger without the required consent.

The transitional rule in subsection (c) ceases to make sense at such time as the provisions of the agreement giving rise to the special rights is first amended after the effective date of this article because at that time the provision may be amended to address expressly an interest exchange. The transitional rule will continue to apply, however, if a provision other than the specific provisions giving rise to the special rights is amended.

Subsection (d) — The statutes that should be listed in Section 301(d) are interest exchange statutes that already exist or are added to the state's various entity statutes when this article is adopted.

§ 30-22-302. Plan of interest exchange. — (a) A domestic entity may be the acquired entity in an interest exchange under this part by approving a plan of interest exchange. The plan must be in a record and contain:

(1) The name and type of entity of the acquired entity;

(2) The name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) The manner of converting the interests in the acquired entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) Any proposed amendments to:

(A) The public organic record, if any, of the acquired entity; and

(B) The private organic rules of the acquired entity that are, or are proposed to be, in a record;

(5) The other terms and conditions of the interest exchange; and

(6) Any other provision required by the law of this state or the organic rules of the acquired entity.

(b) In addition to the requirements of subsection (a) of this section, a plan of interest exchange may contain any other provision not prohibited by law.

History.

I.C., § 30-22-302, as added by 2015, ch. 243, § 19, p. 758.

Official Comment

This section sets forth the requirements for the plan of interest exchange, which must be approved by the acquired entity in accordance with Section 2-303. The content of the plan of interest exchange is similar to the content of a plan of merger. *See* Section 2-202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

The plan of interest exchange may, but need not, be filed instead of the statement of interest exchange (Section 2-305) so long as it contains all the information required to be in the statement and is delivered to the filing office for filing after the plan has been adopted and approved. *See* Section 2-305(d).

Subsection (a)(3) — Under this subsection, interest holders in the acquired entity may receive interests or securities of the acquiring entity or of a party other than the acquiring entity, obligations, rights to acquire interests, or securities, cash, or other property.

§ 30-22-303. Approval of interest exchange. — (a) A plan of interest exchange is not effective unless it has been approved:

(1) By a domestic acquired entity:

(A) In accordance with the requirements, if any, in its organic law and organic rules for approval of an interest exchange;

(B) If neither its organic law nor organic rules provide for approval of an interest exchange, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

(i) In the case of an entity that is not a business corporation or a limited cooperative association, a merger, as if the interest exchange were a merger;

(ii) In the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the interest exchange were that type of merger; or

(iii) In the case of a limited cooperative association, a transaction under this chapter; or

(C) By all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) In the case of an entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of an interest exchange or merger; or

(ii) In the case of a limited cooperative association, neither its organic law nor organic rules provide for approval of an interest exchange or a transaction under this chapter; and

(2) In a record, by each interest holder of a domestic acquired entity that will have interest holder liability for debts, obligations, and other liabilities that arise after the interest exchange becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

(A) The organic rules of the entity provide in a record for the approval of an interest exchange or a merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all the interest holders; and

(B) The interest holder consented in a record to or voted for that provision of the organic rules or became an interest holder after the adoption of that provision.

(b) An interest exchange involving a foreign acquired entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

(c) Except as otherwise provided in its organic law or organic rules, the interest holders of the acquiring entity are not required to approve the interest exchange.

History.

I.C., § 30-22-303, as added by 2015, ch. 243, § 19, p. 758.

Official Comment

This section sets forth the required approval of an interest exchange. An interest exchange transaction governed by this part only requires approval by the acquired entity, unless the applicable organic law or the organic rules of the acquiring entity otherwise provide (*see* subsection (c)), a condition that rarely exists.

If the acquired entity is a domestic entity, one of three possibilities will be applicable:

(1) if the organic law (*see* Section 1-102(25)) governing the acquired domestic entity has specific provisions for approval of an interest exchange, or even if there are no such provisions, the organic rules (*see* Section 1-102(26)) of the acquired entity have specific provisions for approval of an interest exchange, then the approval provisions in the organic law or organic rules apply;

(2) if there are no specific provisions for approval of an interest exchange in the acquired entity's organic law or organic rules but either the organic law governing the acquired entity or the acquired entity's organic rules

contain provisions for approval of mergers, then those merger provisions (except for any provisions that allow approval of a merger without a vote of the shareholders in the case of an acquired entity that is a corporation) apply; and

(3) if neither (1) or (2) are applicable, then unanimous consent of the acquired entity's interest holders will be required.

A three-tiered approval scheme is necessary because specific provisions for interest exchanges do not exist in many state corporation and unincorporated entity statutes or in the various types of entity organic rules.

If the acquired entity is a foreign entity, then approval is in accordance with the laws of the acquired entity's jurisdiction of formation. *See* subsection (b).

Subsection (a)(1)(B)((ii) — Many business corporation laws permit a corporation that owns a specified percentage of the shares of another corporation (typically 80 or 90%) to merge with the subsidiary corporation without a vote of the subsidiary's shareholders. Some corporation laws also permit a merger to be effected without a vote of the shareholders in other situations as well; for example, 8 Del. Code § 251(g) and 15 Pa.C.S. § 1924(b)(4) permit a holding company structure to be formed through the device of a merger without the approval of the shareholders. Section 303(a)(1)(b)(ii) makes clear that those "short form" and other merger rules do not apply and a vote of the shareholders of an acquired entity that is a corporation is always required to approve an interest exchange under Part 3.

Subsection (a)(2) — See the comment to Section 2-203(a)(2) for an explanation of this interest holder liability provision.

§ 30-22-304. Amendment or abandonment of plan of interest exchange. — (a) A plan of interest exchange may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic acquired entity may approve an amendment of a plan of interest exchange:

(1) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) By its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the interest exchange is entitled to vote on or consent to any amendment of the plan that will change:

(A) The amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the interest holders of the acquired entity under the plan;

(B) The public organic record, if any, or private organic rules of the acquired entity that will be in effect immediately after the interest exchange becomes effective, except for changes that do not require approval of the interest holders of the acquired entity under its organic law or organic rules; or

(C) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(c) After a plan of interest exchange has been approved and before a statement of interest exchange becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic acquired entity may abandon the plan in the same manner as the plan was approved.

(d) If a plan of interest exchange is abandoned after a statement of interest exchange has been delivered to the secretary of state for filing and before the statement becomes effective, a statement of abandonment, signed

by the acquired entity, must be delivered to the secretary of state for filing before the statement of interest exchange becomes effective. The statement of abandonment takes effect on filing, and the interest exchange is abandoned and does not become effective. The statement of abandonment must contain:

(1) The name of the acquired entity;

(2) The date on which the statement of interest exchange was filed by the secretary of state; and

(3) A statement that the interest exchange has been abandoned in accordance with this section.

History.

I.C., § 30-22-304, as added by 2015, ch. 243, § 19, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

This section parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See* Sections 2-204 (mergers), 2-404 (conversions), and 2-504 (domestications).

§ 30-22-305. Statement of interest exchange — Effective date of interest exchange. — (a) A statement of interest exchange must be signed by a domestic acquired entity and delivered to the secretary of state for filing.

(b) A statement of interest exchange must contain:

(1) The name and type of entity of the acquired entity;

(2) The name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) If the statement of interest exchange is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(4) A statement that the plan of interest exchange was approved by the acquired entity in accordance with this part; and

(5) Any amendments to the acquired entity's public organic record, if any, approved as part of the plan of interest exchange.

(c) In addition to the requirements of subsection (b) of this section, a statement of interest exchange may contain any other provision not prohibited by law.

(d) A plan of interest exchange that is signed by a domestic acquired entity and meets all the requirements of subsection (b) of this section may be delivered to the secretary of state for filing instead of a statement of interest exchange and on filing has the same effect. If a plan of interest exchange is filed as provided in this subsection, references in this chapter to a statement of interest exchange refer to the plan of interest exchange filed under this subsection.

(e) A statement of interest exchange becomes effective on the date and time of filing or the later date and time specified in the statement of interest exchange.

(f) An interest exchange in which the acquired entity is a domestic entity is effective when the statement of interest exchange is effective.

History.

I.C., § 30-22-305, as added by 2015, ch. 243, § 19, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

The filing of a statement of interest exchange makes the transaction a matter of public record. The requirements for a statement of interest exchange are set forth in subsection (b). They are essentially the same as the requirements for a statement of merger in Section 2-205.

Subsection (b)(3) and (e) — The effective date and time of a statement of interest exchange are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 2-305(b)(3).

Subsection (d) — A plan of interest exchange can be used as a substitute for the statement of interest exchange so long as the plan satisfies the requirements in subsection (d).

Subsection (f) — When the statement of interest exchange is effective under subsection (e), the interest exchange transaction occurs under subsection (f) if the acquired entity is a domestic entity. If the acquired entity is a foreign entity, the effectiveness of the interest exchange will occur when provided by the law of its jurisdiction of formation.

§ 30-22-306. Effect of interest exchange. — (a) When an interest exchange in which the acquired entity is a domestic entity becomes effective:

(1) The interests in the domestic acquired entity that are the subject of the interest exchange are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of interest exchange and to any appraisal rights as provided in section 30-22-109, Idaho Code, and the acquired entity's organic law;

(2) The acquiring entity becomes the interest holder of the interests in the acquired entity stated in the plan of interest exchange to be acquired by the acquiring entity;

(3) The public organic record, if any, of the acquired entity is amended as provided in the statement of interest exchange; and

(4) The private organic rules of the acquired entity that are to be in a record, if any, are amended to the extent provided in the plan of interest exchange.

(b) Except as otherwise provided in the organic law or organic rules of the acquired entity, the interest exchange does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the acquired entity.

(c) When an interest exchange becomes effective, a person that did not have interest holder liability with respect to the acquired entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the interest exchange has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that arise after the interest exchange becomes effective.

(d) When an interest exchange becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic acquired entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The interest exchange does not discharge any interest holder liability under the organic law of the domestic acquired entity to the extent the interest holder liability arose before the interest exchange became effective.

(2) The person does not have interest holder liability under the organic law of the domestic acquired entity for any debt, obligation, or other liability that arises after the interest exchange becomes effective.

(3) The organic law of the domestic acquired entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) of this subsection as if the interest exchange had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by law other than this chapter or the organic law or organic rules of the domestic acquired entity with respect to any interest holder liability preserved under paragraph (1) of this subsection as if the interest exchange had not occurred.

History.

I.C., § 30-22-306, as added by 2015, ch. 243, § 19, p. 758.

Official Comment

Subsection (a) — In contrast to a merger, an interest exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring entity the assets of the acquired entity, or render the acquiring entity liable for the liabilities of the acquired entity. Thus, subsection (a) is significantly simpler than Section 2-206(a) with respect to the effects of a merger.

When an interest exchange becomes effective: (1) the interests of the acquired entity are exchanged, converted, or canceled as provided in the plan; (2) the only rights of the former interest holders of the acquired entity whose interests are affected by the interest exchange are those rights related to the exchange, conversion, or cancellation; (3) the acquiring entity becomes the owner of the acquired entity's interests as provided in the plan; and (4) the organic rules of the acquired entity are amended as provided in the statement of interest exchange, thus obviating the need for repetitive

filings (*i.e.*, a filing as to the entity interest exchange and another filing to reflect amendments to the public organic record as required by the laws governing the acquired entity).

Subsection (c) — Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See* the comment to Section 2-206(c).

Subsection (d) — Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See* the comment to Section 2-206(d).

Part 4
Conversion

Idaho Code § 30-22-401

§ 30-22-401. Conversion authorized. — (a) By complying with this part, a domestic entity may become:

(1) A domestic entity that is a different type of entity; or

(2) A foreign entity that is a different type of entity, if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(b) By complying with the provisions of this part applicable to foreign entities, a foreign entity may become a domestic entity that is a different type of entity if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a conversion, the provision applies to a conversion of the entity as if the conversion were a merger until the provision is amended after July 1, 2007.

History.

I.C., § 30-22-401, as added by 2015, ch. 243, § 20, p. 758.

Official Comment

The procedure in this part permits an entity to change to a different type of entity in its jurisdiction of formation or in a foreign jurisdiction. A transaction in which an entity changes its jurisdiction of formation but does not change its type is a domestication and is the subject of Part 5.

Subsection (a)(2) — Under subsection (a)(2) a conversion of a domestic entity into a foreign entity must be authorized by the law of the foreign jurisdiction. If this is not the case, it may be possible to achieve the same result by forming an entity of the type desired in the foreign jurisdiction and then merging the domestic entity into the new foreign entity under Part 2.

Subsection (b) — Subsection (b) allows a foreign entity to effectuate a conversion into a domestic entity only if the conversion is permitted by the laws of the foreign entity's jurisdiction of formation. *See* Section 1-102(22) for the definition of "jurisdiction of formation." When a foreign entity becomes a domestic entity pursuant to this part, the effect of the conversion will be as provided in Section 2-406. The procedures by which the conversion is approved, however, will be determined by the laws of the foreign entity's jurisdiction of formation.

§ 30-22-402. Plan of conversion. — (a) A domestic entity may convert to a different type of entity under this part by approving a plan of conversion. The plan must be in a record and contain:

(1) The name and type of entity of the converting entity;

(2) The name, jurisdiction of formation, and type of entity of the converted entity;

(3) The manner of converting the interests in the converting entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) The proposed public organic record of the converted entity if it will be a filing entity;

(5) The full text of the private organic rules of the converted entity that are proposed to be in a record;

(6) The other terms and conditions of the conversion; and

(7) Any other provision required by the law of this state or the organic rules of the converting entity.

(b) In addition to the requirements of subsection (a) of this section, a plan of conversion may contain any other provision not prohibited by law.

History.

I.C., § 30-22-402, as added by 2015, ch. 243, § 20, p. 758.

Official Comment

This section sets forth the requirements for the plan of conversion, which must be approved by the converting entity in accordance with Section 2-403. The content of a plan of conversion is similar to the content of a plan of merger. *See* Section 2-202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

The plan of conversion may, but need not, be filed instead of the statement of conversion, so long as it contains all of the information required to be in the statement of conversion and is delivered to the filing office for filing after the plan has been adopted and approved. *See* Section 2-405(e).

Subsection (a)(3) — Interest holders in the converting entity may receive interests or other securities of the converted entity or of any other person, obligations, rights to acquire interests or other securities, cash, or other property. *See also* Sections 2-202(a)(3) (mergers), 2-302(a)(3) (interest exchanges), and 2-502(a)(3) (domestications).

§ 30-22-403. Approval of conversion. — (a) A plan of conversion is not effective unless it has been approved:

(1) By a domestic converting entity:

(A) In accordance with the requirements, if any, in its organic rules for approval of a conversion;

(B) If its organic rules do not provide for approval of a conversion, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

(i) In the case of an entity that is not a business corporation or limited cooperative association, a merger, as if the conversion were a merger; or

(ii) In the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the conversion were that type of merger; or

(iii) In the case of a limited cooperative association, a transaction under this chapter; or

(C) By all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) In the case of any entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of a conversion or a merger; or

(ii) In the case of a limited cooperative association, neither its organic law nor organic rules provide for approval of a conversion or a transaction under this chapter; and

(2) In a record, by each interest holder of a domestic converting entity that will have interest holder liability for debts, obligations, and other liabilities that arise after the conversion becomes effective, unless, in the case of an entity that is not a business or nonprofit corporation:

(A) The organic rules of the entity provide in a record for the approval of a conversion or a merger in which some or all of its interest holders

become subject to interest holder liability by the vote or consent of fewer than all the interest holders; and

(B) The interest holder voted for or consented in a record to or voted for that provision of the organic rules or became an interest holder after the adoption of that provision.

(b) A conversion of a foreign converting entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

History.

I.C., § 30-22-403, as added by 2015, ch. 243, § 20, p. 758.

Official Comment

As is the case with the other types of transactions authorized by this article, there are three possible ways to obtain approval of a conversion by a domestic entity. The first is to determine if the organic rules (defined in Section 1-102(26)) of the converting entity contain specific approval provisions for conversions. If they exist, then those provisions apply to approval of the plan of conversion. If there are no provisions in the organic rules for approval of a conversion, then the provisions for approval of a merger in either the organic law (defined in Section 1-102(25)) or organic rules of the entity will apply. If there are no approval provisions for conversions in the entity's organic rules and no approval provisions for mergers in the entity's organic law or organic rules, then unanimous consent of all the entity's interest holders is required.

In the case of a foreign entity that is converting into another type of entity in this jurisdiction, subsection (b) provides that the required approval is determined by the laws of the foreign entity's jurisdiction of formation.

Subsection (a)(1)(B) — Subsection (a)(1)(B) requires that a conversion be approved by a business corporation in the same manner as a merger that requires approval by a vote of the shareholders. *See* the comment to Section 2-303(a)(1)(b)(ii).

Subsection (a)(2) — See the comment to Section 2-203(a)(2) for an explanation of this interest holder liability provision.

§ 30-22-404. Amendment or abandonment of plan of conversion. — (a) A plan of conversion of a domestic converting entity may be amended:

(1) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) By its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the conversion is entitled to vote on or consent to any amendment of the plan that will change:

(A) The amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the interest holders of the converting entity under the plan;

(B) The public organic record, if any, or private organic rules of the converted entity that will be in effect immediately after the conversion becomes effective, except for changes that do not require approval of the interest holders of the converted entity under its organic law or organic rules; or

(C) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(b) After a plan of conversion has been approved and before a statement of conversion becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic converting entity may abandon the plan in the same manner as the plan was approved.

(c) If a plan of conversion is abandoned after a statement of conversion has been delivered to the secretary of state for filing and before the statement becomes effective, a statement of abandonment, signed by the converting entity, must be delivered to the secretary of state for filing before the statement of conversion becomes effective. The statement of abandonment takes effect on filing, and the conversion is abandoned and does not become effective. The statement of abandonment must contain:

(1) The name of the converting entity;

(2) The date on which the statement of conversion was filed by the secretary of state; and

(3) A statement that the conversion has been abandoned in accordance with this section.

History.

I.C., § 30-22-404, as added by 2015, ch. 243, § 20, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

This section parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Sections 2-204 (mergers), 2-304 (interest exchanges), and 2-504 (domestications).

§ 30-22-405. Statement of conversion — Effective date of conversion. — (a) A statement of conversion must be signed by the converting entity and delivered to the secretary of state for filing.

(b) A statement of conversion must contain:

(1) The name, jurisdiction of formation, and type of entity of the converting entity;

(2) The name, jurisdiction of formation, and type of entity of the converted entity;

(3) If the statement of conversion is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(4) If the converting entity is a domestic entity, a statement that the plan of conversion was approved in accordance with this part or, if the converting entity is a foreign entity, a statement that the conversion was approved by the foreign entity in accordance with the law of its jurisdiction of formation;

(5) If the converted entity is a domestic filing entity, its public organic record, as an attachment;

(6) If the converted entity is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(7) If the converted entity is a foreign entity, a statement designating a registered agent in compliance with section 30-21-411, Idaho Code.

(c) In addition to the requirements of subsection (b) of this section, a statement of conversion may contain any other provision not prohibited by law.

(d) If the converted entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic record.

(e) A plan of conversion that is signed by a domestic converting entity and meets all the requirements of subsection (b) of this section may be delivered to the secretary of state for filing instead of a statement of conversion and on filing has the same effect. If a plan of conversion is filed as provided in this subsection, references in this chapter to a statement of conversion refer to the plan of conversion filed under this subsection.

(f) A statement of conversion is effective on the date and time of filing or the later date and time specified in the statement of conversion.

(g) If the converted entity is a domestic entity, the conversion is effective when the statement of conversion is effective. If the converted entity is a foreign entity, the conversion is effective on the later of:

(1) The date and time provided by the organic law of the converted entity; or

(2) When the statement is effective.

History.

I.C., § 30-22-405, as added by 2015, ch. 243, § 20, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

The filing of a statement of conversion makes the transaction a matter of public record. The requirements for a statement of conversion are set forth in subsection (b). They are essentially the same as the requirements for a statement of merger in Section 2-205.

Subsection (b)(3) and (f) — The effective date and time of a statement of conversion are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of conversion is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 2-405(b)(3).

Subsection (e) — A plan of conversion can be used as a substitute for the statement of conversion so long as the plan satisfies the requirements in subsection (e).

Subsection (g) — When the statement of conversion is effective under subsection (f), the conversion transaction occurs if the converted entity is a domestic entity. A conversion in which the converted entity is a foreign entity will usually also take effect when the statement of conversion takes effect because the best practice will be to coordinate the filings that need to be made when a conversion involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, subsection (g) provides that the conversion transaction itself will take effect at the later of (i) when the statement of conversion takes effect, and (ii) when the conversion takes effect under the law of the foreign jurisdiction. That rule avoids the possibility that the conversion will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the converting domestic entity would cease to exist before it has been converted into the foreign entity.

It is only necessary for the filing office to record the effective date of the statement of conversion and the filing office does not need to be concerned with the effective date of the conversion itself. Persons wishing to determine the effective date of a conversion involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

§ 30-22-406. Effect of conversion. — (a) When a conversion becomes effective:

(1) The converted entity is:

(A) Organized under and subject to the organic law of the converted entity; and

(B) The same entity without interruption as the converting entity;

(2) All property of the converting entity continues to be vested in the converted entity without transfer, reversion or impairment;

(3) All debts, obligations, and other liabilities of the converting entity continue as debts, obligations, and other liabilities of the converted entity;

(4) Except as otherwise provided by law or the plan of conversion, all of the rights, privileges, immunities, powers, and purposes of the converting entity remain in the converted entity;

(5) The name of the converted entity may be substituted for the name of the converting entity in any pending action or proceeding;

(6) If a converted entity is a filing entity, its public organic record is effective;

(7) If the converted entity is a limited liability partnership, its statement of qualification is effective;

(8) The private organic rules of the converted entity that are to be in a record, if any, approved as part of the plan of conversion are effective; and

(9) The interests in the converting entity are converted, and the interest holders of the converting entity are entitled only to the rights provided to them under the plan of conversion and to any appraisal rights they have under section 30-22-109, Idaho Code, and the converting entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of the converting entity, the conversion does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the converting entity.

(c) When a conversion becomes effective, a person that did not have interest holder liability with respect to the converting entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the conversion has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that arise after the conversion becomes effective.

(d) When a conversion becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic converting entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The conversion does not discharge any interest holder liability under the organic law of the domestic converting entity to the extent the interest holder liability arose before the conversion became effective.

(2) The person does not have interest holder liability under the organic law of the domestic converting entity for any debt, obligation, or other liability that arises after the conversion becomes effective.

(3) The organic law of a domestic converting entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) of this subsection as if the conversion had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by other law or the organic rules of the domestic converting entity with respect to any interest holder liability preserved under paragraph (1) of this subsection as if the conversion had not occurred.

(e) When a conversion becomes effective, a foreign entity that is the converted entity may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities in accordance with applicable law.

(f) If the converting entity is a registered foreign entity, its registration to do business in this state is canceled when the conversion becomes effective.

(g) A conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

History.

I.C., § 30-22-406, as added by 2015, ch. 243, § 20, p. 758.

Official Comment

A converted entity is the same entity as it was before the conversion; it just has a different legal form. The legal effects of this are set forth in subsection (a). The converted entity remains the owner of all real and personal property and remains subject to all the liabilities, actual or contingent, of the converted entity. A conversion is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. It does not give rise to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion. The contract rights that remain in the converted entity include, without limitation, the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the conversion.

When a conversion becomes effective, the internal affairs of the converting entity are no longer governed by its former organic law but instead by the organic law of the converted entity. As a result, filings that may have been made under the organic law of the converting entity, such as the following, will no longer be effective: a statement of qualification as a limited liability partnership under Section 3-901, a statement of partnership authority under Section 3-303, a statement of authority under Section 5-302 with respect to a limited liability company, or a statement of authority under Section 7-107 with respect to an unincorporated nonprofit association.

Subsection (a)(5) — All pending proceedings involving the converting entity are continued. The name of the converted entity may be, but need not be, substituted in any pending proceeding for the name of the converting entity.

Subsection (c) — Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* the comment to Section 2-206(c).

Subsection (d) — Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* the comment to Section 2-206(d).

Subsection (e) — When a domestic converting entity becomes a foreign entity as a result of a conversion, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the converting entity. Section 2-406(e), which parallels analogous provisions in Parts 2 (mergers) and 5 (domestications), authorizes service of process for all such claims in this state.

Subsection (g) — When a conversion takes effect, the entity continues to exist — simply in a different form. Subsection (g) thus makes clear that the conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Part 5
Domestication

Idaho Code § 30-22-501

§ 30-22-501. Domestication authorized. — (a) Except as otherwise provided in this section, by complying with this part, a domestic entity may become a domestic entity of the same type of entity in a foreign jurisdiction if the domestication is authorized by the law of the foreign jurisdiction.

(b) Except as otherwise provided in this section, by complying with the provisions of this part applicable to foreign entities a foreign entity may become a domestic entity of the same type of entity in this state if the domestication is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a domestication, the provision applies to a domestication of the entity as if the domestication were a merger until the provision is amended after July 1, 2007.

History.

I.C., § 30-22-501, as added by 2015, ch. 243, § 21, p. 758.

Official Comment

A domestication authorized by Part 5 differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

As with a conversion, all rights and privileges, debts, obligations, and other liabilities, and actions or proceedings of a domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale, transfer, assignment, or conveyance and does not give rise to a claim of reverter or impairment of title.

Part 5 governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this article. On the other hand, the organic laws of the

foreign jurisdiction, and not Part 5, will govern the legal effect of most aspects of a domestication of a domestic entity in another jurisdiction. In the latter scenario, Part 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Part 5 does not create a right in the domestic entity to be received in the foreign jurisdiction. Similarly, Section 2-501 does not provide a right on the part of a foreign entity to become a domestic entity if the domestication is not authorized by the laws of the foreign jurisdiction. If the foreign jurisdiction does not authorize a domestication, the same result can be accomplished by forming a new entity of the same type in the new state and merging the existing entity into the new entity.

§ 30-22-502. Plan of domestication. — (a) A domestic entity may become a foreign entity in a domestication by approving a plan of domestication. The plan must be in a record and contain:

(1) The name and type of entity of the domesticating entity;

(2) The name and jurisdiction of formation of the domesticated entity;

(3) The manner of converting the interests in the domesticating entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) The proposed public organic record of the domesticated entity if it is a filing entity;

(5) The full text of the private organic rules of the domesticated entity that are proposed to be in a record;

(6) The other terms and conditions of the domestication; and

(7) Any other provision required by the law of this state or the organic rules of the domesticating entity.

(b) In addition to the requirements of subsection (a) of this section, a plan of domestication may contain any other provision not prohibited by law.

History.

I.C., § 30-22-502, as added by 2015, ch. 243, § 21, p. 758.

Official Comment

This section sets forth the requirements for the plan of domestication, which must be approved by the domesticating entity in accordance with Section 2-503. The content of a plan of domestication is similar to the content of a plan of merger. *See* Section 2-202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

The plan of domestication, may, but need not, be filed instead of the statement of domestication, so long as it contains all of the information required to be in the statement and is delivered to the filing office for filing after the plan has been adopted and approved. *See* Section 2-505(e).

Subsection (a)(3) — Interest holders in the domesticating entity may receive interests or other securities of the domesticated entity or any other person, obligations, rights to acquire interests or other securities, cash, or other property.

§ 30-22-503. Approval of domestication. — (a) A plan of domestication is not effective unless it has been approved:

(1) By a domestic domesticating entity:

(A) In accordance with the requirements, if any, in its organic rules for approval of a domestication;

(B) If its organic rules do not provide for approval of a domestication, in accordance with the requirements, if any, in its organic law and organic rules for approval of: (i) In the case of an entity that is not a business corporation or limited cooperative association, a merger, as if the domestication were a merger; (ii) In the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the domestication were that type of merger; or (iii) In the case of a limited cooperative association, a transaction under this chapter;

(C) By all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) In the case of an entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of a domestication or a merger; or (ii) In the case of a limited cooperative association, neither its organic law nor organic rules provide for approval of a domestication or a transaction under this chapter; and (2) In a record, by each interest holder of a domestic domesticating entity that will have interest holder liability for debts, obligations, and other liabilities that arise after the domestication becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation: (A) The organic rules of the entity in a record provide for the approval of a domestication or merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all of the interest holders; and (B) The interest holder consented in a record to or voted for that provision of the

organic rules or became an interest holder after the adoption of that provision.

(b) A domestication of a foreign domesticating entity is not effective unless it is approved in accordance with the law of the foreign entity's jurisdiction of formation.

History.

I.C., § 30-22-503, as added by 2015, ch. 243, § 21, p. 758.

Official Comment

Subsection (a) — As is the case with the other types of transactions authorized by this article, there are three possible ways to obtain approval of a domestication by a domestic entity. The first is to determine if the organic rules (defined in Section 1-102(26)) of the domesticating entity contain specific approval provisions for a domestication. If they exist, then those provisions apply to approval of the plan of domestication. If there are no domestication approval provisions, then the approval process for a merger in either the entity's organic law (defined in Section 1-102(25)) or organic rules will apply. If there are no specific domestication approval provisions in the entity's organic rules and no merger approval provisions in the entity's organic law or organic rules, then unanimous consent of all the entity's interest holders is required.

In the case of a foreign entity that is domesticating in this state, subsection (b) provides that the required approval is determined by the laws of the foreign entity's jurisdiction of formation.

Subsection (a)(1)(B)(ii) — Subsection (a)(1)(B) requires that a domestication be approved by a business corporation in the same manner as a merger that requires approval by a vote of the shareholders. *See* the comment to Section 2-303(a)(1)(B)(ii).

Subsection (a)(2) — See the Comment 2 to Section 2-203(a)(2) for an explanation of this interest holder liability provision.

§ 30-22-504. Amendment or abandonment of plan of domestication. — (a) A plan of domestication of a domestic domesticating entity may be amended:

(1) In the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) By its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the domestication is entitled to vote on or consent to any amendment of the plan that will change:

(A) The amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the interest holders of the domesticating entity under the plan;

(B) The public organic record, if any, or private organic rules of the domesticated entity that will be in effect immediately after the domestication becomes effective, except for changes that do not require approval of the interest holders of the domesticated entity under its organic law or organic rules; or

(C) Any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(b) After a plan of domestication has been approved by a domestic domesticating entity and before a statement of domestication becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic domesticating entity may abandon the plan in the same manner as the plan was approved.

(c) If a plan of domestication is abandoned after a statement of domestication has been delivered to the secretary of state for filing and before the statement becomes effective, a statement of abandonment, signed by the entity, must be delivered to the secretary of state for filing before the statement of domestication becomes effective. The statement of abandonment takes effect on filing, and the domestication is abandoned and does not become effective. The statement of abandonment must contain:

(1) The name of the domesticating entity;

(2) The date on which the statement of domestication was filed by the secretary of state; and

(3) A statement that the domestication has been abandoned in accordance with this section.

History.

I.C., § 30-22-504, as added by 2015, ch. 243, § 21, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

This section parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* Sections 2-204 (mergers), 2-304 (interest exchanges), and 2-404 (conversions).

§ 30-22-505. Statement of domestication — Effective date of domestication. — (a) A statement of domestication must be signed by the domesticating entity and delivered to the secretary of state for filing.

(b) A statement of domestication must contain:

(1) The name, jurisdiction of formation, and type of entity of the domesticating entity;

(2) The name and jurisdiction of formation of the domesticated entity;

(3) If the statement of domestication is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than ninety (90) days after the date of filing;

(4) If the domesticating entity is a domestic entity, a statement that the plan of domestication was approved in accordance with this part or, if the domesticating entity is a foreign entity, a statement that the domestication was approved in accordance with the law of its jurisdiction of formation;

(5) If the domesticated entity is a domestic filing entity, its public organic record, as an attachment;

(6) If the domesticated entity is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(7) If the domesticated entity is a foreign entity that is not a registered foreign entity, a statement designating a registered agent in compliance with section 30-21-411, Idaho Code.

(c) In addition to the requirements of subsection (b) of this section, a statement of domestication may contain any other provision not prohibited by law.

(d) If the domesticated entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, but the public organic record does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic record.

(e) A plan of domestication that is signed by a domesticating domestic entity and meets all the requirements of subsection (b) of this section may be delivered to the secretary of state for filing instead of a statement of domestication and on filing has the same effect. If a plan of domestication is filed as provided in this subsection, references in this chapter to a statement of domestication refer to the plan of domestication filed under this subsection.

(f) A statement of domestication is effective on the date and time of filing or the later date and time specified in the statement of domestication.

(g) A domestication in which the domesticated entity is a domestic entity is effective when the statement of domestication is effective. A domestication in which the domesticated entity is a foreign entity is effective on the later of:

(1) The date and time provided by the organic law of the domesticated entity; or

(2) When the statement is effective.

History.

I.C., § 30-22-505, as added by 2015, ch. 243, § 21, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

The filing of a statement of domestication makes the transaction a matter of public record. The requirements for a statement of domestication are set forth in subsection (b). They are essentially the same as the requirements for a statement of merger in Section 2-205.

Subsection (b)(3) and (f) — The effective date and time of a statement of domestication are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of

domestication is effective on that date and time, subject to the 90 day maximum delayed effective date in subsection (b)(3).

Subsection (e) — A plan of domestication can be used as a substitute for the statement of domestication so long as the plan satisfies the requirements in subsection (e).

Subsection (g) — When the statement of domestication is effective under subsection (f), the domestication transaction occurs if the domesticated entity is a domestic entity. A domestication in which the domesticated entity is a foreign entity will usually also take effect when the statement of domestication takes effect because the best practice will be to coordinate the filings that need to be made in each jurisdiction so that they take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, subsection (g) provides that the domestication transaction itself will take effect at the later of (i) when the statement of domestication takes effect, and (ii) when the domestication takes effect under the law of the foreign jurisdiction. This rule avoids the possibility that the domestication will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domesticating domestic entity would cease to appear as an active entity on the records of this state before it appears as its active domesticated self on the records of the foreign jurisdiction.

It is only necessary for the filing office to record the effective date of the statement of domestication and the filing office does not need to be concerned with the effective date of the domestication itself. Persons wishing to determine the effective date of a domestication will be able to do so by consulting the records of the filing offices in each jurisdiction.

§ 30-22-506. Effect of domestication. — (a) When a domestication becomes effective:

(1) The domesticated entity is:

(A) Organized under and subject to the organic law of the domesticated entity; and

(B) The same entity without interruption as the domesticating entity;

(2) All property of the domesticating entity continues to be vested in the domesticated entity without transfer, reversion or impairment;

(3) All debts, obligations, and other liabilities of the domesticating entity continue as debts, obligations, and other liabilities of the domesticated entity;

(4) Except as otherwise provided by law or the plan of domestication, all of the rights, privileges, immunities, powers, and purposes of the domesticating entity remain in the domesticated entity;

(5) The name of the domesticated entity may be substituted for the name of the domesticating entity in any pending action or proceeding;

(6) If the domesticated entity is a filing entity, its public organic record is effective;

(7) If the domesticated entity is a limited liability partnership, its statement of qualification is effective simultaneously;

(8) The private organic rules of the domesticated entity that are to be in a record, if any, approved as part of the plan of domestication are effective; and

(9) The interests in the domesticating entity are converted to the extent and as approved in connection with the domestication, and the interest holders of the domesticating entity are entitled only to the rights provided to them under the plan of domestication and to any appraisal rights as provided in section 30-22-109, Idaho Code, and the domesticating entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of the domesticating entity, the domestication does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the domesticating entity.

(c) When a domestication becomes effective, a person that did not have interest holder liability with respect to the domesticating entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the domestication has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that arise after the domestication becomes effective.

(d) When a domestication becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic domesticating entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The domestication does not discharge any interest holder liability under the organic law of the domesticating domestic entity to the extent the interest holder liability arose before the domestication became effective.

(2) A person does not have interest holder liability under the organic law of the domestic domesticating entity for any debt, obligation, or other liability that arises after the domestication becomes effective.

(3) The organic law of the domestic domesticating entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) of this subsection as if the domestication had not occurred.

(4) A person has whatever rights of contribution from any other person as are provided by other law or the organic rules of the domestic domesticating entity with respect to any interest holder liability preserved under paragraph (1) of this subsection as if the domestication had not occurred.

(e) When a domestication becomes effective, a foreign entity that is the domesticated entity may be served with process in this state for the

collection and enforcement of any of its debts, obligations, and other liabilities in accordance with applicable law.

(f) If a domesticating entity is a registered foreign entity, the registration to do business in this state of the domesticating entity is canceled when the domestication becomes effective.

(g) A domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

History.

I.C., § 30-22-506, as added by 2015, ch. 243, § 21, p. 758.

Official Comment

Subsection (a)(1) — The domesticated entity is the same entity as the domesticating entity; it has merely changed its jurisdiction of formation.

Subsection (a)(2) — A domestication is not a sale, conveyance, transfer, or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment, or conveyance.

Subsection (a)(5) — All pending proceedings involving the domesticating entity are continued. The name of the domesticated entity may be, but need not be, substituted in any pending proceeding for the name of the domesticating entity.

Subsection (a)(9) — The interests of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and the interest holders of the domesticating entity are only entitled to those rights. Subsection (a)(9), on its face, allows certain owners in the domesticating entity to be entitled to a continuing equity interest in the domesticated entity whereas other owners in the domesticating entity may be cashed out as a result of the transaction.

Subsection (c) — Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* the comment to Section 2-206(c).

Subsection (d) — Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* the comment to Section 2-206(d

Subsection (e) — When a domestic domesticating entity becomes a foreign entity as a result of a domestication, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the domesticating entity. Subsection (e), which parallels analogous provisions in Parts 2 (mergers) and 4 (conversions), authorizes service of process for all such claims in this state.

Subsection (g) — When a domestication takes effect, the entity continues to exist — simply as a domestic entity under the laws of a different state. Subsection (g) thus makes clear that the domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Chapter 23
GENERAL PARTNERSHIPS

Part 1. General Provisions

Sec.

Part 2. Nature of Partnership

Part 3. Relations of Partners to Persons Dealing with Partnership

Part 6. Dissociation

Part 7. Partner's Dissociation When Business Not Wound Up

Part 8. Dissolution and Winding Up

Part 9. Limited Liability Partnership

Part 1
General Provisions

Idaho Code § 30-23-101

§ 30-23-101. Short title. — This chapter may be cited as the “Idaho Uniform Partnership Act.”

History.

I.C., § 30-23-101, as added by 2015, ch. 243, § 23, p. 758.

Official Comment

This article replaces a state’s current general partnership statute, whether or not that statute is based on UPA (1914) or UPA (1997). Section 3-110 contains transition provisions for the applicability of this article to general partnerships formed before the effective date of the Code (*see* Section 1-708).

§ 30-23-102. Definitions. — (a) In this chapter:

(1) "Business" includes every trade, occupation and profession.

(2) "Contribution," except in the phrase "right of contribution," means property or a benefit described in section 30-23-403, Idaho Code, that is provided by a person to a partnership to become a partner or in the person's capacity as a partner.

(3) "Distribution" means a transfer of money or other property from a partnership to a person on account of a transferable interest or in a person's capacity as a partner. The term:

(A) Includes:

(i) A redemption or other purchase by a partnership of a transferable interest; and

(ii) A transfer to a partner in return for the partner's relinquishment of any right to participate as a partner in the management or conduct of the partnership's business or have access to records or other information concerning the partnership's business; and

(B) Does not include amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program.

(4) "Foreign limited liability partnership" means a foreign partnership whose partners have limited liability for the debts, obligations, or other liabilities of the foreign partnership under a provision similar to section 30-23-306(c), Idaho Code.

(5) "Foreign partnership" means an unincorporated entity formed under the law of a jurisdiction other than this state which would be a partnership if formed under the law of this state. The term includes a foreign limited liability partnership.

(6) "Limited liability partnership" means a partnership that has filed a statement of qualification under section 30-23-901, Idaho Code, and does

not have a similar statement in effect in any other jurisdiction.

(7) “Partner” means a person that:

(A) Has become a partner in a partnership under section 30-23-402, Idaho Code, or was a partner in a partnership when the partnership became subject to this chapter under section 30-23-110, Idaho Code; and

(B) Has not dissociated as a partner under section 30-23-601, Idaho Code.

(8) “Partnership” means an association of two (2) or more persons to carry on as co-owners a business for profit formed under this chapter or that becomes subject to this chapter under part 2 of this chapter or section 30-23-110, Idaho Code. The term includes a limited liability partnership.

(9) “Partnership agreement” means the agreement, whether or not referred to as a partnership agreement and whether oral, implied, in a record, or in any combination thereof, of all the partners of a partnership concerning the matters described in section 30-23-105(a), Idaho Code. The term includes the agreement as amended or restated.

(10) “Partnership at will” means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

(11) “Transferable interest” means the right, as initially owned by a person in the person’s capacity as a partner, to receive distributions from a partnership in accordance with the partnership agreement, whether or not the person remains a partner or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

(12) “Transferee” means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner.

(b) The following definitions outside this chapter apply to this chapter:

(1) “Debtor in bankruptcy” — section 30-21-102(7), Idaho Code.

(2) “Jurisdiction” — section 30-21-102(22), Idaho Code.

(3) “Jurisdiction of formation” — section 30-21-102(23), Idaho Code.

(4) "Person" — section 30-21-102(35), Idaho Code.

(5) "Principal office" — section 30-21-102(36), Idaho Code.

(6) "Property" — section 30-21-102(41), Idaho Code.

(7) "Record" — section 30-21-102(44), Idaho Code.

(8) "Registered agent" — section 30-21-102(45), Idaho Code.

(9) "Sign" — section 30-21-102(47), Idaho Code.

(10) "State" — section 30-21-102(48), Idaho Code.

(11) "Transfer" — section 30-21-102(50), Idaho Code.

History.

I.C., § 30-23-102, as added by 2015, ch. 243, § 23, p. 758; am. 2020, ch. 82, § 18, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, in subsection (a), substituted "section 30-23-901, Idaho Code" for "section 30-21-503, Idaho Code" near the middle of paragraph (6), substituted "part 2 of this chapter" for "article 2" near the end of the first sentence in paragraph (8), and substituted "section 30-23-105(a), Idaho Code" for "section 33-22-105(a), Idaho Code" at the end of the first sentence in paragraph (9).

CASE NOTES

Decisions Under Prior Law

Nature of partnership.

Partnership agreement.

Partnership property.

Nature of Partnership.

Partnership is a contract of mutual agency, each partner acting as principal in his own behalf and as agent for his copartner. State v. Cosgrove,

36 Idaho 278, 210 P. 393 (1922).

Partnership Agreement.

It is an almost universal rule that general reputation or common report cannot be shown to establish a partnership relation. Orofino Rochdale Co. v. Shore Lumber Co., 43 Idaho 425, 252 P. 487 (1927).

Partnership arises from express or implied contract. Bussell v. Barry, 61 Idaho 216, 102 P.2d 276 (1940).

Partnership Property.

Property purchased with the design that it shall become partnership property, and actually used in accordance with that design, must be regarded as firm assets (rule applied to purchase of saw mill). Gold Fork Lumber Co. v. Sweany & Smith Co., 35 Idaho 226, 205 P. 554 (1922).

Evidence was insufficient to sustain finding that ranch was owned by partnership, in view of evidence that, while partners owned the ranch, each looked upon and treated his undivided half interest therein as his sole and separate property. Bussell v. Barry, 61 Idaho 216, 102 P.2d 276 (1940).

Fact that ranch owners each owned an undivided half interest in the ranch and shared profits arising therefrom did not establish ownership of ranch as "partners." Bussell v. Barry, 61 Idaho 216, 102 P.2d 276 (1940).

Official Comment

Subsection (a) contains definitions for terms used throughout this article. Subsection (b) contains a list of definitions in Article 1 that are applicable to this article.

This section contains definitions for terms used throughout the act; it is important to remember that "partnership" means solely a domestic general partnership, except when "partnership" is used as part of a multiword-term (e.g., "foreign partnership"). Section 1101 contains definitions specific to Article 11's provisions on mergers, conversions, interest exchanges, and domestications.

"Business" [(a)(1)] — This definition originated in UPA (1914) § 2 and is fundamentally important; a general partnership must have a business

purpose. *See* Section 3-202(a) (referring to the association of two or more persons to carry on as co-owners a business for profit). *Compare* Section 3-102(1), *with* Section 4-110(b) ("A limited partnership may have any lawful purpose, regardless of whether for profit."), *and* Section 5-108(a) (same as to a limited liability company).

"Contribution" [(a)(2)] — This definition is based on ULPA (2001) § 102(2) and serves to distinguish capital contributions from other circumstances under which a partner or would-be partner might provide benefits to a general partnership (e.g., providing services to the partnership as an employee or independent contractor, leasing property to the partnership).

This definition also distinguishes "contributions" from capital raised from transferees who invest; to be a contribution, the property or benefit must be "provided by a person . . . to become a partner or in the person's capacity as a partner." This definition is ubiquitous in the law of unincorporated business organizations. *See, e.g.*, ULPA (2001) § 102(2) ("Contribution"); N.Y. Ltd. Liab. Co. Law § 102(f) (McKinney 2013) ("'Contribution' means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to render services that a member contributes to a limited liability company in his or her capacity as a member.")

In contrast, partnership agreements sometimes provide for contributions from transferees. In such circumstances, the default rules for liquidating distributions should be altered accordingly. *See* Section 3-806(b)(1) (referring to distributions to be made "to each person owning a transferable interest that reflects *contributions* made and not previously returned.") (emphasis added).

"Distribution" [(a)(3)(A) — redemptions included] — This provision specifically refers to transactions between a general partnership and one of its partners, which in the corporate context would be labeled "redemption." The paragraph has subparts because ownership interests in a partnership are conceptually bifurcated into economic rights ("transferable interests"), and governance and information rights.

Under Section 3-405(a), "[a]ny distribution made by a partnership before its dissolution and winding up must be in equal shares among partners,

except to the extent necessary to comply with a transfer effective under Section 3-503 or charging order in effect under Section 3-504." Since a redemption is a distribution, absent authorization in the partnership agreement a partnership may not redeem the interest of one partner or transferee without redeeming (or at least offering to redeem) the interests of all other partners and transferees to a comparable extent.

The law of close corporations has flirted with a similar notion. *See, e.g.*, *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 518 (Mass. 1975) (stating, with regard to closely held corporations, "if the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price"); *cf. Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976) (stating that "untempered application of the strict good faith standard enunciated in *Donahue* . . . will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned"). *See also Toner v. Baltimore Envelope Co.*, 498 A.2d 642, 650 (Md. 1985) (rejecting the "per se breach of duty" approach).

A partnership agreement can override Section 3-405(a)'s equal treatment requirement without specifically mentioning redemptions.

> EXAMPLE: Ryan Company is a general partnership whose partnership agreement: (i) includes a list (the "protected list") of decisions or actions that may be taken only with the consent of all partners; and (ii) provides that all other decisions and acts may be taken as the Management Committee determines. The protected list does not include redemptions. The partnership agreement overrides the Section 3-404(a)'s equal treatment requirement.

Subsection [(a)(3)(B) — exclusion] — This exclusion affects the reach of: (i) the charging order remedy under Section 3-504; and (ii) Section 3-407's clawback provision applicable to distributions made by a limited liability partnership. The effect on the clawback provision reflects the law in several states, *see, e.g.*, Del. Code Ann. tit. 6, § 15-309(a) (2014); Va. Code Ann. § 13.1-1036 (2014), and makes sense conceptually and as a matter of

policy. *See In re Tri-River Trading, L.L.C.*, 329 B.R. 252, 266 (B.A.P. 8th Cir. 2005), *aff'd*, 452 F.3d 756 (8th Cir. 2006) ("We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad."). UPA (1997) provides no clawback provision, an omission that disadvantaged creditors of an LLP compared to creditors of other entities with a liability shield.

"Limited liability partnership" [(a)(6)] — Under this article (and most, if not all, LLP statutes), a general partnership obtains its LLP status from only one jurisdiction. The resulting LLP is "domestic" with regard to that jurisdiction and "foreign" with regard to all others.

Sections 3-901(f) (cancellation of statement of qualification) and 3-903 (administrative revocation of statement of qualification) limit this paragraph's open-ended definition of a "limited liability partnership" as "a partnership that has filed a statement of qualification under Section 3-901." Under this article, LLP status depends on a statement of qualification being in effect. See Section 3-903(d) and its comment.

"Partner" [(a)(7)] — Under Section 3-202(a), any "person" can be a partner. Section 1-102(34) defines "person" very broadly to include individuals and "any . . . legal or commercial entity." At common law, "[t]he general rule . . . [was] that every person of sound mind, *sui juris*, and not otherwise restrained by law, may enter into a contract of partnership." Joseph Story, Commentaries on the Law on Partnership § 7, at 10 (2d ed. 1850). The phrase "sound mind" and the term "*sui juris*" suggest that at common law a partner was necessarily an individual. *See* Black's Law Dictionary (9th ed. 2009) (defining *sui juris* as one "[o]f full age and capacity"). UPA (1914) § 2 defined "person" to include "partnerships, corporations, and other associations." *See, e.g., Williams v. Mammoth of Alaska, Inc.*, 890 P.2d 581, 584 n.8 (Alaska 1995) (stating that under UPA (1914) "[a] partner need not be a natural person").

After a person has been dissociated as a partner under Section 3-602, the term "partner" continues to apply to the person's conduct while a partner. *See* Section 3-603(b).

"Partnership" [(a)(8)] —This definition, combined with Section 3-202(a), makes clear that a general partnership is a *business* organization.

This definition makes no reference to a partnership having partners upon formation, but Section 3-202(a) does

“Partnership agreement” [(a)(9)] — This definition must be read in conjunction with Sections 3-105 through 3-107, which further describe the partnership agreement. In particular, although this definition refers to “the agreement . . . of all the partners,” the partnership itself is bound by and may enforce the agreement. Section 3-106(a).

A partnership agreement is a contract, and therefore all statutory language pertaining to the partnership agreement must be understood in the context of the law of contracts.

The definition in Paragraph 12 is very broad and recognizes a wide scope of authority for the partnership agreement: “the matters described in Section 3-105(a).” Those matters include not only all relations *inter se* the partners and the partnership but also “the business of the partnership and the conduct of that business.” Section 3-105(a)(2). Moreover, the definition puts no limits on the form of the partnership agreement. To the contrary, the definition contains the phrase “whether oral, implied, in a record, or in any combination thereof.”

Unless the partnership agreement itself provides otherwise:

• A partnership agreement may comprise a number of separate documents (or records), however denominated; and

• Subject to Section 3-106(b) (deeming new partners to assent to the then-existing partnership agreement), a document, record, understanding, *etc*. can be part of the partnership agreement only with the assent of all persons then partners.

An agreement among less than all partners might well be enforceable among those partners as parties, but would not be part of the partnership agreement. However, under Section 3-105(a)(3), an amendment to a partnership agreement can be made with less than unanimous consent if the partnership agreement itself so provides.

An agreement to form a partnership is not itself a partnership agreement. The term “partnership agreement” presupposes “partners,” and a person cannot be a partner in a partnership before the partnership exists. However, as soon as a partnership comes into existence, it perforce has a partnership

agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in a manner that satisfies Section 3-202 (formation of partnership); (ii) the partnership is thus formed; and (iii) without further ado or agreement, the persons become the partnership's initial partners. A partnership agreement exists. In the words of Paragraph 12 "all the partners" have agreed who the partners are and that, as "all the partners," they will conduct a business. That agreement — no matter how informal or rudimentary — is an agreement "concerning the matters described in Section 3-105(a)." To the extent the agreement does not provide the *inter se* "rules of the game," the "default rules" of this article "fill in the gaps." Section 3-105(b).

This article states no rule as to whether the statute of frauds applies to partnership agreements. Case law suggests that the answer is yes:

> Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing [and signed by the party to be bound]; however, a contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside the Statute of Frauds.

Abbott v. Hurst, 643 So. 2d 589, 592 (Ala. 1994) (citations omitted).

Likewise, the land provision of the statute of frauds:

> applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.

Froiseth v. Nowlin, 287 P. 55, 56 (Wash. 1930) (quoting 27 C.J.S. § 220); *see also E. Piedmont 120 Associates, L.P. v. Sheppard*, 434 S.E.2d 101, 102 (Ga. Ct. App. 1993) (same, stating that "the fact that promises covered by the Statute of Frauds are made in the context of a partnership or joint venture agreement does not render the statute inapplicable"); *Filippi v. Filippi*, 818 A.2d 608, 618 (R.I. 2003) (applying the statute of frauds to an

alleged oral agreement to transfer land owned by a limited partnership to one of its partners).

In contrast, the land provision does not apply to a partner's interest in a partnership, no matter how much the partnership owns or deals in real property. Interests in a partnership are personal property and reflect no direct interest in the entity's assets. *See* Sections 3-102(23), 3-501. Thus, the real property issues pertaining to a partnership ownership of land do not "flow through" to the partners and partnership interests. *See, e.g., Wooten v. Marshall*, 153 F. Supp. 759, 763-64 (S.D.N.Y. 1957) (involving an "oral agreement for a joint venture concerning the purchase, exploitation and eventual disposition of this 160 acre tract" and stating "[t]he real property acquired and dealt with by the venturers takes on the character of personal property as between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]"); *see also Wade v. DeHart*, 1926 WL 2944 (Ohio Misc. 1926), *aff'd sub nom., Wade v. De Hart*, 159 N.E. 838 (Ohio Ct. App. 1927) (same).

On the question of how far a written (or "in a record") partnership agreement can go to prevent oral or implied-in-fact terms, see Section 3-105(a)(3), comment. For the effect of a pre-formation agreement, see Section 3-106(c). For the partnership's status viz-a-viz the partnership agreement, see Section 3-106(a).

"Partnership at will" [(a)(10)] — This paragraph defines "partnership at will" in the negative (*i.e.*, by stating what the defined term is not). A partnership is "at will" if the partners' agreement does not obligate them to remain in the partnership until the passage of a specified time (a term) or the completion of a specified task, job, project, *etc*. (an undertaking).

"Partnership at will" is thus the default mode under this article; that is, a partnership is "at will" unless the partners have agreed otherwise. Absent such agreement, a partner may rightfully leave the partnership at any time (dissociate), Sections 3-601(1), 3-602(b)(2), and rightfully cause or seek the winding up of the partnership and its business (dissolution), Section 3-801(1); *see Fleming v. Hagen Estate*, 702 N.W.2d 786, 789 (Minn. Ct. App. 2005) (rejecting "the [appellant] estate's assertion that the district court erred by not concluding that [a partner's] counterclaim unilaterally dissolved the agreement pursuant to [Minnesota Statutes section

323A.0801]"; noting that "section 323A.0801(1) is applicable only to an at-will partnership").

This article does not directly define "partnership for a term" and "partnership for an undertaking," but their respective meanings are clear from this paragraph's wording and the case law. *E.g., Girard Bank v. Haley*, 332 A.2d 443, 447 (Pa. 1975) ("A 'particular undertaking' under the statute must be capable of accomplishment at some time, although the exact time may be unknown and unascertainable at the date of the agreement."). This paragraph thus suggests that a partnership under this article will fit into one of three conveniently labeled categories: at-will, for a term, for an undertaking. However, hybrid structures are possible.

EXAMPLE: The partnership agreement of a general partnership:

• states a minimum term of ten years;

• permits one particular partner to leave the partnership at any time upon thirty days advance written notice; and

• provides that that person's dissociation as a partner will neither cause the partnership to dissolve nor entitle any other person to dissociate.

Hybrid structures cause no trouble, if the partnership agreement: (i) clearly and completely details the partners' understanding as to dissociation and dissolution; and (ii) does not confuse matters by inaccurately labeling the partnership as if it were a pure form of one of the three categories.

"Transferable interest" [(a)(11)] — Absent a contrary provision in the partnership agreement or the consent of the partners, a "transferable interest" is the only interest in a partnership which can be transferred to a non-partner. *See* the comment to Section 3-502. This article does not define any term to encompass the entirety of a partner's rights in a partnership (*i.e.*, governance and information rights as well as economic rights).

UPA (1997) took a different approach, defining the entirety of a partner's rights directly and identifying the economic aspect through a limit on transferability. *See* UPA (1997) §§ 101(9) (defining "[p]artnership interest" or "partner's interest in the partnership" as "all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights"), and 3-502 (stating that "the only transferable interest of a

partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions").

This article defines "[t]ransferable interest" as an interest "initially owned by a person in the person's capacity as a partner," because this article does not contemplate a partnership directly creating interests that comprise only economic rights. *See* Sections 3-402 (addressing how a person becomes a partner), 3-503 (addressing how a person becomes a transferee).

§ 30-23-103. Knowledge — Notice. — (a) A person knows a fact if the person:

(1) Has actual knowledge of it; or

(2) Is deemed to know it under subsection (d)(1) of this section or law other than this chapter.

(b) A person has notice of a fact if the person:

(1) Has reason to know the fact from all the facts known to the person at the time in question; or

(2) As deemed to have notice of the fact under subsection (d)(2) of this section.

(c) Subject to section 30-21-212, Idaho Code, a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to know the fact.

(d) A person not a partner is deemed:

(1) To know of a limitation on authority to transfer real property as provided in section 30-23-303(g), Idaho Code; and

(2) To have notice of:

(A) A person's dissociation as a partner ninety (90) days after a statement of dissociation under section 30-23-704, Idaho Code, becomes effective; and

(B) A partnership's:

(i) Dissolution ninety (90) days after a statement of dissolution under section 30-23-802, Idaho Code, becomes effective;

(ii) Termination ninety (90) days after a statement of termination under section 30-23-802, Idaho Code, becomes effective; and

(iii) Participation in a merger, interest exchange, conversion, or domestication ninety (90) days after articles of merger, interest

exchange, conversion, or domestication under chapter 22, title 30, Idaho Code, become effective.

(e) A partner's knowledge or notice of a fact relating to the partnership is effective immediately as knowledge of or notice to the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

History.

I.C., § 30-23-103, as added by 2015, ch. 243, § 23, p. 758; am. 2020, ch. 82, § 19, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "chapter 22, title 30, Idaho Code" for "chapter 21, title 30, Idaho Code" near the end of paragraph (d)(2)(B)(iii).

Official Comment

The Harmonization Project made two important changes to UPA (1997) in this section. First, unlike UPA (1997), this article contains no generally applicable provisions determining when an organization other than a partnership is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this article than in other circumstances; and (iv) are the subject of considerable attention in the Restatement (Third) of Agency (2006). However, Subsection (e) does provide a rule for attributing to a partnership knowledge or notice possessed by a partner.

Second, this article does not define "notice" to include "knowledge." Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for the uninitiated. In ordinary usage, notice has a meaning separate from knowledge. This article follows ordinary usage and therefore contains some references to "knowledge or notice."

Subsection (a)(2) — In this context, the most important source of "law other than this [article]" is the common law of agency.

Subsection (b)(1) — The "facts known to the person at the time in question" include facts the person is deemed to know under Subsection (a)(2).

Subsection (c) — If a person "notifies" another person of a fact, the other person has "reason to know" the fact and therefore has notice under Subsection (b)(1). However, a person can have "notice" of a fact without having been "notifie[d]" of the fact.

Section 1-212 pertains to delivery of records *by* the filing office.

Subsection (d) — Following the pioneering approach of UPA (1997), this subsection provides constructive notice of facts stated in specified filed public records. The subsection works in conjunction with other sections of this article to curtail the power to bind and personal liability of partners and persons dissociated as partners. *See* Sections 3-702, 3-703, 3-804, 3-805. The constructive notice begins ninety days after the effective date of the filed record. For this act's rules on delayed effective dates, see Section 1-203.

UPA (1997) used an oblique and decentralized approach to constructive notice. *See, e.g.*, UPA (1997) § 704(c) (stating that "for the purposes of Sections 702(a)(3) [pertaining to the lingering power to bind the partnership of a person dissociated as a partner] and 703(b)(3) [pertaining to a the lingering liability for partnership obligations of a person dissociated as a partner], a person not a partner is deemed to have notice of the dissociation 90 days after [a] statement of dissociation is filed"). As revised by the Harmonization Project, this subsection provides directly for constructive notice and centralizes all of this article's constructive notice provisions except for those pertaining to statements of authority under Section 3-303.

Subsection (e) — This subsection states the rule for imputing a partner's knowledge or notice to the partnership. The rule was part of the common law. *Peoples' Bank of Baltimore v. Keech*, 26 Md. 521, 533 (Md. 1867) (holding that "the firm is bound by notice to one of the co-partners; because each represents the firm and is general agent of all"). UPA (1914) § 12 codified the rule, and UPA (1997) § 102(f) carried forward the codified rule

with some modification. The Harmonization Project did not change UPA (1997) § 102(f), except to delete "receipt of a notification"; the phrase "receipt of a notification" is no longer a term of art in the LLC and partnership acts.

§ 30-23-104. Governing law. — The internal affairs of a partnership and the liability of a partner as a partner for the debts, obligations, or other liabilities of the partnership are governed by:

(1) In the case of a limited liability partnership, the law of this state; and
(2) In the case of a partnership that is not a limited liability partnership, the law of the jurisdiction in which the partnership has its principal office.

History.

I.C., § 30-23-104, as added by 2015, ch. 243, § 23, p. 758.

Official Comment

This section states two choice-of-law rules: an invariable rule for limited liability partnerships, Paragraph 1, and a default rule for non-LLPs, Paragraph 2. Both rules address "internal affairs" and "the liability of a partner as a partner for the debts, obligations, or other liabilities of the partnership."

Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the partnership agreement, relations among the partners as partners, and relations between the partnership and a partner as a partner. *Compare* Section 104, *with* Restatement (Second) of Conflict of Laws § 302, cmt. a (1971) (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

"Internal affairs" do not encompass the power *vel non* of a person to bind a partnership. Restatement (Second) of Conflict of Laws §§ 292(2) (1971) ("The principal will be held bound by the agent's action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority."), 295(1) ("Whether a partnership is bound by action taken on its behalf by an agent in dealing with a third person is determined by the local law of the state selected by application of

the rule of § 292."); Restatement (First) of Conflict of Laws § 345, cmt. c (1934) (Law Governing Effect of Act of Agent or Partner) ("If . . . the principal or partner sends the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only for authorized but for unauthorized conduct of the agent or partner in accordance with the law of that state."); *see also Farm & Ranch Services, Ltd. v. LT Farm & Ranch, L.L.C.*, 779 F. Supp. 2d 949, 960 (S.D. Iowa 2011).

"Internal affairs" and the "liability of a partner as a partner" are mentioned separately, because it can be argued that the liability of partners to third parties is not an internal affair. *See, e.g.*, Restatement (Second) of Conflict of Laws § 307 (1971) (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs. *See, e.g., Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (holding that the corporation's "primary purpose is to insulate shareholders from legal liability" and therefore "the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away" (quoting *Soviet Pan Am Travel Effort v. Travel Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991) (internal quotation marks omitted).

In any event, neither "internal affairs" nor the "liability of a partner as a partner" encompass a claim that a partner is liable to a third party for: (i) having purported inaccurately to have the actual authority to bind a partnership to the third party; or (ii) having committed a tort against the third party while acting on the partnership's behalf or in the course of the partnership's business. That liability is not by status (*i.e.*, not "as a partner") but rather results from function or conduct.

Treating "liability of a partner as a partner" as a matter of domestic law comports generally with the law of business entities. For example, some (if not all) limited liability partnership statutes so provide. *E.g.*, Del. Code Ann. tit. 6, § 15-1101(a) (2013) (stating that "[t]he law under which a foreign limited liability partnership is formed governs . . . the liability of partners for obligations of the partnership"); N.Y. P'ship Law § 121-1502(l) (2014) (stating that "[t]he laws of the jurisdiction that govern a foreign limited liability partnership shall determine . . . the liability of partners for debts, obligations and liabilities of, or chargeable to, the foreign limited liability partnership").

Moreover, "[t]he general rule [from the case law] is that a plaintiff's alter ego theory is governed by the law of the state in which the business at issue is organized." *Rual Trade Ltd. v. Viva Trade L.L.C.*, 549 F. Supp. 2d 1067, 1077 (E.D. Wis. 2008); *see also In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 787 (Bankr. W.D. La. 2013) (stating both conceptual and policy rationales for choosing the law of the state of formation); *In re Saba Enters., Inc.*, 421 B.R. 626, 648-51 (Bankr. S.D.N.Y. 2009) (examining the issue in detail and applying the state of formation rule).

Paragraph 1 — The partnership agreement cannot alter this paragraph. *See* Section 105(c)(1). In essence, when a partnership chooses where to deliver for filing a statement of qualification, the partnership chooses its governing law. This approach comports with the law of other businesses entities whose formation or legal status depends at least in part on a publicly filed record. *See, e.g.*, Section 4-104 (stating that the law of the state of formation is the governing law of a domestic limited partnership); 5-104 (same for limited liability company).

However, a partnership agreement may lawfully incorporate by reference the provisions of another state's partnership act. If done correctly, this incorporation makes the foreign statutory language part of the partnership agreement, and the incorporated terms (together with the rest of the partnership agreement) then govern the partners (and those claiming through the partners) to the extent not prohibited by this article. *See* Section 105. This approach: (i) does not switch the limited liability partnership's governing law to that of another state; (ii) instead takes the provisions of another state's law and incorporates them by reference into the contract among the partners; (iii) raises complex drafting issues — *e.g.*, how to address subsequent changes to the incorporated law (whether occurring by statutory amendment or court decision); and (iv) thus is rarely, if ever, a good idea.

Paragraph 2 — Section 1-102(36) defines "principal office."

The partnership agreement may change the rule stated in this paragraph, although other law may limit a partnership's options. *See* Restatement (Second) of Conflict of Laws §§ 294 (1971) (Relationship of Partners Inter Se), 187(2) (stating the limited bases for disregarding a contractual choice of law).

When a statement of qualification becomes effective under Section 901: (i) this paragraph no longer applies; and (ii) neither the partnership's principal office nor the partnership agreement is relevant to determining the law governing the partnership's internal affairs. Section 3-105(c)(1) (stating that the partnership agreement may not "vary the law applicable under Section [30-23-104(1)").

§ 30-23-105. Partnership agreement — Scope, function and limitations. — (a) Except as otherwise provided in subsections (c) and (d) of this section, the partnership agreement governs:

(1) Relations among the partners as partners and between the partners and the partnership;

(2) The business of the partnership and the conduct of that business; and

(3) The means and conditions for amending the partnership agreement.

(b) To the extent the partnership agreement does not provide for a matter described in subsection (a) of this section, this chapter governs the matter.

(c) A partnership agreement may not:

(1) Vary the provisions of section 30-23-110, Idaho Code;

(2) Vary the law applicable under section 30-23-104(1), Idaho Code;

(3) Vary the provisions of section 30-21-210, Idaho Code;

(4) Vary the provisions of section 30-23-307, Idaho Code;

(5) Unreasonably restrict the duties and rights under section 30-23-408, Idaho Code, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;

(6) Alter or eliminate the duty of loyalty or the duty of care, except as otherwise provided in subsection (d) of this section;

(7) Eliminate the contractual obligation of good faith and fair dealing under section 30-23-409(d), Idaho Code, but the partnership agreement may prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured;

(8) Unreasonably restrict the right of a person to maintain an action under section 30-23-410(b), Idaho Code;

(9) Relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or a knowing violation of the

law;

(10) Vary the power of a person to dissociate as a partner under section 30-23-602(a), Idaho Code, except to require that the notice under section 30-23-601(1), Idaho Code, be in a record;

(11) Vary the right of a court to expel a partner in the events specified in section 30-23-601(5), Idaho Code;

(12) Vary the causes of dissolution specified in section 30-23-801(4) or (5), Idaho Code;

(13) Vary the requirement to wind up the partnership's business as specified in section 30-23-802(a), (b)(1), and (d), Idaho Code;

(14) Vary the right of a partner under section 30-23-901(f), Idaho Code, to vote on or consent to a cancellation of a statement of qualification;

(15) Vary the right of a partner to approve a merger, interest exchange, conversion, or domestication under section 30-22-203(a)(2), 30-22-303(a)(2), 30-22-403(a)(2), or 30-22-503(a)(2), Idaho Code;

(16) Vary the required contents of a plan of merger under section 30-22-202(a), Idaho Code, plan of interest exchange under section 30-22-302(a), Idaho Code, plan of conversion under section 30-22-402(a), Idaho Code, or plan of domestication under section 30-22-502(a), Idaho Code;

(17) Vary any requirement, procedure, or other provision of this act pertaining to:

(A) Registered agents; or

(B) The secretary of state, including provisions pertaining to records authorized or required to be delivered to the secretary of state for filing under this act; or

(18) Except as otherwise provided in sections 30-23-106 and 30-23-107(2), Idaho Code, restrict the rights under this act of a person other than a partner.

(d) Subject to subsection (c)(8) of this section, without limiting other terms that may be included in a partnership agreement, the following rules apply:

(1) The partnership agreement may:

(A) Specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one (1) or more disinterested and independent persons after full disclosure of all material facts; and

(B) Alter the prohibition stated in section 30-23-406(2)(b), Idaho Code, so that the prohibition requires only that the partnership's total assets not be less than the sum of its total liabilities.

(2) To the extent the partnership agreement expressly relieves a partner of a responsibility that the partner would otherwise have under this chapter and imposes the responsibility on one (1) or more other partners, the agreement also may eliminate or limit any fiduciary duty of the partner relieved of the responsibility that would have pertained to the responsibility.

(3) If not manifestly unreasonable, the partnership agreement may:

(A) Alter or eliminate the aspects of the duty of loyalty stated in section 30-23-409(b), Idaho Code;

(B) Identify specific types or categories of activities that do not violate the duty of loyalty;

(C) Alter the duty of care, but may not authorize conduct involving bad faith, willful or intentional misconduct or a knowing violation of the law; and

(D) Alter or eliminate any other fiduciary duty.

(e) The court shall decide as a matter of law whether a term of a partnership agreement is manifestly unreasonable under subsection (c)(6) or (d)(3) of this section. The court:

(1) Shall make its determination as of the time the challenged term became part of the partnership agreement and by considering only circumstances existing at that time; and

(2) May invalidate the term only if, in light of the purposes and business of the partnership, it is readily apparent that:

(A) The objective of the term is unreasonable; or

(B) The term is an unreasonable means to achieve the provision's objective.

History.

I.C., § 30-23-105, as added by 2015, ch. 243, § 23, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

The Harmonization Project re-wrote this section, for the most part conforming this section to the corresponding section of ULLCA (2006).

Principal Provisions of this Article Concerning the Partnership Agreement

The partnership agreement is pivotal to a partnership, and Sections 3-105 through 3-107 are pivotal to this article. They must be read together, along with Section 3-102(12) (defining the partnership agreement).

This section performs five essential functions. Subsection (a) establishes the primacy of the partnership agreement in establishing *inter se* relations among the partners and partnership. Subsection (b) recognizes this article as comprising mostly default rules (*i.e.*, gap fillers for issues as to which the partnership agreement provides no rule). Subsection (c) lists the few mandatory provisions of the article. Subsection (d) lists some provisions frequently found in partnership agreements, authorizing some unconditionally and others so long as "not manifestly unreasonable." Subsection (e) delineates in detail both the meaning of "not manifestly unreasonable" and the information relevant to determining a claim that a provision of a partnership agreement is manifestly unreasonable.

Section 3-106 details the effect of a partnership agreement on the partnership and on persons becoming partners. Section 3-107 concerns the effect of a partnership agreement on third parties.

Role and Inevitability of Partnership Agreement

Section 3-102(12) delineates a very broad scope for "partnership agreement." As a result, once a partnership comes into existence, a

partnership agreement necessarily exists. *See* the comment to Section 3-102(12). Accordingly, this article refers to "the partnership agreement" rather than "a partnership agreement." This phrasing should not, however, be read to require a partnership or its partners to take any formal action to adopt a partnership agreement.

The partnership agreement is the exclusive consensual process for modifying this article's various default rules pertaining to relationships *inter se* the partners and between the partners and the partnership. Section 3-105(a). The partnership agreement also has power over "the obligations of a partnership and its partners to a person in the person's capacity as a transferee or person dissociated as a partner." Section 3-107(b). For the relationship between the partnership agreement and public records in the filing office, see Section 3-107(d).

The Partnership Agreement and the Fiduciary and Other Duties of Those Who Manage

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization's owners can affect the fiduciary and other duties of those who have ultimate power to manage the organization — in a general partnership, the partners themselves. As explained in detail in the comment to Subsection (d)(3), this article rejects the notion that a contract can completely transform an inherently fiduciary relationship into a merely arm's length association. Within that limitation, however, this section provides substantial power to the partnership agreement to reshape, limit, and eliminate fiduciary and other managerial duties.

Subsection (a) recognizes that the partnership agreement is the map to the parties' deal and that any claim by a partner of managerial misconduct must be assessed first under the relevant terms of the partnership agreement. Subsection (d) specifically validates arrangements commonly used to reshape managerial duties and limit the consequences of breaching those duties. Subsection (c) contains relevant limitations, but those limitations: (i) must be read together with Subsection (d); and (ii) do not preclude the partnership agreement fundamentally redesigning the duties applicable to

the partners. For this article's design of those duties, see Sections 3-408 and 3-409.

Subsection (a) — This section describes the very broad scope of a partnership's partnership agreement, which includes all matters constituting "internal affairs." *Compare* Section 105(a), *with* Section 104 (using the phrase "internal affairs" in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in Subsection (c), including the broad restriction stated in Subsection (c)(17) (concerning the rights of third parties under this article).

Subsection (a)(1) — This paragraph encompasses all the rights and duties of each partner, including rights and duties pertaining to transactions under Article 2.

Subsection (a)(3) — Under this provision, the partnership agreement can control both the quantum of consent required (*e.g.*, majority of partners) and the means by which the consent is manifested (*e.g.*, prohibiting modifications except when consented to in writing). *See* the comment to Section 3-107(a).

Under subsection (b), if the partnership agreement does not address the issue, Section 401(k) applies and requires the affirmative vote or consent of all the partners. Under Section 1-702 (Supplemental Principles of Law), the parol evidence rule will apply to a written partnership agreement when appropriate under contract law.

Subsection (b) — To the extent the partnership agreement does not determine an inter se matter, this article determines the matter. The partnership agreement may vary any provision of this article pertaining to *inter se* matters, except as provided in Subsections (c) and (d).

Sometimes — but not always — the comments to this article refer to a variable provision as a "default rule" and a non-waivable provision as "mandatory." These references are merely to draw attention to the default/mandatory distinction in particular contexts and have neither the intent nor the power to affect the default/mandatory status of provisions of this article whose comments lack a comparable reference.

Subsection (c) — This subsection lists provisions of this article whose respective effects cannot be varied or may be varied subject to a stated

limitation. For historical reasons, this subsection uses the words "vary" and "alter" interchangeably. No difference in meaning is intended.

If a person claims that a term of the partnership agreement violates this subsection, as a matter of ordinary procedural law the burden of proof is on the person making the claim.

Subsection (c)(1) — "[T]he law applicable under Section 3-104(1)" establishes the governing law for the internal affairs of a partnership. The organizers of a partnership make this choice of law by choosing to form a partnership under this article. Domestication to another jurisdiction will re-set the choice of law, *see* Sections 2-501 through 2-506, but the partnership agreement cannot. See the comment to Section 3-104(1).

Subsection (c) contains no parallel prohibition on varying Section 3-901 (stating the governing law for foreign limited liability partnerships), because a prohibition is unnecessary. As a matter of fundamental contract law, an agreement among partners of one partnership is powerless to govern the affairs of another partnership.

Subsection (c)(3) — Under this article, a partnership is emphatically an entity, and the partners lack the power to alter that characteristic.

The cited section pertains to "actions by and against partnership and partners," arguably comes within Subsection (c)(17) (prohibiting the partnership agreement from "restrict[ing] the rights under this [Code] of a person other than a partner"), but is specifically noted for the avoidance of doubt.

Subsection (c)(4) — Although phrased as a restriction, this provision grants substantial power to the partnership agreement.

> EXAMPLE: A law firm operates as a partnership, and the partnership agreement provides that a "Compensation Committee" periodically decides each partner's compensation. The agreement also states that only partners who are on the Compensation Committee may have access to the Committee's compensation decisions pertaining to other partners. This restriction is reasonable.

This article also empowers the partnership "as a matter within the ordinary course of its business [to] impose reasonable restrictions and

conditions on access to and use of information" obtained under Section 3-408. *See* Section 3-408(j).

In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored.

Subsection (c)(5) — This limitation is less powerful than might first appear, because Subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care, including restricting and substantially eliminating those duties.

Subsection (c)(6) — Section 3-409(d) refers to the "contractual obligation of good faith and fair dealing," which contract law implies in every contract. The partnership agreement cannot eliminate this obligation, neither in whole (i.e., generally) nor in part (*i.e.*, as applicable to specified situations).

However, a partnership agreement may "prescribe the standards . . . by which the performance of [that] obligation is to be measured."

EXAMPLE: A partnership agreement designates a managing partner, provides that partner almost total control of the partnership's operations, and grants the partner the discretion to cause the partnership to enter into contracts with affiliates of the partner (so-called "Conflict Transactions"). The agreement further provides: "When causing the Company to enter into a Conflict Transaction, the Managing Partner complies with Section 3-409(d) of [this article] if a disinterested person, knowledgeable in the subject matter, states in writing that the terms and conditions of the Conflict Transaction are equivalent to the terms and conditions that would be agreed to by persons at arm's length in comparable circumstances." This provision "prescribes[s] the standards by which the performance of the [Section 3-409(d)] obligation is to be measured."

EXAMPLE: Same facts as the previous example, except that, during the performance of a Conflict Transaction, the managing partner causes the partnership to waive material protections under the applicable contract. The standard stated in the previous example is inapposite to this conduct. Section 409(d) therefore applies to the conduct without any direct

contractual delineation. (However, other terms of the agreement may be relevant to determining whether the conduct violates Section 3-409(d). *See* the comment to Section 3-409(d).)

EXAMPLE: A partnership agreement designates a managing partner and gives that partner "sole discretion" to make various decisions. The agreement further provides: "Whenever this agreement requires or permits the Managing Partner to make a decision that has the potential to benefit one class of partners to the detriment of another class, the Managing Partner complies with Section 3-409(d) of [this article] if the Managing Partner makes the decision with:

a. the honest belief that the decision:

i. serves the best interests of the Partnership; or

ii. at least does not injure or otherwise disserve those interests; and

b. the reasonable belief that the decision breaches no partner's rights under this agreement."

This provision "prescribe[s] the standards by which the performance of the [Section 3-409(d)] obligation is to be measured." *Compare* Section 3-105(c)(6), *with Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) (considering such a situation in the context of the right to call preferred stock and deciding by a three-two vote that exercising the call did not breach the implied covenant of good faith and fair dealing).

A partnership agreement that seeks to prescribe standards for measuring the contractual obligation of good faith and fair dealing under Section 3-409(d) should expressly refer to the obligation. *See Gerber v. Enter. Prods. Hldgs., L.L.C.*, 67 A.3d 400, 418 (Del. 2013) (distinguishing between the implied contractual covenant and an express contractual obligation of "good faith" as stated in a limited partnership agreement).

For an explanation of the function and role of the covenant of good faith and fair dealing, see the comment to Section 3-409(d). For the rules delimiting the "not manifestly unreasonable" requirement, see Subsection (e).

Subsection (c)(7) — Section 3-410(b) delineates a partner's rights to "maintain an action against the partnership or another partner." It would be

unreasonable to frustrate these rights but not unreasonable to channel their exercise. For example, the partnership agreement might select a forum, require pre-suit mediation, provide for arbitration, or require a pre-suit demand on a management committee before a partner files suit against the partnership. Similarly, it is not unreasonable to provide for liquidated damages consonant with the law of contracts. In contrast, it would be unreasonable for a partnership agreement to both: (i) require a partner intending to sue the partnership to make demand on a management committee before filing suit against the partnership regardless of futility; and (ii) bar taking the claim to court no matter how long the management committee ponders the demand.

Subsection (c)(8) — These restrictions are ubiquitous in the law of business entities and, in conjunction with other provisions of this section, control the otherwise very broad power of a partnership agreement to affect fiduciary and other duties. The restrictions are central to the raft of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695 (Del. 2009). Delaware led the response with Delaware Code Annotated title 8, section 102(b)(7), and a number of LLC statutes have similar provisions. *E.g.*, Ga. Code Ann. § 14-11-305(4)(A) (2011). For an extreme example, see Virginia Code Annotated section 13.1-1025 (B) (2012). In this context, "conduct" includes both acts and omissions. Black's Law Dictionary (9th ed. 2009) (defining conduct as "[p]ersonal behavior, whether by action or inaction").

The term "bad faith" has multiple meanings, and the context determines which meaning applies. In the context of the duty of loyalty, "bad faith" includes conduct motivated by ill will or other intent purposely to harm another person. The concept also includes conduct from which a person derives an improper personal benefit. *See, e.g., Mroz v. Hoaloha Na Eha, Inc.*, 410 F. Supp. 2d 919, 936-37 (D. Haw. 2005) (denying a motion to dismiss a claim that "the Majority Partners" were personally liable for the partnership's wrongful termination of the plaintiff; quoting the complaint as alleging that "the Majority Partners, individually and as a group, acted with malice and/or ill will, and/or with an intent to serve their own personal interests and/or without an intent to serve company interests, and/or outside of the scope of their authority and/or without justification"); *BOGNC, LLC*

v. Cornelius NC Self-Storage L.L.C., 10 CVS 19072, 2013 WL 1867065, at *9 (N.C. Super. [Business Court] May 1, 2013) (noting that "no . . . [exculpatory] provision may limit a manager's liability for acts known to be in conflict with the interests of the limited liability company, or for acts from which the manager derived an improper personal benefit") (citing N.C. Gen. Stat. § 57C-3-32(b)); *Lasica v. Savers Grp. of Minn., L.L.C.*, A12-0092, 2012 WL 3553246, at *2 (Minn. Ct. App. Aug. 20, 2012) (noting that an "individual seeking indemnification [under statute providing for indemnification)] must have acted in good faith and must not have received an improper personal benefit") (citing MINN. STAT. § 322B.699, subdivs. 2(a)(2), (3) (2010)).

In the context of the duty of care, the concept of bad faith comes primarily from corporate law and means an extreme breach of the duty (*i.e.*, "the failure to exercise honest judgment in the lawful and legitimate furtherance of corporate purposes"). *Deblinger v. Sani-Pine Products Co., Inc.*, 107 A.D.3d 659, 661 (N.Y. 2013) (quoting *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979)) (emphasis added) (internal quotation marks omitted).

Thus, when a plaintiff alleges bad faith as pertaining to the duty of care, "[t]he burden . . . is to show irrationality: a plaintiff must demonstrate that no reasonable business person could possibly authorize the action in good faith. Put positively, the decision must go so far beyond the bounds of reasonable business judgment that its only explanation is bad faith." *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (discussing then prevailing Delaware law) (citation omitted); *see also KDW Restructuring & Liquidation Servs. L.L.C. v. Greenfield*, 874 F. Supp. 2d 213, 226 (S.D.N.Y. 2012) (referring to a lack of "a rationale corporate purpose" and "a disregard for the duty to examine all available information — *information that was readily at hand*") (emphasis added).

With regard to both the duty of loyalty and the duty of care, "bad faith" is entirely distinct from the meaning of "good faith" in the contractual covenant of good faith and fair dealing. *See* the comment to Section 3-409(d).

Subsection (c)(8) pertains to indirect as well as direct efforts to "relieve or exonerate" and thus limits how far a partnership agreement can go in

providing for indemnification. *See* Section 3-401(c) (stating a default rule for indemnification).

Although this paragraph does not expressly address contracts between a partnership and a partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

> EXAMPLE: A general partnership enters into a management contract with its sole managing partner, and the contract provides the partner exoneration for liability to the partnership even for willful and intentional misconduct. Most likely, contract law will treat the provision as against public policy and therefore unenforceable. Restatement (Second) of Contracts § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."). If not, a court should hold the provision unenforceable to avoid evisceration of Subsection (c)(8). (Or, the court could invoke the policy expressed in Subsection (c)(8) as grounds for holding the provision unenforceable under contract law.)

Subsection (c)(9) — As a result of this restriction, a partner always has the power to dissociate; the partnership agreement can only negate the right. This approach is consistent with the notions that: (i) a partnership is a voluntary association, *see, e.g., Gangl v. Gangl*, 281 N.W.2d 574, 580 (N.D. 1979) (stating that "[t]he term [association] connotes not only a group of two or more persons but also voluntariness"); (ii) the partnership relationship is essentially contractual, *see, e.g., Wallner v. Schmitz*, 239 Minn. 93, 95, 57 N.W.2d 821, 823 (1953) (stating that "[a] partnership is a contractual relationship as between the parties"); and (iii) only in exceptional circumstances does a party to a contract lack the power to breach, and courts will not enjoin a person to remain in an ongoing contractual relationship that involves trust and confidence. E. Allan Farnsworth, Contracts § 12.7, at 781 (3d ed. 1999) ("A court will not grant specific performance of a contract to provide a service that is personal in nature. This refusal . . . is based [in part] of the undesirability of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken and the undesirability, in some instances, of imposing what might seem like involuntary servitude.") (footnote omitted).

Subsection (c)(10) — The partnership agreement may not change the stated grounds for expulsion but may determine the forum in which a claim for expulsion under Section 3-601(5) is determined.

Subsection (c)(11) — The partnership agreement may not change the stated grounds for dissolution but may determine the forum in which a claim for dissolution under Section 3-801(4) or (5) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and in partnership agreements in particular.

The approach of this paragraph differs from the law of Delaware. *See Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898, at *1, n.2 (Del. Ch. Dec. 9, 2013) (stating that "the right to judicial dissolution is a default right which the parties may eschew by contract" but reserving the question of "[w]hether the parties may, by contract, divest this Court of its authority to order a dissolution in all circumstances, even where it appears manifest that equity so requires — leaving, for instance, irreconcilable members locked away together forever like some alternative entity version of Sartre's *Huis Clos* ").

Subsection (c)(12) — The cited provisions comprise the non-waivable aspects of winding up a dissolved partnership. The other provisions of Section 3-802 are default rules and therefore waivable.

Subsection (c)(13) — Section 3-901(f) requires the "the affirmative vote or consent of all the partners." The requirement is non-waivable, because canceling a statement of qualification eliminates the LLP liability shield and makes each partner automatically liable for partnership's obligations subsequently incurred.

Subsection (c)(14) — Sections 2-203(a)(1), 2-303(a)(1), 2-403(a)(1), and 2-503(a)(1) each requires the consent or the affirmative vote of all partners. The partnership agreement may modify these requirements. In contrast, under the sections stated in this subsection:

□• each partner is protected from being merged, exchanged, converted, or domesticated "into" the status of a partner in a general partnership that is not a limited liability partnership (or a comparable "unshielded" position in

some other organization) without the partner having *directly* consented to either:

• the merger, interest exchange, conversion, or domestication; or

• a partnership agreement provision that permits such transactions to occur with less than unanimous consent of the partners; and

☐• merely consenting to a partnership agreement provision that permits amendment of the partnership agreement with less than unanimous consent of the partners does not qualify as the requisite direct consent.

Subsection (c)(15) — Because these plans are the basic "deal documents" for each of the organic transactions contemplated in Article 2, the partnership agreement may not vary the contents of these plans.

Subsection (c)(16) — This prohibition is arguably implicit in Subsection (c)(17) (affecting rights under this article of third parties) but is stated expressly to avoid any doubt.

Subsection (c)(17) — This limitation pertains only to "the rights under this [Code] of third parties" other than partners. Moreover, the limitation is subject to two major exceptions: Section 3-106 (pertaining to the partnership agreement's relationship to the partnership itself and to persons becoming partners) and Section 3-107(b) (pertaining to the partnership agreement's power over the rights of transferees).

Subsection (d) — The partnership agreement has plenipotentiary power over the matters described in Subsection (a), except as specifically limited by Subsections (c) and (d)(3). However, for the convenience of practitioners and the courts, Paragraphs 1 and 2 list various terms often found in partnership agreements. No negative inference should be drawn about terms not listed; the listing is provided "without limiting other terms that may be included in a partnership agreement."

Paragraph 3 lists arrangements subject to the "not manifestly unreasonable" standard. Subsection (e) delineates that standard. The same standard applies to terms of a partnership agreement which seek to "prescribe the standards . . . by which the performance of the [contractual] obligation [of good faith and fair dealing under Section 3-409(d)] is to be measured." Subsection (c)(6).

Subsection (d)(1)(A) — An arrangement *not* involving "one or more disinterested and independent persons" acting "after full disclosure of all material facts" would "alter . . . the aspects of the duty of loyalty stated in Section 3-409(b)" and would therefore be subject to the "not manifestly unreasonable standard" of Subsection (d)(3)(A).

For the meaning of "material" as applied to information, see the comment to Section 3-409(f).

Subsection (d)(1)(B) — Section 3-405(a)(2) prohibits distributions by a limited liability partnership:

• *not merely* when, after the distribution, "the partnership's total assets would be less than the sum of its total liabilities";

• *but also* when, after the distribution, the assets would less than the total liabilities "plus the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to the rights of persons receiving the distribution."

The second part of the solvency test pertains to preferential rights to distributions, is thus a matter *inter se* the partners and any transferees, and is therefore subject to change in the partnership agreement.

In contrast, the first part of the solvency test protects third parties — creditors of the partnership — and therefore cannot be changed by the partnership agreement. Section 3-105(c)(17). Likewise, the partnership agreement cannot change the solvency test stated in Section 3-406(a)(1) (that "the partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's business").

Subsection (d)(2) — The "not manifestly unreasonable" standard does not apply to partnership agreement provisions within this paragraph.

EXAMPLE: ABC Company ("ABC") has three partners. ABC has two entirely separate lines of business, the Alpha business and the Beta business. Under ABC's partnership agreement:

• Partner 1's responsibilities pertain exclusively to the Alpha business, while responsibility for:

- the Beta business is allocated exclusively to Partner 2; and
- ABC's overall operation is allocated exclusively to Partner 3.

• Partner 2's responsibilities pertain exclusively to the Beta business, while responsibility for:

- the Alpha business is allocated exclusively to Partner 1; and
- ABC's overall operation is allocated exclusively to Partner 3.

• Partner 1 has no fiduciary duties pertaining to the Beta business.

• Partner 2 has no fiduciary duties pertaining to the Alpha business.

The elimination of Partner 1's fiduciary duties with regard to the Beta business and Partner 2's fiduciary duties with regard to the Alpha business are enforceable, without regard to the "manifestly unreasonable" standard of Subsection (d)(3).

Section (d)(3) — This article rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of "freedom of contract" against the dangers that inescapably exist when some persons have power over the interests of others.

Nonetheless, a properly drafted partnership agreement may substantially alter and even eliminate fiduciary duties. Two important limitations exist. First, arrangements subject to this subsection may not be "manifestly unreasonable." *See* Subsection (e) (delineating this standard).

Second, the partnership agreement may not transform the relationship *inter se* partners and the partnership into an entirely arm's length arrangement. For example, displacement of fiduciary duties is effective only to the extent that the displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence of fiduciary duty. *See, e.g., Paige Capital Mgmt., L.L.C. v. Lerner Master Fund, L.L.C.*, Civ. A. No. 5502-CS, 2011 WL 3505355, at *31 (Del. Ch. Aug. 8, 2011) (stating that, even under a statute that "permits the waiver of fiduciary duties . . . such waivers must be set forth clearly"); *Kelly v. Blum*, Civ. A. No. 4516-VCP, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010) ("Having been granted great contractual freedom by the LLC Act, drafters of or parties to an LLC agreement should be expected to provide . . . clear and

unambiguous provisions when they desire to expand, restrict or eliminate the operation of traditional fiduciary duties"). It would therefore be manifestly unreasonable for a partnership agreement to negate this rule.

Although Subsection (d)(3) does not expressly address contracts between a partnership and a partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

> EXAMPLE: A general partnership enters into a management contract with its sole managing partner, and the contract provides that the duties of loyalty stated in Section 3-409(b) are entirely eliminated. If the partnership agreement were to so provide, the provision would be subject to the "manifestly unreasonable standard." Section 3-105(d)(3)(A). Absent the authorization provided by Section 3-105(d)(3)(A), the management contract's attempt to waive fiduciary duties may be unenforceable as a matter of public policy and contract law. *See Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 57, 133 Cal. Rptr. 2d 218 (2003) (stating that "waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in private close corporations is against public policy and a contract provision in a buy-sell agreement purporting to effect such a waiver is void"). If not, a court should hold the provision unenforceable nonetheless so as to avoid eviscerating Subsection (d)(3).

Subsection (d)(3)(A) — Subject to the "not manifestly unreasonable" standard, this paragraph empowers the partnership agreement to eliminate *all* aspects of the duty of loyalty listed in Section 3-409(b). The obligation of good faith and fair dealing, Section 3-409(d), would remain. See Subsection (c)(6). As to any other, uncodified aspects of the duty of loyalty, see Subsection (d)(3)(D) (empowering the partnership agreement to "alter or eliminate any other fiduciary duty").

> EXAMPLE: Joint Venture Partnership ("JV") is a general partnership, with two partners, Kappa, Inc. ("Kappa") and Lambda, LLC ("Lambda"). The partnership agreement provides that:
>
> • JV is managed by a "board" consisting of one person appointed by Kappa and one person appointed by Lambda;
>
> • each appointee:

• owes fiduciary and any other duties exclusively to the partner that made the appointment; and

• owes no duties to the other partner and the partnership.

The “not manifestly unreasonable” standard applies to these provisions under Subsection (d)(3)(A) and (D), and the provisions are not manifestly unreasonable. Note that the provisions do not affect the duties of Kappa and Lambda to each other.

Subsection (d)(3)(B) — Under this paragraph, a partnership agreement might provide that an affiliate of a partner will provide compensated services to the partnership at a price not exceeding market price, or that the partner may pursue opportunities that otherwise would be partnership opportunities. Such arrangements are commonplace and permissible.

Subsection (d)(3)(C) — In this context, “conduct” includes both acts and omissions. Black’s Law Dictionary (9th ed. 2009) (defining conduct as “[p]ersonal behavior, whether by action or inaction”). Subject to the “not manifestly unreasonable” standard and the bedrock requirements stated here and in Subsection (c)(8), the partnership agreement can reduce the duty of care substantially. In particular, the partnership agreement can eliminate the aspects of the duty of care pertaining to gross negligence and recklessness.

This provision replicates in a particular context the general rule stated in Subsection (c)(8). For the meaning of “bad faith” in the context of the duty of care, see Subsection (c)(8), comment.

Subsection (e) — The “not manifestly unreasonable” concept became part of uniform business entity statutes when UPA (1997) imported the concept from the Uniform Commercial Code. (In the current version of the Uniform Commercial Code, the concept appears in Section 1-302(b).)

This subsection provides rules for applying the concept, specifying:

• who decides the issue of “manifestly unreasonable”

□• “the court . . . as a matter of law,” Subsection (e);

• the framework for determining the issue

□• determination to be made “in light of the purposes, activities, and affairs of the partnership,” Subsection (e)(2);

- the temporal setting for determining the issue

  □• "[d]etermination [to be made] as of the time the challenged term became part of the partnership agreement," Subsection (e)(1); and

- what information is admissible for determining the issue

  □• "[o]nly circumstances existing" when "the challenged term became part of the partnership agreement," Subsection (e)(1).

The subsection also provides a very demanding standard for persons claiming that a term of a partnership agreement is "manifestly unreasonable." "The court . . . may invalidate the term only if, in light of the purposes, and business of the partnership, it is *readily apparent* that: (A) the objective of the term is unreasonable; or (B) the term is an unreasonable means to achieve the term's objective." Subsection (e)(2) (emphasis added).

Subsection (e) is fundamental to this article, because: (i) this article generally defers to the agreement among the partners; and (ii) Subsection (e) safeguards the partnership agreement in at least four ways:

• Determining manifest unreasonableness *inter se* owners of an organization is a different task than doing so in a commercial context, where concepts like "usages of trade" are available to inform the analysis. Each business organization must be understood in its own terms and context.

• If loosely applied, the concept of "manifestly unreasonable" would permit a court to rewrite the partners' agreement, which would destroy the balance this article seeks to establish between freedom of contract and fiduciary duty.

• Case law has not adequately delineated the concept. *See, e.g., In re Brobeck, Phleger & Harrison L.L.P.,* 408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) ("RUPA [UPA (1997)] does not define what is 'manifestly unreasonable' and the parties have not cited, nor can the court locate, a decision that defines the term. Absent case law or even a dictionary definition, the court must rely on its common sense to recognize something as manifestly unreasonable.").

• In the context of statutes permitting stock transfer restrictions unless "manifestly unreasonable," courts have often ignored the word

"manifestly." *See, e.g., Brandt v. Somerville*, 692 N.W.2d 144, 152 (N.D. 2005) (stating that "in close corporations, a majority of courts have sustained restrictions that are determined to be reasonable in light of the relevant circumstances"); *Roof Depot, Inc. v. Ohman*, 638 N.W.2d 782, 786 (Minn. Ct. App. 2002) (stating that "the restrictions [on share transfer] are not 'manifestly unreasonable' because they are reasonable means to ensure that the management and control of the business remains in the group of investors or with people well known to them"); *Castriota v. Castriota*, 633 A.2d 1024, 1027-28 (N.J. App. Div. 1993) ("We are obliged to apply the statute in a manner consonant with its essential purpose to permit reasonable restrictions upon alienation.").

Subsection (e)(1) — The significance of the phrase "as of the time the term as challenged became part of the partnership agreement" is best shown by example.

EXAMPLE: When a particular partnership comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the partnership's sole managing partner. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the partnership's start-up. In order to induce the individual to accept the position of sole managing partner, the other partners are willing to have the partnership agreement significantly limit the managing partner's fiduciary duties. Several years later, when the partnership's operations have turned prosaic and the managing partner's talents and background are not nearly so crucial, a partner challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under Subsection (e)(1) is when the partnership began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

EXAMPLE: As initially adopted, a partnership agreement identifies a category of decisions ordinarily subject to the duty of loyalty and provides that "the managing partner's sole, reasonable discretion" satisfies the duty. A year later, the agreement is amended to delete the word "reasonable." Later, a partner claims that, without the word "reasonable," the provision is manifestly unreasonable. The relevant time

under Subsection (e)(1) is when the agreement was amended, not when the agreement was initially adopted.

Subsection (e)(2) — If a person claims that a term of the partnership agreement is manifestly unreasonable under Subsections (c)(6) or (d)(3), as a matter of ordinary procedural law the person making the claim has the burden of proof.

§ 30-23-106. Partnership agreement — Effect on partnership and person becoming partner — Preformation agreement. — (a) A partnership is bound by and may enforce the partnership agreement, whether or not the partnership has itself manifested assent to the agreement.

(b) A person that becomes a partner is deemed to assent to the partnership agreement.

(c) Two (2) or more persons intending to become the initial partners of a partnership may make an agreement providing that upon the formation of the partnership the agreement will become the partnership agreement.

History.

I.C., § 30-23-106, as added by 2015, ch. 243, § 23, p. 758.

Official Comment

Subsection (a) — This subsection resolves twin questions that have troubled some courts — namely, whether an unincorporated entity that has not signed its foundational agreement nonetheless is bound by and may enforce the agreement. The questions have been particularly troubling in the context of agreements to arbitrate. *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 3:13-CV-1655-K, 2014 WL 1255844, at *5-6 (N.D. Tex. Mar. 27, 2014) (concluding that a limited liability partnership "is a party to the Partnership Agreement," even though the partnership itself never signed or otherwise assented to the agreement; enforcing arbitration provision to the benefit of the LLP). *Contra Trover v. 419 OCR, Inc.*, 921 N.E.2d 1249, 1255 (2010) (finding that "neither FODG [an LLC] nor the Golf Club [a related LLC] was a party to the operating agreements and that they are therefore not bound by the arbitration clauses therein").

Developments pertaining to the Virginia LLC Act further illustrate the difficulties. In *Mission Residential, L.L.C. v. Triple Net Properties, L.L.C.*, 654 S.E.2d 888, 891 (Va. 2008), the Virginia Supreme Court held that an LLC member's derivative claim was not subject to the arbitration provision in the operating agreement, because: (i) the LLC was "the real party in interest"; (ii) the LLC had not signed the operating agreement; and (iii)

requiring the claim to be arbitrated would "ignore[] the separate existence of Holdings [the LLC]." The Virginia legislature promptly disagreed and amended the LLC act to state: "A limited liability company is bound by its operating agreement whether or not the limited liability company executes the operating agreement." 2009 Va. Acts 763 (S.B. 1241), codified as Va. Code Ann. § 13.1-1023.A.1 (2012). The legislature left open the question of a limited liability company's power to enforce an operating agreement that the company has not executed.

This subsection answers the twin questions, categorically and in the affirmative.

This subsection does not consider whether a partnership is an indispensable party to a suit concerning the partnership agreement. That question is one of procedural law, and the answer can determine whether federal diversity jurisdiction exists.

Subsection (b) — Given the possibility of oral and implied-in-fact terms in the partnership agreement, a person becoming a partner of an existing partnership should take precautions to ascertain fully the contents of the partnership agreement. *See* the comment to Section 3-105(a)(3), cmt.

Subsection (c) — A pre-formation arrangement is not a partnership agreement. A partnership agreement is among "partners," and, under this article, the earliest a person can become a partner is upon the formation of the partnership. *See* Section 3-402.

§ 30-23-107. Partnership agreement — Effect on third parties and relationship to records effective on behalf of partnership. — (a) A partnership agreement may specify that its amendment requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) The obligations of a partnership and its partners to a person in the person's capacity as a transferee or person dissociated as a partner are governed by the partnership agreement. Subject only to a court order issued under section 30-23-504(b)(2), Idaho Code, to effectuate a charging order, an amendment to the partnership agreement made after a person becomes a transferee or is dissociated as a partner:

(1) Is effective with regard to any debt, obligation, or other liability of the partnership or its partners to the person in the person's capacity as a transferee or person dissociated as a partner; and

(2) Is not effective to the extent the amendment:

(A) Imposes a new debt, obligation, or other liability on the transferee or person dissociated as a partner; or

(B) Prejudices the rights under section 30-23-701, Idaho Code, of a person that dissociated as a partner before the amendment was made.

(c) If a record delivered by a partnership to the secretary of state for filing becomes effective under this chapter and contains a provision that would be ineffective under section 30-23-105(c) or (d)(3), Idaho Code, if contained in the partnership agreement, the provision is ineffective in the record.

(d) Subject to subsection (c) of this section, if a record delivered by a partnership to the secretary of state for filing becomes effective and conflicts with a provision of the partnership agreement:

(1) The agreement prevails as to partners, persons dissociated as partners, and transferees; and

(2) The record prevails as to other persons to the extent they reasonably rely on the record.

History.

I.C., § 30-23-107, as added by 2015, ch. 243, § 23, p. 758; am. 2020, ch. 82, § 20, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "section 30-23-105(c) or (d)(3), Idaho Code" for "section 33-22-105(c) or (d)(3), Idaho Code" near the middle of subsection (c).

Official Comment

Subsection (a) — This subsection, derived from Delaware Code Annotated title 6, § 18-302(e), permits the partnership agreement to: (i) accord a non-partner veto rights over amendments to the agreement; and (ii) establish other preconditions for amendments. An amendment made in derogation of a veto right or precondition is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-partner managers.

> EXAMPLE: A non-partner manager enters into a management contract with a partnership, and that agreement provides in part that the partnership may remove the manager without cause only with the consent of partners holding two-thirds of the profits interests. The partnership agreement contains a parallel provision (the "quantum provision"), but the non-partner manager is not a party to the partnership agreement. Later, the partners amend the quantum provision to reduce the quantum to a simple majority of profits interests and thereafter purport to remove the manager without cause. Although the partnership has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the partnership has the *power* under Section 105(a)(2) to effect the removal — unless the partnership agreement provides the manager a veto right over changes in the partnership agreement's quantum provision.

This subsection does not refer to partner veto rights because, unless otherwise provided in the partnership agreement, the consent of each

partner is necessary to effect an amendment. *See* Section 3-401(k).

Because "[a] partnership agreement may specify that its amendment requires . . . the satisfaction of a condition," a partnership agreement can require that any amendment be made through a writing or a record signed by each partner. *See* Section 3-105(a)(3) (empowering the partnership agreement to determine "the means and conditions for amending the partnership agreement").

Subsection (b) — The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization's economic interests. If, as is often the situation, the partnership agreement overrides Section 3-701 (Purchase of Interest of Person Dissociated as Partner), such transferees can include the heirs of the partnership's founders as well as former partners who, by agreement, are "locked in" as transferees of their own interests.

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can "freeze the deal" as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

There is little case law in this area, and almost all of it pertains to limited rather than general partnerships. The case law clearly favors the remaining owners over former owners and other transferees. *See, e.g., Bauer v. Blomfield Co./Holden Joint Venture*, 849 P.2d 1365, 1367 n.2 (Alaska 1993) (holding that a mere assignee "was not entitled to complain about a decision made with the consent of all the partners" and stating "[w]e are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest"); *Bynum v. Frisby*, 311 P.2d 972, 975 (Nev. 1957) ("[A]n assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners nor require them to resort to dissolution in order to prevent such a relationship from arising. The stranger remains a stranger entitled only to share in the partnership's worth and to demand an accounting upon dissolution.") (applying UPA (1914) § 27, which pertains to rights of an

assignee). *See generally* Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 Suffolk L. Rev. 587 (2009).

This subsection follows *Bauer* and other cases by expressly subjecting transferees (including a person dissociated as a partner) to partnership agreement amendments made after the transfer or dissociation, except amendments that increase obligations on transferees. For example, an amendment might extend the duration of a partnership but may not institute a new capital call obligation on transferees.

The issue of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation awaits development in the case law. An unreported LLC case suggests the answer might be yes, but the decision rests primarily on the wording of the LLC's operating agreement. In *Kohannim v. Katoli*, 08-11-00155-CV, 2013 WL 3943078, at *10-11 (Tex. App. July 24, 2013), the court: (i) noted that a limited liability company's "[r]egulations provide[] for the distribution of 'available cash' to members quarterly provided that the available cash is not needed for a reasonable working capital reserve"; (ii) also noted that "Jacob [the defendant member] paid himself $100,000 for management services that were not performed and failed to make any profit distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-spouse of Mike, who became Mike's transferee as part of their divorce proceeding] even though more than $250,000 in undistributed profit had accumulated in the company's accounts since the mortgage on the property had been paid off in February 2007"; and (iii) concluded that "more than a scintilla of evidence supports the trial court's finding that Jacob failed to make profit distributions to Pavaneh." In essence, the court upheld a finding that Jacob had breached (or caused the partnership to breach) a contractual obligation to make distributions. But the court went further: "We also agree with the trial court's conclusion that the established facts demonstrated Jacob engaged in wrongful conduct and exhibited a lack of fair dealing in the company's affairs to the prejudice of Parvaneh." *Id*. at *11.

For the very limited statutory rights of transferees, see Section 3-503.

Subsection (b)(1) — This provision is inapposite when "a partner or transferee becomes entitled to receive a distribution." Section 3-405(d). In

that circumstance:

- "the partner or transferee has the status of . . . a creditor of the partnership with respect to the distribution," *id* .; and

- the relevant obligation is not owed to "a person in the person's capacity as a transferee or person dissociated as a partner," Subsection (b), but rather to the person in the person's capacity as a creditor.

Subsection (c) — This provision precludes using a filed record (*e.g*., a statement of authority) to make an end run around the strictures of Section 3-105(c) and (d)(3).

Subsection (d) — It will be possible, albeit improvident, for a partnership agreement to be inconsistent with a public filing pertaining to the partnership. For those circumstances, this subsection provides rules for determining which source of information prevails.

- For partners and transferees, the partnership agreement is paramount.

- Third parties may invoke the public record upon a showing of reasonable reliance, which presupposes actual knowledge — *i.e*., deemed knowledge under Section 3-103(d) does not suffice.

The mere fact that a term is present in a publicly filed record and not in the partnership agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not expressly cover a situation in which: (i) one of the specified filed records contains information in addition to, but not inconsistent with, the partnership agreement, and (ii) a person, other than a partner or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation. Moreover, to argue that the partnership agreement prevails over the filed record is to argue that the additional term does conflict with the partnership agreement, at least in effect.

Section 3-105(a)(3) might also be relevant to the subject matter of this subsection. Absent a contrary provision in the partnership agreement, language in a record delivered to the filing office for filing on behalf of the partnership might be evidence of the partners' agreement and might thereby constitute or at least imply a term of the partnership agreement.

This subsection does not apply to records delivered to the filing office for filing on behalf of persons other than a partnership.

§ 30-23-108. Signing of records to be delivered for filing to secretary of state. — (a) A record delivered to the secretary of state for filing pursuant to this act must be signed as follows:

(1) Except as otherwise provided in subsections (2) and (3) of this section [paragraphs (2) and (3) of this subsection], a record signed by a partnership must be signed by a person authorized by the partnership.

(2) A record filed on behalf of a dissolved partnership that has no partner must be signed by the person winding up the partnership's business under section 30-23-802(3), Idaho Code, or a person appointed under section 30-23-802(4), Idaho Code, to wind up the business.

(3) A statement of denial by a person under section 30-23-304, Idaho Code, must be signed by that person.

(4) Any other record delivered on behalf of a person to the secretary of state for filing must be signed by that person.

(b) A record filed under this chapter may be signed by an agent. Whenever this chapter requires a particular individual to sign a record and the individual is deceased or incompetent, the record may be signed by a legal representative of the individual.

(c) A person that signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.

History.

I.C., § 30-23-108, as added by 2015, ch. 243, § 23, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Compiler's Notes.

The bracketed insertion in paragraph (a)(1) was added by the compiler to correct the enacting legislation and to conform to the uniform act.

Official Comment

Subsection (a) — Section 1-102(20) defines "sign" broadly, including "an electronic symbol, sound, or process."

Subsection (a)(1) — From the perspective of the filing office, it is not necessary that a partner sign a record delivered for filing on behalf of a partnership. The partnership agreement can impose such a requirement as an *inter se* matter, but the requirement would not affect this provision. *See* Section 3-105(c)(16)(B) (stating that the partnership agreement may not "vary any requirement, procedure, or other provision of this [Code] pertaining to . . . the [Secretary of State], including provisions pertaining to records authorized or required to be delivered to the [Secretary of State] for filing under this [Code]").

The filing office will not check whether a person who purports to be authorized to sign a record on behalf of a partnership actually has that authority, even if a statement of authority pertaining to the matter is in effect. Indeed, even if the filing office somehow "knows" of a statement limiting authority, the office lacks the authority to reject a record on that basis. *See* the comment to Section 1-206(a) (stating the requirements for filing and noting that the filing office's review is ministerial and limited to information pertaining to the stated requirements), and the comment to Section 1-206(c) (explaining why such a statement of authority does not affect the filing office).

Subsection (b) — The filing office will not check the bona fides of a person purporting to have signed a record in a representative capacity. This subsection expressly authorizes taking action through an agent to provide context for Subsection (c) and for the avoidance of doubt. No negative inference should be drawn about using agents to take other action under this act.

Subsection (c) — As a matter of agency law, a person who signs in a representative capacity gives a "warranty of authority." Restatement (Third) of Agency § 6.10 (2006). This subsection has criminal law implications. Under Section 3-109(c), "[a]n individual who signs a record authorized or required to be filed under this [chapter] affirms under penalty of perjury that the information stated in the record is accurate."

§ 30-23-109. Liability for inaccurate information in filed record. — (a) If a record delivered to the secretary of state for filing under this act and filed by the secretary of state contains inaccurate information, a person that suffers loss by reliance on the information may recover damages for the loss from a partner if:

(1) A person signed the record, or caused another to sign it on the person's behalf, and knew the information to be inaccurate at the time the record was signed; and

(2) Subject to subsection (b) of this section:

(A) The record was delivered for filing on behalf of the partnership; and

(B) The partner had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the partner reasonably could have:

(i) Effected an amendment under section 30-23-901(f), Idaho Code;

(ii) Filed a petition under section 30-21-210, Idaho Code; or

(iii) Delivered to the secretary of state for filing a statement of change under section 30-21-407, Idaho Code, or a statement of correction under section 30-21-205, Idaho Code.

(b) To the extent the partnership agreement expressly relieves a partner of responsibility for maintaining the accuracy of information contained in records delivered on behalf of the partnership to the secretary of state for filing under this act and imposes that responsibility on one (1) or more other partners, the liability stated in subsection (a) (2) of this section applies to those other partners and not to the partner that the partnership agreement relieves of the responsibility.

(c) An individual who signs a record authorized or required to be filed under this act affirms under penalty of perjury that the information stated in the record is accurate.

History.

I.C., § 30-23-109, as added by 2015, ch. 243, § 23, p. 758; am. 2020, ch. 82, § 21, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, in paragraph (a)(2)(B), substituted "section 30-21-210, Idaho Code" for "section 30-23-112, Idaho Code" at the end of paragraph (ii) and, in paragraph (ii), substituted "section 30-21-407, Idaho Code" for "section 30-23-906 Idaho Code" and "section 30-21-205, Idaho Code" for "section 30-23-116 Idaho Code."

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section works in concert with Section 1-211, which addresses another aspect of liability for inaccurate information in a file record.

Subsection (a)(2) — Although this article establishes the avoidance of gross negligence as the standard of care for partners viz-a-viz the partnership, this subsection encompasses liability to third parties. Accordingly, the standard here is more demanding. The phrases "reasonably sufficient time" and "reasonably could have" indicate a standard of ordinary care. "[N]otice of the inaccuracy" involves "reason to know." Section 3-103(b)(1).

Subsection (b) — Section 3-105(d)(2) authorizes the partnership agreement to establish an analogous rule *inter se* the partners. This subsection goes where the partnership agreement cannot reach and affects the rights of third parties.

§ 30-23-110. Application to existing relationships. — (a) Before July 1, 2017, this chapter governs only:

(1) A partnership formed on or after July 1, 2015; and

(2) Except as otherwise provided in subsection (c) of this section, a partnership formed before July 1, 2015, that elects, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be subject to this chapter.

(b) Except as otherwise provided in subsection (c) of this section, on and after July 1, 2017, this chapter governs all partnerships.

(c) With respect to a partnership that elects pursuant to subsection (a)(2) of this section to be subject to this chapter, after the election takes effect the provisions of this chapter relating to the liability of the partnership's partners to third parties apply:

(1) Before July 1, 2015, to:

(A) A third party that had not done business with the partnership in the year before the election took effect; and

(B) A third party that had done business with the partnership in the year before the election took effect only if the third party knows or has been notified of the election; and

(2) On and after July 1, 2017, to all third parties, but those provisions remain inapplicable to any obligation incurred while those provisions were inapplicable under paragraph (1)(B) of this subsection.

History.

I.C., § 30-23-110, as added by 2015, ch. 243, § 23, p. 758.

§ 30-23-111. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Delivery of record — section 30-21-104, Idaho Code.

(2) Signing and filing pursuant to judicial order — section 30-21-210, Idaho Code.

(3) Filing requirements — section 30-21-201, Idaho Code.

(4) Effective date and time — section 30-21-203, Idaho Code.

(5) Withdrawal of filed record before effectiveness — section 30-21-204, Idaho Code.

(6) Correcting filed record — section 30-21-205, Idaho Code.

(7) Duty of secretary of state to file; review of refusal to file; delivery of record by secretary of state — sections 30-21-206 and 30-21-212, Idaho Code.

(8) Reservation of power to amend or repeal — section 30-21-701, Idaho Code.

(9) Supplemental principles of law — section 30-21-702, Idaho Code.

History.

I.C., § 30-23-111, as added by 2015, ch. 243, § 23, p. 758; am. 2020, ch. 82, § 22, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "30-21-212, Idaho Code" for "30-21-211, Idaho Code" at the end of subsection (7).

Part 2
Nature of Partnership

Idaho Code § 30-23-201

§ 30-23-201. Partnership as entity. — (a) A partnership is an entity distinct from its partners.

(b) A partnership is the same entity regardless of whether the partnership has a statement of qualification in effect under section 30-23-901, Idaho Code.

History.

I.C., § 30-23-201, as added by 2015, ch. 243, § 24, p. 758.

Official Comment

Subsection (a) — The law of general partnerships long struggled with the question of whether a partnership is merely an aggregate of its partners or an entity distinct from its partners.

The common law took the aggregate approach. *X-L Liquors v. Taylor*, 111 A.2d 753, 759 (1955) (stating that "the common law did not recognize the separate existence of partnerships"); *Watson v. G.C. Associates Ltd. P'ship*, 691 P.2d 417, 418 (1984) (referring to the "common law or aggregate theory of partnership"); *McKinney v. Truck Ins. Exch.*, 324 S.W.2d 773, 776 (Mo. Ct. App. 1959) (referring to "the aggregate or common-law theory as to partnerships").

Under UPA (1914), a general partnership had both entity and aggregate characteristics, in part because that act's first reporter, who died during the lengthy drafting process, strongly favored the entity approach, while his replacement just as strongly favored the aggregate construct. *New England Herald Dev. Grp. v. Town of Falmouth*, 521 A.2d 693, 697 (Me. 1987) ("The draftsmen of the uniform act were divided over what effect it should have on the common law [aggregate] rule . . . . The result is the Act contains language that supports application of either [the entity or aggregate] theory.").

According to the comment to this section, UPA (1997) "embrace[d] the entity theory of the partnership," characterized "the entity theory as the dominant model" for the act, and highlighted a key problem arising from the aggregate aspect of UPA (1914) — namely, "the necessity of a deed to convey title from the 'old' partnership to the 'new' partnership every time there is a change of cast among the partners." Under UPA (1997), "there [was] no 'new' partnership just because of membership changes," thereby "avoid[ing] the result in cases such as *Fairway Development Co. v. Title Insurance Co.*, 621 F. Supp. 120 (N.D. Ohio 1985), which held that the 'new' partnership resulting from a partner's death did not have standing to enforce a title insurance policy issued to the 'old' partnership."

The Harmonization process made no changes to this aspect of UPA (1997). Note, however, that UPA (1997) retained several aspects of the aggregate construct: (i) joint and several liability of the partners for the obligations of a partnership that is not an LLP, Section 3-306(a); (ii) the concept of a partnership at-will, under which dissociation of any partner by "express will" dissolves the partnership, Section 3-801(1); and (iii) the susceptibility to dissolution of a partnership for a term or undertaking following the dissociation of a person as a partner. Section 3-801(2). Those vestiges continue under the Harmonization amendments adopted in 2011 and 2013.

Subsection (b) — Neither becoming nor ceasing to be a limited liability partnership affects a partnership's entity status. These changes merely add or subtract a characteristic. Compare Section 3-201(b), *with* Section 2-406(a)(1) (stating that "[w]hen a conversion becomes effective [] (1) the converted entity is: (A) organized under and subject to the organic law of the converted entity [and therefore a different type of entity]; and (B) the same entity without interruption as the converting entity").

§ 30-23-202. Formation of partnership. — (a) Except as otherwise provided in subsection (b) of this section, the association of two (2) or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter.

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

(A) Of a debt by installments or otherwise;

(B) For services as an independent contractor or of wages or other compensation to an employee;

(C) Of rent;

(D) Of an annuity or other retirement or health benefit to a deceased or retired partner or a beneficiary, representative, or designee of a deceased or retired partner;

(E) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or

(F) For the sale of the goodwill of a business or other property by installments or otherwise.

History.

I.C., § 30-23-202, as added by 2015, ch. 243, § 24, p. 758.

CASE NOTES

Decisions Under Prior Law

Declarations as evidence.

Partnership not created.

Profits and losses generally.

Declarations as Evidence.

The declarations of a partner are not admissible against his copartners as evidence of the partnership. Boise Payette Lumber Co. v. Sarret, 38 Idaho 278, 221 P. 130 (1923).

Partnership Not Created.

Testimony that an alleged partner had given orders not to charge any more to the partnership and that charges were made to him personally thereafter is of no value on the issue as to whether that person held himself out to be a partner. Orofino Rochdale Co. v. Shore Lumber Co., 43 Idaho 425, 252 P. 487 (1927).

Profits and Losses Generally.

A mere agreement to share in the profits, of itself, constitutes neither partnership nor a joint adventure; hence, an agreement whereby the vendors of an irrigation project are, in addition to the purchase price, to share in the net profits, does not establish a partnership with the purchasers thereof. Palmer v. Maney, 45 Idaho 731, 266 P. 424 (1928).

The fact that ranch owners each owned an undivided one-half interest in the ranch and shared profits arising therefrom did not establish ownership of such ranch as partners. Bussell v. Barry, 61 Idaho 350, 102 P.2d 280 (1940).

A mere agreement to share in profits constitutes, as of itself, neither a "partnership" nor a "joint adventure," and in order to constitute one of these

relationships there must be other facts showing that the relationship was the intention of the parties, or such as to estop a denial of the relationship as against third parties. Moon v. Ervin, 64 Idaho 464, 133 P.2d 933 (1943).

Where there has been a division of profits of a partnership, and such division of profits conformed to the written partnership agreement, there is a presumption that not only is there a valid partnership, but also the distribution of profits was made in accordance with the written terms of the agreement. Kraiter v. Jerome, 79 Idaho 148, 312 P.2d 1034 (1957).

Official Comment

Subsection (a) — Consistent with the common law and UPA (1914), under this article "co-ownership" is a key concept. Ownership involves the power of ultimate control (albeit a power that can be substantially diminished by agreement) and a right to share in the profits of the co-owned business. To state that partners are co-owners of a business is to state that: (i) they share in the profits (if any) of the enterprise; and (ii) *ab initio* at least, they collectively have the power of ultimate control. Consequently:

• mere passive co-ownership of property, as distinguished from using the property to carry on a business, does not establish a partnership, Subsection (c)(1); and

• merely sharing gross revenues is likewise insufficient, Subsection (c)(2).

UPA (1997) added, "whether or not the persons intend to form a partnership" to the UPA (1914) formulation, thereby codifying a rule uniformly applied by courts: Subjective intent to create the legal relationship of "partnership" is irrelevant. What matters is the intent *vel non* to establish the business relationship that the law labels a "partnership." Thus, a disclaimer of partnership status is ineffective to the extent the parties' intended arrangements meet the criteria stated in this subsection.

Subsection (b) — This subsection continues the UPA (1914) concept that the general partnership is the residual form of business association. Accordingly, partnership-like organizations formed under specially applicable statutes are not within this article. *E.g.*, Mont. Code Ann. §§ 35-13-101 to 102 (pertaining to mining partnerships).

An arrangement labeled a "joint venture" is a partnership if the arrangement meets the criteria stated in Subsection (a). In fact, in many jurisdictions, the law of general partnerships applies almost without analysis to joint ventures in which the co-venturers share profits. *See Jonathan Woodner Co. v. Laufer*, 531 A.2d 280, 285 n.7 (D.C. 1987) (stating that: (i) "[s]trictly speaking, a joint venture is not the same as a partnership, but there is 'very little law . . . applicable to one that does not apply to the other'"; (ii) "the rights and liabilities of joint venturers among themselves are generally governed by the laws of partnership"; and (iii) "[p]rinciples of partnership law, in particular the Uniform Partnership act, apply in most instances to joint ventures") (quoting 46 Am. Jur. 2d Joint Ventures § 4, at 25 (1969) and collecting cases).

A limited partnership is not a partnership under this article; a limited partnership is "formed under a statute other than this [article]." *See* Section 1-102(27) ("Limited partnership' means a domestic limited partnership formed under or subject to [Article] 4 . . ."). Moreover, ULPA (2001) delinked the uniform limited partnership act from the uniform general partnership act. *See* ULPA (2001) (Last Amended 2013) Prefatory Note, *The Decision to "De-Link" and Create a Stand Alone Act*.

An unincorporated nonprofit organization is not a partnership under this article, because the organization is limited to "nonprofit purposes" and therefore cannot "carry on a business" in the traditional sense of that concept. *See* Section 7-102(11) (defining "unincorporated nonprofit association").

Subsection (c) — UPA (1997) derived this subsection from UPA (1914) § 7 and with one exception, made no substantive change to the law. The substantive change pertains to the sharing of profits, which UPA (1997) recast as creating a rebuttable presumption of partnership rather merely constituting *prima facie* evidence. "*Prima facie*" means that the party with the burden of proof has adduced sufficient evidence to carry that burden, subject to the finder of fact's view of any contrary evidence. The burden of persuasion is unchanged. In contrast, "rebuttable presumption" switches the burden of persuasion.

Subsection (c)(3) — The protected categories listed in this paragraph apply regardless of whether the profit share is a single, unvarying

percentage or a ratio that varies; for example, after reaching a dollar floor or different levels of profits. Like UPA (1914), this article makes no attempt to answer in every case whether a partnership is formed. Whether a relationship is more properly characterized as that of borrower and lender, employer and employee, or landlord and tenant is left to the trier of fact. As under UPA (1914), a person may function in both partner and non-partner capacities.

Subsection (c)(3)(E) — UPA (1997) added this protected category, excepting from the rebuttable presumption a share of the profits received in payment of interest or other charges on a loan, “including a direct or indirect present or future ownership in the collateral, or rights to income, proceeds, or increase in value derived from the collateral.” The quoted language was taken from Section 211 of the Uniform Land Security Interest Act and is intended to protect shared-appreciation mortgages, contingent or other variable or performance-related mortgages, and other equity participation arrangements by clarifying that contingent payments do not presumptively convert lending arrangements into partnerships.

§ 30-23-203. Partnership property. — Property acquired by a partnership is property of the partnership and not of the partners individually.

History.

I.C., § 30-23-203, as added by 2015, ch. 243, § 24, p. 758.

Official Comment

Although phrased differently, this section, which originated in UPA (1997), produces the same result as do UPA (1914) § 8(1) and 25. All property acquired by a partnership, by whatever manner acquired, becomes partnership property and belongs to the partnership as an entity, rather than to the individual partners.

Section 3-204 provides guidance concerning when property is "acquired by" the partnership.

UPA (1914) § 25(2)(c) and (e) also provides that partnership property is not subject to exemptions, allowances, or rights of a partner's spouse, heirs, or next of kin. UPA (1997) omitted those provisions as unnecessary, because the exemptions and rights inure to the property of the partners, and not to partnership property.

§ 30-23-204. When property is partnership property. — (a) Property is partnership property if acquired in the name of:

(1) The partnership; or

(2) One (1) or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

(b) Property is acquired in the name of the partnership by a transfer to:

(1) The partnership in its name; or

(2) One (1) or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

(c) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one (1) or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

(d) Property acquired in the name of one (1) or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

History.

I.C., § 30-23-204, as added by 2015, ch. 243, § 24, p. 758.

CASE NOTES

Joint Venture Property.

District court erred in finding that the backhoe purchased by the claimant was an asset of the joint venture, because, from the evidence presented, the $10,000 could have been simply the down payment to purchase the

backhoe, and the district court needed to determine the total cost of the backhoe, whether the claimant paid any money to purchase it, and how any such payments should be treated. Costa v. Borges, 145 Idaho 353, 179 P.3d 316 (2008).

Decisions Under Prior Law

Conveyance.

Partnership property.

Conveyance.

When legal title to partnership property is conveyed, a valid lien is created, provided that the title to the property is in the partnership and the conveyance is for partnership purposes. Treasure Valley Bank v. Butcher, 117 Idaho 974, 793 P.2d 206 (1990).

Partnership Property.

Property purchased on account of partnership becomes partnership property. Gold Fork Lumber Co. v. Sweany & Smith Co., 35 Idaho 226, 205 P. 554 (1922).

Mortgage on partnership property executed by partner as security for his individual debt does not bind partnership property in absence of approval by other partners. Gold Fork Lumber Co. v. Sweany & Smith Co., 35 Idaho 226, 205 P. 554 (1922).

Evidence sustained finding that land, including land recorded in name of one of the partners and land recorded in name of a corporation, was owned by the partnership as partnership property. Bussell v. Barry, 61 Idaho 350, 102 P.2d 280 (1940).

Partners are presumed to possess equal interests in the partnership, unless there is an agreement to the contrary. Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984).

Magistrate's conclusion that the personal property placed in the partnership by husband's parents "merged into the partnership" was supported by evidence that the bank account was used as partnership account, equipment was depreciated and taken as partnership expense, capital assets (livestock) were sold and divided between partners, expenses

such as taxes, insurance, and maintenance of the assets were paid from partnership income and there was no accounting of capital accounts from year to year and no written agreement for one partner to pay the other assets contributed to the partnership. Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984).

The ultimate determination of whether particular assets are partnership property is dependent on the intention of the parties. Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984).

The ultimate determination of whether an asset is partnership property depends on the parties' intent. Murgoitio v. Murgoitio, 111 Idaho 573, 726 P.2d 685 (1986).

The trial court's finding that the real property was owned by the partnership was supported by substantial and competent evidence, where all the property was purchased with partnership funds, the partnership made both the down payments and all of the mortgage payments, all the improvements were made with partnership labor or with labor and materials paid for by the partnership, and the improvements were depreciated on the partnership tax returns, the real property was occupied, managed and used as an integral part of the partnership businesses, and the partnership did not pay any compensation to the individual partners for its use of the properties. Murgoitio v. Murgoitio, 111 Idaho 573, 726 P.2d 685 (1986).

The common law view required that title to real estate be held by recognized legal persons, necessitating a holding by the courts that a partnership could not take title to realty in the firm name. Treasure Valley Bank v. Butcher, 117 Idaho 974, 793 P.2d 206 (1990).

RESEARCH REFERENCES

ALR. — Right of partnership to recover damages for injury to partner. 36 A.L.R.3d 1375.

Insurance on life of partner as partnership asset. 56 A.L.R.3d 892.

Official Comment

Section 3-204 states the rules *inter se the partners and partnership* for determining when property is acquired by the partnership and so becomes partnership property. These rules apply to "all property, whether real, personal, or mixed or tangible or intangible, or any right or interest therein." Section 1-102(41) (defining "property").

These rules provide three separate approaches — according to:

• the name or names used in acquiring the property;

• when a partner's name appears as a transferee, the capacity in which the partner is acting; and

• for property acquired by purchase, whether the partnership provided the consideration for the property.

These approaches are complementary, not mutually exclusive.

This section omits any provision corresponding to UPA (1914) § 8(4), which states: "A conveyance to a partnership in the partnership name, even without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears." UPA (1997) omitted the provision as unnecessary because under modern conveyancing law all transfers pass the entire estate or interest of the grantor unless a contrary intent appears.

To what extent this section's *inter se* rules affect third party rights is a matter for other law, but in any event these rules yield automatically to statutes providing record title for particular types of property. For an example, see the comment to Subsection (c).

Subsection (a) and (b) — These subsections act in combination to provide the first two of the approaches listed above. Under these subsections, property becomes partnership property if acquired:

• in the name of the partnership; or

• in the name of one or more of the partners with an indication in the instrument transferring title of either:

• their capacity as partners; or

• of the existence of a partnership, even if the name of the partnership is not indicated.

Property acquired “in the name of the partnership” includes property acquired in the name of one or more partners in their capacity as partners, but only if the name of the partnership is indicated in the instrument transferring title.

Property transferred to a partner is partnership property, even though the name of the partnership is not indicated, if the instrument transferring title indicates either: (i) the partner’s capacity as a partner; or (ii) the existence of a partnership. This approach is consonant with the entity theory of partnership and resolves the troublesome issue of a conveyance to fewer than all the partners but that nevertheless indicates their partner status.

Subsections (c) and (d) — At least *inter se* the partners and partnership, it is the intention of the partners that controls whether property belongs to the partnership or to one or more of the partners in their individual capacities. These subsections each contain a rebuttable presumption as to the partners’ intent.

When applicable, the presumptions switch the burden of persuasion but are subject to an important limitation in favor of third parties. *See* Section 3-302(a)(3) (“Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed signed by the persons in whose name the property is held.”).

Subsection (c) — Under this subsection, property purchased with partnership property is presumed to be partnership property, notwithstanding the name in which title is held or any other indicia. In this context, a promise made by a partnership in exchange for property triggers the presumption, including a promise to perform services or to guarantee another person’s obligation with regard to the purchase of the property.

The presumption is entirely ineffective against third parties with regard to property with record title.

> EXAMPLE: Using partnership funds, a partner purchases realty in the partner’s own name and records the purchase in the appropriate land records. The partner later transfers title to the realty to a third party that has neither knowledge nor notice of any rights the partnership may have

in the property. The relevant real estate statute is the applicable law; this subsection is entirely inapposite.

Subsection (d) — Under this subsection, property acquired in the name of one or more of the partners, without an indication of their capacity as partners and without use of partnership funds or credit, is presumed to be the partners' separate property, even if used for partnership purposes. In effect, this subsection presumes that only the use of the property is contributed to the partnership.

Part 3
Relations of Partners to Persons Dealing with Partnership

Idaho Code § 30-23-301

§ 30-23-301. Partner agent of partnership. — Subject to the effect of a statement of partnership authority under section 30-23-303, Idaho Code, the following rules apply:

(1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the signing of an instrument in the partnership name, for apparently carrying on in the ordinary course of the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner did not have authority to act for the partnership in the particular matter and the person with which the partner was dealing knew, or had notice, that the partner lacked authority.

(2) An act of a partner that is not apparently for carrying on in the ordinary course of the partnership's business or business of the kind carried on by the partnership binds the partnership only if the act was actually authorized by all the other partners.

History.

I.C., § 30-23-301, as added by 2015, ch. 243, § 25, p. 758.

CASE NOTES

Evidence.

On an issue whether declarations of a partner made in connection with the purchase of certain articles were in the course of the firm business, testimony that such articles were customarily purchased and used by persons engaged in business of the kind conducted by the firm is

admissible. Boise Payette Lumber Co. v. Sarret, 38 Idaho 278, 221 P. 130 (1923).

Partner as Agent.

Power of partner to act as agent is limited to transactions within scope of partnership business. Gold Fork Lumber Co. v. Sweany & Smith Co., 35 Idaho 226, 205 P. 554 (1922).

The giving of a mortgage upon firm property, by a partner to secure his individual debt, is not an act for apparently carrying on in the usual way the business of the partnership and does not bind the partnership unless authorized by the other partners. Gold Fork Lumber Co. v. Sweany & Smith Co., 35 Idaho 226, 205 P. 554 (1922).

Partnership Business.

Where partnership consisting of three partners pledged bonds as collateral security, and two partners without consent of third thereafter sold their interest in bonds to pledgee as payment of two-thirds of partnership indebtedness, sale was not in ordinary course of partnership business and therefore could not bind partnership in absence of specific concurrence of all partners. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

Where the contract of sale stated that the land belonged to the partnership, and, even if plaintiff believed that the exclusive manager had authority to transact all business for the firm, he still could not bind the partnership through a unilateral act which was not in the usual business of the partnership; therefore the trial court erred in holding that the contract was binding on the partnership. Hodge v. Garrett, 101 Idaho 397, 614 P.2d 420 (1980).

RESEARCH REFERENCES

ALR. — Partner's breach of fiduciary duty to copartner on sale of partnership interest to another partner. 4 A.L.R.4th 1122.

Official Comment

At common law, a general partner was considered a general agent of the partnership. Joseph Story, Commentaries on the Law on Partnership § 101,

at 153 (2d ed. 1850); Restatement (Second) of Agency § 14A, cmt. a (1958). The mere status of a general partner "clothes" a person with apparent authority to carry on the partnership business. *Stockwell v. U.S.*, 80 U.S. 531, 567 (1871); *Lincoln Nat'l Bank v. Schoen*, 56 Mo. App. 160, 164 (Mo. Ct. App. 1894); *Kansallis Fin. Ltd. v. Fern*, 659 N.E.2d 731, 733, 740 (Mass. 1996). In 1914, the UPA codified this principle, UPA (1914) § 9, and "statutory apparent authority" has been part of uniform partnerships acts ever since. *See* Section 3-301 (Partnership Agent of Partnership); Section 4-402 (General Partner Agent of Limited Partnership).

This section's principal purpose is to delineate a partner's statutory apparent authority. The partnership agreement and Section 401 govern the rights of the partners among themselves, including the right to restrict a partner's actual authority.

Paragraph (1) — This paragraph retains the basic principles reflected in UPA (1914) § 9(1) and in effect characterizes a partner as a general managerial agent. Such agents have both actual and apparent authority, and this section delineates the apparent authority. For a discussion of the scope of actual authority, see Section 3-401(h), comment.

The agency law origins of statutory apparent authority has informed courts' application of UPA (1914) § 9(1), and that case law is equally applicable under this article. For example, although the statutory language does not appear to require that the appearance of authority be reasonable, the case law does so routinely. *See, e.g., In re Fox Hill Office Invs., Ltd.*, 101 B.R. 1007, 1019 (Bankr. W.D. Mo. 1989) (stating a third-party lender in possession of a copy of a limited partnership's partnership agreement was on notice of the general partner's lack of authority and therefore should have inquired as to the partner's authority), *aff'd*, 926 F.2d 752 (8th Cir. 1991); *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 789 (N.C. 1987) (stating that "in order to hold the [partnership] liable, [a third party] must show that in the exercise of reasonable care under the circumstances, it was justified in believing that the principal had conferred . . . authority to [act] on behalf of the partnership"); *First Interstate Bank of Oregon, N.A. v. Bergendahl*, 723 P.2d 1005, 1010 (Or. Ct. App. 1986) (stating that bank in possession of management agreement was on notice of general partner's restricted authority and could not rely on a theory of apparent authority).

Likewise, per the law of apparent authority, a partner can bind a partnership under this section even if the partner intends to take and does take the resulting benefits for the partner's own benefit. *See Wolfe v. Harms*, 413 S.W.2d 204, 216 (Mo. 1967) (stating that partnership is liable for partner's acts "even if the predominant motive of the partner was to benefit himself or third persons"); *Rouse v. Pollard*, 18 A.2d 5, 7 (N.J. Eq. 1941) ("All the partners are responsible for the act of one of their number as agent, even though he acts for some secret purpose of his own, and not really for the benefit of the [partnership]."), *aff'd*, 21 A.2d 801 (N.J. Eq. 1941); *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 788 (N.C. 1987) (stating that the mere fact that the partner's act was for personal gain was not enough to justify summary judgment for the partnership on the subject of the partnership's liability for the act).

UPA (1997) § 301(1) effected three changes from UPA (1914) § 9(1). First, Section 301(1) clarified that a partner's apparent authority includes acts for carrying on in the ordinary course "business of the kind carried on by the partnership," not just the business of the particular partnership in question. UPA (1914) is ambiguous on this point, but the drafters of UPA (1997) found some authority for an expanded construction in accordance with the so-called English rule. *See, e.g., Burns v. Gonzalez*, 439 S.W.2d 128, 131 (Tex. Civ. App. 1969) (dictum); *Comm'l Hotel v. Weeks*, 254 S.W. 521 (Tex. Civ. App. 1923).

The Harmonization Project preserved this UPA (1997) change, the significance of which depends on how broadly courts construe "business of the kind carried on by the partnership." For example, does a partnership that acts as a grain broker (never taking a position in grain) do business "of the kind carried on" by a partnership that buys grain for resale?

Second, UPA (1997) used "carrying on in the ordinary course" in lieu of the UPA (1914) phrase "in the usual way." The 1997 comments stated that: (i) "[t]he UPA and the case law use both terms without apparent distinction"; and (ii) "[n]o substantive change [was] intended by use of the more customary phrase." See the comment to UPA (1997) § 301.

The change in language had the benefit of aligning Section 3-301(1) with Section 305 (establishing attribution rules for a partner's wrongful conduct and referring to "ordinary course of business of the partnership" and "the

ordinary course of the partnership's business"). The Harmonization Project also preserved this UPA (1997) change. For a discussion of the relationship between the ordinary course of the partnership's business and a partner's ordinary duties, see the comment to Section 3-305(a).

UPA (1997)'s third change to UPA (1914) § 9(1) concerned the allocation of risk of a partner's lack of authority. Under UPA (1914) § 9(1) and (4), a restriction on a partner's authority binds only a person with knowledge of the restriction. In contrast, UPA (1997) § 301(1) provides that a person who has received a notification of a restriction is also bound. Thus, UPA (1997) shifted the risk of lack of authority somewhat away from the partnership and somewhat toward third parties dealing with partners.

The Harmonization Project shifted the risk a bit further, binding third parties who know or *have reason to know* of a restriction. Section 3-301(1). (However, it is arguable that the Harmonization Project merely made explicit a rule implicit in the case law. As noted above, the case law requires a third party to show a *reasonable* belief in the partner's authority. A third party who has reason to know of a partner's lack of authority will be hard pressed to make that showing.) Statements of partnership authority, Section 3-303, affect the application of this paragraph only in two ways. First, under Section 3-303(e) all persons (other than partners) are deemed to know of a limitation on the authority of a partner to transfer real property contained in a statement recorded in the appropriate land records. Second, a person (other than a partner) with actual knowledge of a grant or limitation of a partner's authority may rely on that knowledge.

Paragraph (2) — UPA (1997) drew this paragraph directly from UPA (1914) § 9(2), with conforming changes to mirror the new language of Paragraph (1). Consistent with the law of agency, a partnership is bound by a partner's actual authority, even if the partner lacks apparent authority. Under general agency principles, a partnership can subsequently ratify a partner's unauthorized act. *See* Section 1-702 (Supplemental Principles of Law).

UPA (1914) § 9(3) and (4) — UPA (1997) omitted UPA (1914) § 9(3), which lists five acts requiring unanimous consent of the partners to bind the partnership. Most of the listed acts probably remain outside the apparent authority of a partner under this article, such as disposing of the goodwill of

the business, but the drafters of UPA (1997) believed that eliminating categorical rules affords useful flexibility. In particular, it seemed “archaic to always require unanimous consent to submit a partnership claim to arbitration.” UPA (1997) § 301, comment.

UPA (1914) § 9(4) provides that a partnership is not bound by an act of a partner in contravention of a restriction on a partner’s authority known to the other party. UPA (1997) omitted that provision as being entirely redundant of UPA (1997) § 301(1).

The Harmonization Project preserved UPA (1997)’s approach to both UPA (1914) § 9(3) and (4).

§ 30-23-302. Transfer of partnership property. — (a) Partnership property may be transferred as follows:

(1) Subject to the effect of a statement of partnership authority under section 30-23-303, Idaho Code, partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership name.

(2) Partnership property held in the name of one (1) or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(3) Partnership property held in the name of one (1) or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(b) A partnership may recover partnership property from a transferee only if it proves that execution of the instrument of initial transfer did not bind the partnership under section 30-23-301, Idaho Code, and:

(1) As to a subsequent transferee who gave value for property transferred under subsection (a)(1) and (2) of this section, proves that the subsequent transferee knew or had been notified that the person who executed the instrument of initial transfer lacked authority to bind the partnership; or

(2) As to a transferee who gave value for property transferred under subsection (a)(3) of this section, proves that the transferee knew or had been notified that the property was partnership property and that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(c) A partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to

recover the property, under subsection (b) of this section, from any earlier transferee of the property.

(d) If a person holds all the partners' interests in the partnership, all the partnership property vests in that person. The person may sign a record in the name of the partnership to evidence vesting of the property in that person and may file or record the record.

History.

I.C., § 30-23-302, as added by 2015, ch. 243, § 25, p. 758.

CASE NOTES

Decisions Under Prior Law

Contract not binding.

Valid lien created.

Contract Not Binding.

Where the contract of sale stated that the land belonged to the partnership, and, even if plaintiff believed that the exclusive manager had authority to transact all business for the firm, he still could not bind the partnership through a unilateral act which was not in the usual business of the partnership; therefore the trial court erred in holding that the contract was binding on the partnership. Hodge v. Garrett, 101 Idaho 397, 614 P.2d 420 (1980).

Valid Lien Created.

When legal title to partnership property is conveyed, a valid lien is created; provided that the title to the property is in the partnership and the conveyance is for partnership purposes. Treasure Valley Bank v. Butcher, 117 Idaho 974, 793 P.2d 206 (1990).

Official Comment

UPA (1997) § 302 replaced UPA (1914) § 10 and provides rules for the transfer and recovery of partnership property. While UPA (1914) § 10 covers only real property, this section applies also to personal property

acquired by instrument and held in the name of the partnership or one or more of the partners.

The language of this section was adapted in part from the Georgia partnership statute in effect during the UPA (1997) drafting process. *See* Ga. Code Ann. § 14-8-10. Rules stated in this section necessarily parallel the rules stated in Section 3-203.

Subsection (a) — Subsection (a)(1) deals with the transfer of partnership property held in the name of the partnership and Subsection (a)(2) deals with property held in the name of one or more of the partners with an indication either of their capacity as partners or of the existence of a partnership. Subsection (a)(3) deals with partnership property held in the name of one or more of the partners without an indication of their capacity as partners or of the existence of a partnership. Like Section 3-301, Subsection (a)(1) is subject to statements of partnership authority under Section 3-303. *See* the comment to Section 3-301(1).

Subsection (b) — This subsection deals with the right of a partnership to recover partnership property transferred by a partner without actual authority. The subsection's structure corresponds to the structure of Subsection (a).

Subsection (b)(1) — This paragraph deals with the recovery of "property transferred under subsection (a)(1) [or] (2)."

Subsection (b)(2) — This paragraph deals with the recovery of "property transferred under subsection (a)(3)."

Subsection (c) — UPA (1997) added this subsection, which parallels Uniform Fraudulent Transfer Act, section 8(a) (subsequent transferee from bona fide purchaser protected), 8(b)(2) (same).

Subsection (d) — UPA (1997) added this subsection. So that this provision does not destroy transferee rights, "all the partners interests" must be read to mean "each interest that originated as a partner interest — which includes all transferable interests, by whomever owned."

The UPA (1997) comment to this subsection took a noteworthy position on the consequences of all the partners' interests in the partnership being held by one person:

> Subsection (d) allows for clear record title, even though the partnership no longer exists as a technical matter. When a partnership becomes a sole proprietorship by reason of the dissociation of all but one of the partners, title vests in the remaining "partner," although there is no "transfer" of the property. The remaining "partner" may execute a deed or other transfer of record in the name of the non-existent partnership to evidence vesting of the property in that person's individual capacity.

Section 3-801(6), added during the Harmonization Project, changes the analysis. The paragraph states that dissolution is caused by "the passage of 90 consecutive days during which the partnership does not have at least two partners." Consequently, for at least eighty-nine consecutive days a partnership remains un-dissolved although having only one partner, and even at ninety days the partnership remains a partnership, albeit dissolved and compelled to wind up its business. Subsection (d) remains quite useful if the sole remaining partner winds up the partnership by becoming a sole proprietor, but it is no longer accurate to state that a partnership with only one partner "no longer exists as a technical matter."

§ 30-23-303. Statement of partnership authority. — (a) A partnership may deliver to the secretary of state for filing a statement of partnership authority. The statement:

(1) Must include the name of the partnership; and if the partnership is not a limited liability partnership, the street and mailing addresses of its principal office;

(2) With respect to any position that exists in or with respect to the partnership, may state the authority, or limitations on the authority, of all persons holding the position to:

(A) Execute an instrument transferring real property held in the name of the partnership; or

(B) Enter into other transactions on behalf of, or otherwise act for or bind, the partnership; and

(3) May state the authority, or limitations on the authority, of a specific person to:

(A) Execute an instrument transferring real property held in the name of the partnership; or

(B) Enter into other transactions on behalf of, or otherwise act for or bind, the partnership.

(b) To amend or cancel a statement of authority filed by the secretary of state, a partnership must deliver to the secretary of state for filing an amendment or cancellation stating:

(1) The name of the partnership;

(2) If the partnership is not a limited liability partnership, the street and mailing addresses of the partnership's principal office;

(3) If the partnership is a limited liability partnership, the name and street and mailing addresses of its registered agent;

(4) The date the statement being affected became effective; and

(5) The contents of the amendment or a declaration that the statement is canceled.

(c) A statement of authority affects only the power of a person to bind a partnership to persons that are not partners.

(d) Subject to subsection (c) of this section and section 30-23-103(4) (a), Idaho Code, and except as otherwise provided in subsections (f), (g) and (h) of this section, a limitation on the authority of a person or a position contained in an effective statement of authority is not by itself evidence of any person's knowledge or notice of the limitation.

(e) Subject to subsection (c) of this section, a grant of authority not pertaining to transfers of real property and contained in an effective statement of authority is conclusive in favor of a person that gives value in reliance on the grant, except to the extent that if the person gives value:

(1) The person has knowledge to the contrary;

(2) The statement has been canceled or restrictively amended under subsection (b) of this section; or

(3) A limitation on the grant is contained in another statement of authority that became effective after the statement containing the grant became effective.

(f) Subject to subsection (c) of this section, an effective statement of authority that grants authority to transfer real property held in the name of the partnership is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

(1) The statement has been canceled or restrictively amended under subsection (b) of this section; or

(2) A limitation on the grant is contained in another statement of authority that became effective after the statement containing the grant became effective.

(g) Subject to subsection (c) of this section, if an effective statement of authority containing a limitation on the authority to transfer real property held in the name of a partnership is filed by the secretary of state, all persons are deemed to know of the limitation.

(h) Subject to subsection (i) of this section, an effective statement of dissolution is a cancellation of any filed statement of authority for the purposes of subsection (f) of this section and is a limitation on authority for purposes of subsection (g) of this section.

(i) After a statement of dissolution becomes effective, a partnership may deliver to the secretary of state for filing a statement of authority that is designated as a post-dissolution statement of authority. The statement operates as provided in subsections (f) and (g) of this section.

(j) Unless canceled earlier, an effective statement of authority is canceled by operation of law five (5) years after the date on which the statement, or its most recent amendment, becomes effective.

(k) An effective statement of denial operates as a restrictive amendment under this section.

History.

I.C., § 30-23-303, as added by 2015, ch. 243, § 25, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment

UPA (1997) § 303 pioneered this concept, which was refined in ULLCA (2006) and further refined in the Harmonization Project. This section is conceptually divided into two realms: (i) statements pertaining to the power to transfer interests in the partnership real property; and (ii) statements pertaining to other matters. In the latter realm, statements are filed only in the records of the filing office and operate only to the extent the statements are actually known and relied on by a third party. Section 3-303(d), (e).

As to interests in real property, in contrast, this section: (i) requires double filing — with the filing office and in the appropriate land records; and (ii) provides for constructive knowledge of statements limiting authority. Thus, a properly filed and recorded statement can protect the partnership, Section 3-303(g), and, in order for a statement pertaining to

real property to be a sword in the hands of a third party, the statement must have been both filed and properly recorded, Section 3-303(f). Experience suggests that statements of authority will most often be used in connection with transactions in real estate.

The requirements for filing documents with the filing office are found in Part 2 of Article 1. *See also* Section 1-104 (Delivery of Record).

By its terms, this section applies only to domestic general partnerships. The section refers throughout to "partnership," which means a domestic general partnership. *See* Section 3-102(a)(8) ("'Partnership' . . . means an association of two or more persons to carry on as co-owners a business for profit formed under this [Code] or that becomes subject to this [article] under [Article 2] [mergers and other organic transactions] or Section 3-110 [transition provision that eventually makes pre-existing general partnerships subject to this article]."). *Cf. Fannie Mae v. Heather Apartments Ltd. P'ship*, A13-0562, 2013 WL 6223564, at *6 (Minn. Ct. App. Dec. 2, 2013) (considering the remedies available to a judgment creditor with respect to the judgment debtor's interest in a Cook Islands LLC; rejecting the debtor's argument that the creditor's "only remedy is to obtain a charging order under" [the Minnesota LLC statute]; explaining that "this argument fails because that statute only applies to Minnesota limited liability companies" which that statute "defines . . . as 'a limited liability company, other than a foreign limited liability company, *organized or governed by this chapter*'") (emphasis added) (statutory citations omitted).

Subsection (a)(2) — This paragraph permits a statement to designate authority by position (or office) rather than by specific person, thus avoiding the need to file anew whenever a new person assumes the position or the office. This type of a statement will enable partnerships to provide evidence of ongoing power to enter into transactions without having to disclose to third parties the entirety of the partnership agreement.

Here and elsewhere in the section, the phrase "real property" includes all types of interests in real property, such as mortgages, easements, *etc*.

Subsection (a)(2)(A) and (a)(3)(A) — The authority to "sign" an instrument includes the authority to commit the partnership to the transfer reflected in the agreement. *See* Subsection (f) (referring not merely to

signing but also to "an effective statement of authority that grants authority to transfer real property").

Subsection (c) — This subsection expresses a very important limitation — *i.e.*, that this section's rules do not operate viz-a-viz partners. For partners, the partnership agreement is controlling. Section 3-107(d). However, like any other record delivered for filing on behalf of a partnership, a statement of authority might be some evidence of the contents of the partnership agreement. *See* the comment to Section 3-107(d).

Another important limitation exists. The filing office is not affected by a statement of authority that purports to delineate the authority of persons to sign documents to be delivered for filing of behalf of a partnership. The Code does define "[p]erson" to include a "government or governmental subdivision, agency, or instrumentality," Section 1-102(35), but "a limitation on the authority of a person or a position contained in an effective statement of authority is not by itself evidence of knowledge or notice of the limitation by any person," Subsection (d).

Moreover, even if an employee of the filing office happened to see that a statement of authority purported to delineate the authority of persons to sign records to be delivered on behalf of a partnership, that information would not pertain to a "fact [that] is material to the agent's duties to the principal" and therefore would not be attributed to the filing office. Restatement (Third) of Agency § 5.03 (2006).

Subsection (d) — The phrase "by itself" is important, because the existence of a limitation of authority could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

Subsection (e)(2) — This paragraph by its terms does not affect a claim of lingering apparent authority. A person could: (i) assert knowledge of a statement of authority as the statement existed before a cancellation or restrictive amendment; and (ii) characterize the original statement as a manifestation of authority traceable to the partnership. Restatement (Third) of Agency § 3.03, cmt. b (2006) ("Apparent authority is present only when a third party's belief is traceable to manifestations of the principal.").

However, for apparent authority to exist, the purported agent must *reasonably* appear to be authorized. Restatement (Third) of Agency § 2.03 (2006) (stating that apparent authority can only exist when "a third party reasonably believes the actor has authority to act on behalf of the principal"). Given the possibility of cancellation or restrictive amendment, how reasonable can it be for a person to know of a statement of authority, let time pass, and then rely on the statement without re-checking the public record?

Subsections (f)-(h) — These subsections: (i) pertain to transactions in real property; (ii) provide a mechanism by which authority to transfer a partnership's real property can be made to appear in the real estate records; and (iii) thus address the principal concerns (raised by real estate lawyers) that led the drafters of UPA (1997) to provide for statements of authority.

Subsection (f) — This subsection provides a sword for a vendee of real property. If the vendee has "give[n] value in reliance on the grant without knowledge to the contrary," the statement of authority protects the vendee against claims that contradict the grant.

Subsection (f)(1) and (2) — As to a claim of lingering apparent authority, see Subsection (e)(2), comment. The analysis stated there applies even more strongly in the context of customary practices involving land transfers.

Subsection (g) — This subsection provides a shield for the partnership as alleged vendor. If a vendee's claim contradicts the stated limitation, constructive notice knowledge ("deemed to know") defeats the claim even if the vendee gave value and lacked actual knowledge.

Subsection (h) — This subsection integrates statements of dissolution, Section 3-802(b)(2)(A), and termination, Section 3-802(b)(2)(F), into the operation of this section.

The effect of a statement of dissolution depends on the circumstances.

EXAMPLE: ABC, a general partnership, has in effect a properly filed and recorded statement of authority authorizing ABC's CEO to transfer real estate owned by the partnership. The proper filing and recording by ABC of a statement of dissolution cancels the statement of authority. Subsequently, Buyer gives value in return for a deed signed by the CEO

on behalf of ABC. Due to Subsections (h) and (f)(1), Subsection (f) does not protect Buyer. Moreover, under Subsections (g) and (h), Buyer is "deemed to know" of the dissolution. Whether that deemed knowledge functions to deprive the CEO of authority to bind ABC depends on agency law and additional facts. For example, the CEO might have had actual or apparent authority to transfer the real estate despite the dissolution of the partnership.

In contrast, the effect of a statement of termination, Section 3-802(b)(2)(f), is categorical. If properly filed with the filing office and properly recorded in the office for land records, the statement eliminates the power of any person to transfer real property owned in the name of the partnership. No one can have the authority to act for a non-existent entity. *Cf.* Restatement (Third) of Agency § 4.04(1)(a) (2006) (precluding ratification by a principal that did not exist at the time of the unauthorized act).

Subsection (i) — This provision permits a partnership to use statements of authority during winding up. As an additional protection for third parties, a statement must be "designated as a post-dissolution statement of authority" to be effective under this provision.

Subsection (k) — Presumably, when real property is involved, a person who obtains the filing of a statement of denial under Section 3-304 will cause a certified copy of the statement to be "recorded by certified copy for purposes of subsection (f)(1)" [undercutting constructive notice as to authority to transfer real property]. However, nothing in this subsection prevents the partnership from causing a certified copy to appear in the land records; due the section's use of the passive voice ("may be recorded"), this article does not delimit who has the authority to act under this subsection.

§ 30-23-304. Statement of denial. — A person named in a filed statement of authority granting that person authority may deliver to the secretary of state for filing a statement of denial that:

(1) Provides the name of the partnership and the caption of the statement of authority to which the statement of denial pertains; and (2) Denies the grant of authority.

History.

I.C., § 30-23-304, as added by 2015, ch. 243, § 25, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Official Comment A person whose powers are delineated in the public record by another person should have the right to dissent from that delineation. This section takes an "all or nothing" approach; a person may not deny in part and confirm in part. For the effect of a statement of denial, see Section 3-303(c), comment, and Section 3-303(k).

Section 3-308(c) makes clear that a person does not become a partner solely because he is named as a partner in a statement of partnership authority filed by another person.

§ 30-23-305. Partnership liable for partner's actionable conduct. — (a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with the actual or apparent authority of the partnership.

(b) If, in the course of the partnership's business or while acting with actual or apparent authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss.

History.

I.C., § 30-23-305, as added by 2015, ch. 243, § 25, p. 758.

CASE NOTES

Applicability.

Partnership and partners were not liable to a buyer for conversion under Idaho's version of the Uniform Partnership Act because (1) the sale of cattle was between the buyer and the debtor, acting in his individual capacity; and (2) the mere fact that the debtor was also a partner in the partnership, or that he chose to deposit the check into an account which he used for the partnership's purposes was insufficient to render the partnership a party to the transaction, or to implicate the provisions of the Uniform Partnership Act In re Morton, 2009 Bankr. LEXIS 1518 (Bankr. D. Idaho June 9, 2009).

Official Comment Subsection (a) — This provision is derived from UPA (1914) § 13 (Partnership Bound by Partner's Wrongful Act), as modernized by UPA (1997) § 305(a) (Partnership Liable for Partner's Actionable Conduct) and for the most part parallels the agency law doctrine of *respondeat superior. See* Restatement (Second) of Agency § 14A, cmt. a (1958) ("When one of the partners is in active management of the business or is otherwise regularly employed in the business, he is

a servant of the partnership."). The liability is vicarious and without regard to the fault of those managing the partnership.

UPA (1997) expanded this attribution rule in two ways. First, the 1997 language omitted the 1914 phrase "not being a partner in the partnership," thereby permitting a partner to sue the partnership under this subsection during the term of the partnership, rather than being limited to the remedies of dissolution and an accounting. This change was consistent with UPA (1997) § 410(b) (stating "[a] partner may maintain an action against the partnership or another partner, with or without an accounting as to partnership business, to enforce the partner's rights and protect the partner's interests"). Second, adding "or other actionable conduct" broadens the subsection to cover no-fault torts.

To successfully invoke this provision, a plaintiff must show: (i) "a wrongful act or omission or other actionable conduct" by a partner; (ii) that caused "loss or injury"; and (iii) that at the relevant moment, the partner was acting with actual authority, apparent authority (if relevant), or within "the ordinary course of business of the partnership."

Extrapolating from agency law, apparent authority is relevant only when the appearance of authority augments the impact of the wrongful act. *See* Restatement (Third) of Agency, § 7.08 (2006) ("A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.").

An act or omission may be "in the ordinary course of business of the partnership" even though the act is wrongful. Any other interpretation would vitiate the "ordinary course" element. "The proper question . . . is not whether the specific wrongful act is 'ordinary course' . . . , but rather whether that type of act, if done rightfully, would be." Daniel S. Kleinberger, Agency, Partnership and LLCS. Examples and Explanations § 10.5.1, at 350 (4th ed. 2012) (emphasis omitted).

However, in *Jackson v. Jackson*, 201 S.E.2d 722, 724 (N.C. App. 1974), the North Carolina Court of Appeals stated that, while "[a]dvising the initiation of a criminal prosecution is clearly within the normal range of

activities for a typical law partnership, . . . taking such action maliciously and without probable cause is quite a different matter." The court held that "[i]n view of [ethics] rules, which clearly forbid any attempt by a lawyer to prosecute a person without cause, it cannot be held that malicious prosecution is within the ordinary course of business of a law partnership." *Id*. It is difficult to identify a reasonable limit to this approach. Presumably, at least, a partner's "plain vanilla" malpractice is within a law firm's ordinary course of business despite the ethical rules requiring lawyers to act zealously and competently.

In any event, Subsection (a) refers to "the ordinary course of business of the *partnership* " (emphasis added); thus, the proper question is whether the conduct is in the ordinary course for the partnership and not whether the particular partner ordinarily plays a role in that part of the partnership's business. *See Vanacore v. Kennedy*, 86 F. Supp. 2d 42, 51 (D. Conn. 1998), *aff'd sub nom., Vanacore v. Space Realty, Inc*., 208 F.3d 204 (2d Cir. 2000) (stating that "Kennedy [a partner] committed his misdeeds, which led directly to plaintiff's injuries, within the ordinary course of the business of E & K [the partnership]"); *Sheridan v. Desmond*, 697 A.2d 1162, 1166 (Conn. App. Ct. 1997) (stating that to be considered "in ordinary course of the business," a partner's action must be "the kind of thing a . . . partner would do") (emphasis added); In *Moren ex. rel. Moren v. JAX Rest*., 679 N.W.2d 165, 167-68 (Minn. Ct. App. 2004) (stating, as part of its analysis under UPA (1997) § 305, that "[i]t is undisputed that one of the cooks scheduled to work that evening [at the partnership's restaurant] did not come in, and that [one] partner asked [another partner] to help in the kitchen . . . [and] that [the other partner] was making pizzas for the partnership when" her negligence injured the plaintiff).

Subsection (b) — This provision is derived from UPA (1914) § 14 (Partnership Bound by Partner's Breach of Trust) and UPA (1997) § 305(b) (Partnership Liable for Partner's Actionable Conduct). It is not necessary that the partner "receiv[ing] or caus[ing] the partnership to receive money or property" do so wrongfully. Culpability is necessary at the second phase — *i.e*. when "the money or property is misapplied by a partner."

§ 30-23-306. Partner's liability. — (a) Except as otherwise provided in subsections (b) and (c) of this section, all partners are liable jointly and severally for all debts, obligations, and other liabilities of the partnership unless otherwise agreed by the claimant or provided by law.

(b) A person that becomes a partner is not personally liable for a debt, obligation, or other liability of the partnership incurred before the person became a partner.

(c) A debt, obligation, or other liability of a partnership incurred while the partnership is a limited liability partnership is solely the debt, obligation, or other liability of the limited liability partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability partnership solely by reason of being or so acting as a partner. This subsection applies:

(1) Despite anything inconsistent in the partnership agreement that existed immediately before the vote or consent required to become a limited liability partnership under section 30-23-901(b), Idaho Code; and

(2) Regardless of the dissolution of the limited liability partnership.

(d) The failure of a limited liability partnership to observe formalities relating to the exercise of its powers or management of its business is not a ground for imposing liability on a partner for a debt, obligation, or other liability of the partnership.

(e) The cancellation or administrative revocation of a limited liability partnership's statement of qualification does not affect the limitation in this section on the liability of a partner for a debt, obligation, or other liability of the partnership incurred while the statement was in effect.

History.

I.C., § 30-23-306, as added by 2015, ch. 243, § 25, p. 758.

CASE NOTES

Decisions Under Prior Law

Joint and several liability.

Purchasing stolen property.

Joint and Several Liability.

All partners are liable jointly and severally for everything chargeable to the partnership. Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979).

Individual partners of a partnership were liable for their partnership's tax deficiency simply because they were partners. Livingston v. United States, 793 F. Supp. 251 (D. Idaho 1992).

Purchasing Stolen Property.

Where a partnership engaged in the junk business purchased parts of a tractor which had been stolen by the seller, the owner from whom the parts were stolen could sue the copartners jointly or any member of the copartnership individually for the conversion. Klam v. Koppel, 63 Idaho 171, 118 P.2d 729 (1941).

RESEARCH REFERENCES

ALR. — Liability of transferor of business operated under trade name for supplies furnished to successor by one without notice of transfer. 70 A.L.R.3d 1250.

Vicarious liability of attorney for tort of partner in law firm. 70 A.L.R.3d 1298.

Official Comment

Derivation — This section was derived from UPA (1997) § 306, which was also the source for ULPA (2001) § 404 and ULLCA (2006) § 304. The Harmonization Project brought the two partnership acts and the limited liability company act into accord to the extent the three acts overlap.

Subsection (a) — Until the advent of limited liability partnerships and limited liability limited partnerships, one hallmark of general partner status was strict, vicarious liability for the debts, obligations, and other liabilities

of the partnership. This subsection states that venerable rule, albeit with two changes:

• Under UPA (1914) § 15, the nature of the general partners' liability depended on the claim, giving rise to the partnership's liability. If the partnership's liability sounded in tort, the general partners' liability was joint and several. If the partnership's liability sounded in contract, the general partners' liability was only several. UPA (1997) § 306(a) dispensed with that distinction.

• UPA (1997) § 307(d) generally requires a judgment creditor to exhaust the partnership's assets before enforcing a judgment against the separate assets of a partner. Prior law was to the contrary.

The Harmonization Project made no substantive changes to this subsection.

Subsection (b) — UPA (1997) continued the approach of UPA (1914) §§ 17 and 41(7) to the vicarious liability of an incoming partner, but used a simpler and clearer formulation. The Harmonization Project made no substantive changes to this subsection.

With regard to when a partnership incurs a debt, obligation, or other liability, the case law is scant and concerns only contractual and similar obligations. The leading case is *Conklin Farm v. Leibowitz*, 658 A.2d 1257 (N.J. 1995), which holds that: (i) obligations on a loan, whether for interest or principal, are incurred when the loan is made, not when each particular payment is due; and (ii) obligations for lease payments are incurred when each rental payment is due, not when the lease is made.

Conklin concerned a partnership loan obligation that was: (i) entered into before a particular partner joined the partnership; but (ii) for the most part, was payable afterwards. The court held that "interest is part of the contractual debt, and the obligation to pay interest on a loan arises, if at all, at the time that the parties execute the note or other debt instrument." *Conklin*, 658 A.2d at 1261. The court indicated that the same analysis applies to the obligation to repay principal. *Id*. at 1263 (stating that "the decisive issue before this court . . . [is that] [p]ayment of interest, like repayment of advances, is an obligation that arises at the time the debt instrument is executed").

Conklin discussed the lease issue in response to the creditor's argument that "just as a rent obligation arises for current use of property, an interest obligation arises for current use of principal." *Id*. at 1261. Rejecting that argument, the court: (i) noted "the *common-law* obligation to pay rent based on current tenancy [which] . . . arises with each period of tenancy, and . . . arises even in the absence of a lease"; (ii) described "the common-law obligation to pay rent [as] entirely independent of the contractual obligation under the lease"; and (iii) held that, for purposes of partnership law, the rule for "incurring" a lease obligation rests on the common law duty in tenancy and not on the lease as a contract. *Id*. at 1262 (citing *Ellingson v. Walsh, O'Connor & Barneson*, 104 P.2d 507, 508 (Cal. 1940)).

As to when a partnership incurs a tort liability, the answer might be found by analogy to statute of limitation rules, another area of law concerned with when claims arise. "Although the courts have not been consistent . . ., the interpretation of [when] a . . . statute [of limitations begins to run] as applied to torts has been such that the statute does not usually begin to run until the tort is complete. . . . A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff." Restatement (Second) of Torts § 899, cmt c (1979); *see also Loehr v. Ventura Cnty. Cmty. Coll. Dist*., 147 Cal. App. 3d 1071, 1078 (Cal. Ct. App. 1983). By analogy, a partnership would incur liability for a tort when the harm occurs. *See, e.g., Jones v. Cox*, 828 P.2d 218, 224 (Colo. 1992) ("A cause of action has commonly been understood to 'accrue' when a suit may be maintained thereon.") (quoting Black's Law Dictionary (5th ed. 1979)); *Loehr*, 147 Cal. App. 3d at 1078.

However, a policy argument exists to the contrary. Vicarious liability for a partnership's torts should be confined to persons who are partners when the wrongful conduct occurs. It is the conduct, not the consequences, that is wrongful; therefore, the occurrence of the wrongful conduct should determine which set of partners is liable for the conduct's consequences.

For further discussion of the "incurred" issue, see Subsection (c), comment (The Temporal Nexus — When Claim Incurred).

Subsection (c) — This subsection provides a corporate/LLC-like liability shield for partners, protecting them from (and only from) the debts,

obligations and liabilities of the partnership — *i.e.*, against a partner's alleged vicarious liability for the obligations of the entity.

Full Liability Shield

This article provides a full liability shield — *i.e.*, the shield applies regardless of the law giving rise to a claim against an LLP. A few jurisdictions provide only a partial shield. *See, e.g.*, 15 Pa. Const. Stat. Ann. § 8204 (2013) (providing the partners of an LLP a shield for claims against the partnership "whether sounding in contract or tort or otherwise," but only the claims that "arise from any negligent or wrongful acts or misconduct committed by another partner or other representative of the partnership"). The resulting partial shield does not protect partners against liability for the partnership's ordinary commercial debts, such as liability for lease payments.

Shield Applicable Regardless of the Identity of the Plaintiff

What makes the shield relevant is the nature of the claim. If the complaint seeks to hold a partner vicariously liability for the LLP's obligations, the shield applies. If not, not. Thus, there is no distinction among a claim arising from an LLP's debt to a commercial creditor, a partner's claim that the LLP has failed to return a contribution as required by the partnership agreement, and a claim by a former partner that the LLP has failed to follow through on a buy-out agreement. *See Rappaport v. Gelfand*, 197 Cal. App. 4th 1213, 1230-32 (Cal. Ct. App. 2011) (involving a claim by a former partner). *Accord Ederer v. Gursky*, 881 N.E.2d 204, 212-13 (N.Y. 2007) (Smith, J., dissenting).

Shield Inapposite for Claims Arising from a Partner's Own Conduct

Because the partner liability at issue is solely vicarious, the LLP shield is irrelevant to claims seeking to hold a partner directly liable on account of the partner's own conduct. Case law on this issue comes from the analogous context of limited liability companies, and in that context a few judges have failed to understand this point. *See* the comment to Section 5-304(a) (Shield Inapposite for Claims Arising from a Member's or Manager's Own Conduct). However, the overwhelming weight of case law is contrary, as are the actual words of shield provisions (immunizing only for obligations of the entity and making no reference to direct obligations of an owner or

manager) and public policy (which recoils from the idea of immunizing a person's misconduct solely because the person acts on behalf of an organization).

EXAMPLE: A partner personally guarantees a debt of a limited liability partnership. Subsection (c) is irrelevant to the partner's liability as guarantor.

EXAMPLE: A partner purports to bind a limited liability partnership while lacking any agency law power to do so. The LLP is not bound, but the partner is liable for having breached the "warranty of authority" (an agency law doctrine). Subsection (c) does not apply. The liability is not *for* a debt, obligation, or other liability of the LLP, but is rather the partner's own, direct liability. Indeed, the liability exists because the LLP is *not* indebted, obligated or liable. Restatement (Third) of Agency § 6.10 (2006).

EXAMPLE: A partner of a limited liability partnership defames a third party in circumstances that render an LLP vicariously liable under Section 3-305(a). Under Subsection (c), the third party cannot hold the partner accountable for the *partnership's* liability, but that protection is immaterial. The partner is the tortfeasor and in that role is directly liable to the third party.

EXAMPLE: A limited liability partnership provides professional services, and one of its partners commits malpractice. The liability shield is irrelevant to the partner's direct liability in tort. However, if the partner's malpractice liability is attributed to the partnership under Section 3-305(a), the liability shield will protect the other partners against a claim that they must make good on the LLP's liability. The same analysis applies if the plaintiff also successfully claims that another partner was negligent in supervising the first partner.

EXAMPLE: A limited liability partnership with two partners enters into a contract to build a home, and the partners perform substantial amounts of the work. The homeowner sues both the LLP and the partners for allegedly defective work, but the complaint sounds in contract rather than in tort. The LLP may be liable, but the partners are not. *See Ogea v. Merritt*, 130 So. 3d 888, 905 (La. 2013).

Subsection (c) pertains only to claims based on the LLP's liability and is irrelevant to claims by a limited liability partnership or a partner against another partner and *vice versa* . *See* Sections 3-307 (pertaining to actions by partners), 3-409 (pertaining to management duties).

Shield Inapposite to Role Liability Claims

Provisions of regulatory law may impose liability on a partner of an LLP due to a role the partner plays in the partnership. *See, e.g., Food Team Intern., Ltd. v. Unilink*, L.L.C., 872 F. Supp. 2d 405, 424 (E.D Pa. 2012) (holding several individuals "subject to secondary individual liability under PACA [Perishable Agricultural Commodities Act]" because their roles within a limited liability company enabled them to control the relevant assets) (citing *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 172 (3d Cir. 2010)). Subsection (c) does not affect this "role liability."

The Temporal Nexus — When Claim Incurred

The LLP shield functions only with respect to obligations incurred while the partnership is a limited liability partnership. The shield does not protect partners from vicarious liability for partnership obligations incurred before a partnership becomes an LLP or after the partnership cancels its LLP status. *See* Section 3-903(d). The same is true initially when LLP status has been administratively revoked, but reinstatement of LLP status resurrects the shield retroactively, except as to persons who relied on the revocation. Section 3-903(d).

For a preliminary discussion of when a partnership obligation is incurred, see the comment to Subsection (b). It could well be argued that "incurred" under Subsection (c) has the same meaning as "incurred" under Subsection (b). *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (referring to 'the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning'); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 925 (1994) (stating that "[w]hen the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning").

However, the argument should yield if the subsections' different contexts raise different issues of policy. 1A Sutherland Statutes and Statutory

Construction § 45:12 (7th ed.) (stating that "departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question"); *see, e.g., S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) ("[W]e have held that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. We have not applied this rule without exception, however, and have sometimes held that an action does not accrue until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury.") (citations omitted).

The case law concerning contractual obligations (incurred when the contract is made) applies appropriately in the context of the LLP shield. However, the lease case law is problematic. If an obligation is incurred each time rent is due, 3-306(c) is a trap for the unwary landlord.

> EXAMPLE: Ordinary general partnership enters into a lease with a commercial landlord. Knowing that each partner is automatically liable for the partnership's debt, the landlord does not obtain personal guarantees. Subsequently, the partnership becomes an LLP. If future rent payments are incurred when due, and not as of when the lease was made, the landlord loses a very important part of the bargain.

Thus, for the purposes of Subsection (c), lease obligations should be treated as contractual obligations, incurred when the contract is made

A similar issue exists with regard to tort liability. Courts must look to when the conduct causing the injury takes place and not to when actual injury occurs. Otherwise, a partnership could: (i) engage in wrongful conduct that does not cause immediate injury; (ii) come to realize that the conduct has occurred; (iii) subsequently file a statement of qualification; (iv) thereby become an LLP; and (v) thereby eliminate the vicarious liability of its partners for all harm subsequently arising from the misconduct. *Cf. Savini v. Univ. of Haw.*, 153 P.3d 1144, 1150 (Haw. 2007) (addressing the question of when a statute of limitations begins to run for bodily injury, when another statute precludes bringing a claim until the amount of damages has reached a specified threshold).

In general, courts should determine the "incurred" question under Subsection (c) so that the LLP shield protects the partners of an LLP to the same extent that the corporate and LLC shields protect corporate shareholders and LLC members. From that perspective, LLP status obtained after a partnership commits a wrongful act should provide no greater protection for the partners than a sole proprietor obtains by forming an LLC after committing a wrongful — *i.e.*, none. *See, e.g., Foxchase, L.L.L.P. v. Cliatt*, 562 S.E.2d 221, 224 (Ga. Ct. App. 2002) (holding that a partnership's liability shield did not protect partners from claims of property damage caused by the construction of a golf course, where the jury could have found that the "damage . . . occurred when they, not the partnership, owned the course").

From the same perspective, *Evanston Ins. Co. v. Dillard Dept. Stores, Inc.*, 602 F.3d 610 (5th Cir. 2010) makes no sense. Interpreting the Texas LLP statute, the court held that a partner's liability for a partnership debit is incurred only when judgment is entered against the partnership. Although the decision itself benefitted creditors, the holding invites the type of gamesmanship shown in the leasing example, above. Moreover, the decision: (i) has been criticized by the Texas Court of Appeals, *Am. Star Energy & Minerals Corp. v. Stowers*, 405 S.W.3d 905, 907 (Tex. App. 2013); (ii) ignores the precedent discussed in Subsection (b), comment and Section 3-307(c), comment; and (iii) can be distinguished as depending on the particular (non-uniform) language of the Texas statute. *Evanston Ins. Co v. Dillard Dep't Stores, Inc.*, 602 F.3d 610, 615-16 (5th Cir. 2010) (contrasting "incurred" with "committed").

Effect of LLP Status on Relations Inter Se the Partners

Although the most noticeable consequence of LLP status is the corporate/LLC-like liability shield, there are two inter se consequences as well. One is straightforward; the other is complex.

• When a partnership chooses the jurisdiction in which to deliver for filing a statement of qualification, the partnership chooses its governing law. Section 3-104(1). The partnership agreement cannot override that choice. Section 3-105(c)(1).

• When a partnership becomes a limited liability partnership, several related default rules change (going forward):

• Partners no longer share losses. Capital losses “lay where they fall.”

• Except for contributions promised but not made, partners no longer have contribution obligations.

□• Due to:

• the liability shield, partners are no longer required to contribute capital to enable the partnership to meet its obligations to creditors; and

• the elimination of loss sharing, partners are no longer required to contribute capital to adjust capital losses *inter se*.

In this context, a partnership’s obligations include a duty to indemnify partners (and others). Thus, indemnification provisions (whether as provided by this article, Section 3-401(c), or the partnership agreement) are no longer “backstopped” by the partners. *See* the comment to Subsection (c)(1).

Subsection (c)(1) — The main part of Subsection (c) overrides contribution obligations under this article. Paragraph 1 overrides contribution obligations created by the partnership agreement.

EXAMPLE: The partnership agreement of a non-LLP partnership requires partners to contribute additional capital as necessary to fund the partnership’s obligations to indemnify partners. When the partnership becomes an LLP, Paragraph 1 overrides that requirement.

Paragraph 1 does not, however, override contribution and indemnification requirements running directly from partner to partner. These obligations are not obligations of the LLP but rather personal to each partner. If such obligations remain in the partnership agreement, they might disable the shield as to partnership liability arising from the misconduct of a partner.

EXAMPLE: The partnership agreement of a non-LLP partnership requires partners to contribute additional capital as necessary to fund the partnership’s obligations to indemnify the Managing Partner and also states:

> To the extent the partnership lacks sufficient funds to perform the partnership’s indemnification obligation, each partner shall indemnify the Managing Partner to the same extent and under the same conditions as the partnership. As among themselves, the indemnifying

> partners shall share the indemnification obligation proportional to their rights to distributions of then current profits as of the time the Managing Partner's conduct gave rise to the claim for which the Managing Partner is to be indemnified.

The partnership becomes an LLP. Subsequently, the Managing Partner is held liable in tort for conduct within the scope of the Managing Partner's responsibility and the partnership is held liable under Section 3-305(a). The partnership has no funds to pay the judgment or indemnify the Managing Partner. Paragraph 1 overrides the contribution requirement but does not change each partner's obligation to indemnify the Managing Partner.

The Managing Partner's right to be indemnified is an asset of the Managing Partner, and the judgment creditor can levy on that asset, thereby defeating the liability shield in effect if not in form.

Subsection (c)(2) — *The Shield and Dissolution* . The rule stated here is inherent in the nature of partnership dissolution. "[D]issolution does not end a partnership's existence but rather changes the purpose of that existence." Section 3-801, comment. "A dissolved partnership shall wind up its business and . . . continues after dissolution . . . for the purpose of winding up." Section 3-802(a). Put another way: dissolution and winding up are part of the life cycle of a partnership — sometimes the most complicated part. There is no logical reason to remove the shield during the last part of an LLP's life cycle.

This subsection makes this point expressly, because it is possible to misinterpret some outlying cases as holding to the contrary. *See, e.g.*, *Carolina Cas. Ins. Co. v. L.M. Ross Law Grp., LLP*, 151 Cal. Rptr. 3d 628, 635 (2012) (affirming the trial court's decision to hold an LLP's named partner liable for a judgment against his limited ability partnership; noting that "[c]entral to the decision to amend the judgment to add Ross [the named partner] as a judgment debtor . . . is the trial court's finding that Ross Law Group dissolved"; recognizing, however, that, before the partnership incurred the liability, Ross had signed and filed with the California Secretary of State a form stating that the law firm had "cease[d] to be a registered limited liability partnership and is hereby filing this notice with

the California Secretary of State that [it] is no longer a registered limited partnership") (quotation marks omitted).

The Shield and Termination . This subsection does not expressly provide that, when a limited liability partnership's existence terminates, the LLP shield remains in place as to any debt, obligation, or other liability of the partnership incurred before the termination. However, the point follows ineluctably from Subsection 3-306(a). That subsection adopts an "occurrence" rather than a "claims made" basis for determining whether the shield applies. *See* the comment to Subsection (b). (The Temporal Nexus — When Claim Incurred).

Moreover, any other result would: (i) create huge holes in the shield; (ii) put the law of unincorporated businesses at odds with the law of corporations; (iii) render surplus this act's distribution recapture provision, Section 3-407; (iv) render meaningless the exception to the notice requirement as stated in Sections 3-807(b)(5) and 3-808(b)(4); and (v) render nonsensical the otherwise logical extension of the equitable trust fund theory to limited liability partnerships. *Cf. Velasquez v. Franz*, 589 A.2d 143, 146 (N.J. 1991) (explaining that "the trust-fund doctrine . . . renders shareholders who receive distributed assets of the corporation liable as 'trustees' for claims of the corporation's creditors").

Subsection (d) — This subsection was added during the Harmonization Project and pertains to the equitable doctrine of "piercing the veil" — *i.e.*, conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of "piercing the corporate veil" is well established, and courts should apply the doctrine to limited liability partnerships for the same reasons that courts have regularly (and sometimes almost reflexively) applied the doctrine to limited liability companies. *Cf. Axtmann v. Chillemi*, 740 N.W.2d 838, 847 (N.D. 2007) (stating that "the shield of a limited liability partnership may be pierced under 'the case law that states the conditions and circumstances under which the corporate veil or limited liability shield of a corporation may be pierced under North Dakota law. . . .'") (quoting N.D.C.C. § 45-22-09(1)).

However, as with LLC piercing, LLP piercing involves one important distinction from the corporate realm. While under corporate law "disregard of corporate formalities" is a key piercing factor, that factor is inapposite in

the law of unincorporated organizations. Corporate formalities reflect statutory mandates. LLP formalities derive for the most part from the agreement among the partners. From a policy perspective, disregarding formalities adopted by agreement differs substantially from disregarding formalities imposed by law. *See e.g. In re Packer,* Bankruptcy No. 13-41304, 2014 WL 5100095 (Bankr. E.D. Tex. Oct. 10, 2014) (noting the informality of LLC governance, recognizing that "the disregard of corporate formalities . . . . [is] one of the key factors in [corporate] veil-piercing determinations"; but holding that "'it makes no sense to imperil the shield simply because the members do not undergo meaningless formalities such as formal meetings'") (citing Carter G. Bishop & Daniel S. Kleinberger, Limited Liability Companies: Tax and Business Law ¶ 6.03 at *3 (Thomson Reuters Tax and Accounting 2014)).

Moreover, because the terms of a partnership agreement may be "implied," Section 3-102(9), an LLP's ongoing disregard of formalities may well constitute an amendment to the partnership agreement. If so, disregard equals amendment, and the concept of "disregard of formalities" makes no sense.

In contrast, this subsection is inapposite to another key piercing factor - disregard of the separateness between entity and owner. *Cf. Vanderford Co. v. Knudson*, 165 P.3d 261, 271 (Idaho 2007) (noting that managing member and "his accountant testified that the LLC's checking account was so confusing that the accountant could not be sure whose money was in the account at what times"); *Utzler v. Braca*, 972 A.2d 743 (Conn. App. Ct. 2009) (holding that veil piercing was appropriate under alter-ego theory when owner deposited LLC funds into a commingled bank account from which he made withdrawals for personal needs and unrelated projects).

EXAMPLE: A partner in a limited liability partnership uses a car titled in the partnership's name for personal purposes and writes checks on the partnership's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not Subsection (b) formalities.

This subsection addresses claims to "impos[e] liability on a partner for a debt, obligation, or other liability of the partnership" — *i.e.*, for what is sometimes termed a "direct pierce." Whether the same approach should

apply to claims for a "reverse pierce" is a question for the courts. *See Comm'r of Envtl. Prot. v. State Five Indus. Park, Inc.*, 37 A.3d 724, 732-33 (Conn. 2012) (stating that "[a]lthough some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because the two share the same equitable goals, others wisely have recognized important differences between them").

This subsection is inapposite to a member's claim that the disregard of agreed-upon formalities is a breach of the partnership agreement.

Subsection (e) — The rule stated here is implicit in Subsection (c) but is stated expressly for the avoidance of doubt.

§ 30-23-307. Actions by and against partnership and partners. — (a) A partnership may sue and be sued in the name of the partnership.

(b) To the extent not inconsistent with section 30-23-306, Idaho Code, a partner may be joined in an action against the partnership or named in a separate action.

(c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

(d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless the partner is personally liable for the claim under section 30-23-306, Idaho Code, and: (1) A judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part; (2) The partnership is a debtor in bankruptcy; (3) The partner has agreed that the creditor need not exhaust partnership assets; (4) A court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or (5) Liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under section 30-23-308, Idaho Code.

History.

I.C., § 30-23-307, as added by 2015, ch. 243, § 25, p. 758.

Official Comment

Section 3-307 reflects the entity construct, Section 3-201(a), was new in UPA (1997), and cannot be varied by the partnership agreement. See

Section 3-105(c)(3). The Harmonization Project made no substantive changes to this section.

Subsection (a) — UPA (1997) § 307 clarified and simplified an "entity versus aggregate" question that had been at best complicated under the common law and UPA (1914) (*i.e.*, whether a general partnership could sue and be sued in its own name and without joining all the partners).

"[A]t common law, . . . a partnership could neither sue or be sued in its name. The individual partners were required to be named as plaintiffs in an action brought by the partnership and as defendants in an action against a partnership." *Telamarketing Commc'ns, Inc. v. Liberty Partners*, 798 S.W.2d 462, 463 (Ky. 1990) (discussing Kentucky law); *see also* Joseph Story, Commentaries on the Law on Partnership § 241, at 373-74 (2d ed. 1850) ("It is a general rule, that in all such suits at law [between a partnership and a third party] all the partners should join.").

UPA (1914) was silent on the point, although some courts inferred capacity to sue (and presumably to be sued) from other entity-like characteristics reflected in that act. *E.g., Decker Coal Co. v. Commonwealth Edison Co.*, 714 P.2d 155, 157 (Mont. 1986) (agreeing with a party's contention that "[a]lthough . . . the UPA does not expressly deal with the question of a partnership's capacity to sue, . . . the UPA does show the modern tendency to treat a partnership as a legal entity distinct from and independent of the individuals composing it"; citing as an example, a partnership's ability to "own property in its own name"; and holding that "it is clear that a partnership is indeed a legal entity distinct from its partners [and] [t]herefore, . . . has the capacity to sue in its own name").

The situation was further complicated by "common name" statutes enacted in many states. *See Silliman v. DuPont*, 302 A.2d 327, 331 (Del. Super. 1972), *aff'd sub nom., F. I. Du Pont, Glore Forgan & Co. v. Silliman*, 310 A.2d 128 (Del. 1973) ("The basic purpose of [common name] statutes was to permit a non-corporate entity to be sued in the name it presented to the public without the necessity of joining the many individuals who composed it.").

The rule stated here is perhaps implicit in Section 3-201(a) ("A partnership is an entity distinct from its partners."). It is a hallmark of a

legal entity that it can sue and be sued. In any event, this subsection leaves no room for doubt.

Subsection (b) — The phrase "not inconsistent with Section 3-306" means: • If a debt, obligation, or other liability is incurred by a limited liability partnership, this subsection does not permit joinder of a partner.

• Likewise, if a debt, obligation, or other liability is incurred by an ordinary partnership before a person becomes a partner, this subsection does not permit joinder of that person As for when a claim is incurred, see the comments to Section 3-307(c) and (d).

The reference to "not inconsistent with Section 3-306" is the procedural analog to the substantive protections of Section 3-306(b) (incoming partner not liable for pre-existing partnership obligations) and (c) (partners not liable for partnership obligations incurred by an LLP). When a partner has personally guaranteed a partnership obligation, naming that partner in a suit against the partnership is "not inconsistent with Section 3-306." *See* the comment to Section 3-306(c) (Shield Inapposite for Claims Arising from a Partner's Conduct); *cf. Bank of Bos. Conn. v. Schlesinger*, 595 A.2d 872, 875 (Conn. 1991) (upholding pre-judgment attachment of a partner's assets, where the partner had personally guaranteed the partnership's obligations).

Subsection (c) — Reflecting the entity construct, Section 3-201(a), this subsection provides that a judgment against the partnership: (i) is not, standing alone, a judgment against the partners; and (ii) cannot be satisfied from a partner's personal assets absent a judgment against the partner.

As did UPA (1914) and UPA (1997), this article leaves to the law of judgments to determine the collateral effects to be accorded a prior judgment for or against the partnership in a subsequent action against a partner individually. *See* Restatement (Second) of Judgments § 60, cmts. (1982); *see also Detrio v. U.S.*, 264 F.2d 658 (5th Cir. 1959); *Brunsoman v. Seltz*, 414 N.W.2d 547 (Minn. Ct. App. 1987) (Lansing, J.). *Contra Evanston Ins. Co. v. Dillard Dep't Stores, Inc.*, 602 F.3d 610, 618 (5th Cir. 2010) (disregarding *sub silentio* the separateness of partner and partnership, overlooking therefore the issue of collateral estoppel, discussing with approval a bankruptcy case in which "the trustee sought to enforce the partnership judgment against [partners] simply by virtue of their status as partner"; and quoting with approval that case's holding that "[o]nce the

liability of the partnership became fixed, the only issue remaining was whether the Defendants are partners of [the partnership]" (quoting *In re Jones*, 161 B.R. 180, 183-84 (Bankr. N.D. Tex. 1993)).

This subsection and Subsection (d) combine to create a trap for the unwary. For statute of limitations purposes, a creditor's claim against the partners accrues simultaneously with the claim against the partnership. If a creditor chooses not to sue the partners in its suit against the partnership, the statute of limitations may run before the creditor commences suit against the partners. *Am. Star Energy & Minerals Corp. v. Stowers*, 405 S.W.3d 905, 907 (Tex. App. 2013) (holding that the partnership creditor "was obligated to sue the partners of S & J . . . within the same limitations period it had to sue S & J, the partnership" and that "[b]ecause, [the creditor] did not, the trial court correctly held that limitations ran"); *Sunseri v. Proctor*, 487 F. Supp. 2d 905, 908 (E.D. Mich. 2007), *aff'd*, 286 F. App'x 930 (6th Cir. 2008) ("While the plaintiff may use collateral estoppel to prevent the partner from relitigating the issue of liability, the plaintiff must still bring suit within the applicable limitations period for the underlying wrong.") **Subsection (d)** — Subject to the five listed exceptions, this subsection prevents a partner's assets from being the first recourse for a judgment creditor of the partnership, even if the partner is liable for the judgment debt under Section 3-306.

Although this subsection is silent with respect to pre-judgment remedies, as a matter of policy the subsection should guide courts as they apply the law of pre-judgment remedies. *Compare Sec. Pac. Nat'l Bank v. Matek*, 175 Cal. App. 3d 1071, 1077 (Cal. Ct. App. 1985) (granting a pre-judgment remedy against a partner because there is "no distinction between those sued individually as partners and those sued as sole proprietors"), *with Bank of Bos. Conn. v. Schlesinger*, 595 A.2d 872, 875 (Conn. 1991) (upholding pre-judgment attachment of a partner's assets, because the partner had personally guaranteed the partnership's obligations).

Subsection (e) — The effect of this subsection depends on whether Section 3-308 applies to produce a partnership obligation or a joint and several obligation. *See* Section 3-308(a) ("If partnership liability results [under the subsection], the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly

and severally with any other person consenting to the representation."), (b) ("If all the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.").

§ 30-23-308. Liability of purported partner. — (a) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one (1) or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(b) If a person is thus represented to be a partner in an existing partnership, or with one (1) or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation. If all the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) A person is not liable as a partner merely because the person is named by another in a statement of partnership authority.

(d) A person does not continue to be liable as a partner merely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to indicate the partner's dissociation from the partnership.

(e) Except as otherwise provided in subsections (a) and (b) of this section, persons who are not partners as to each other are not liable as

partners to other persons.

History.

I.C., § 30-23-308, as added by 2015, ch. 243, § 25, p. 758.

CASE NOTES

Decisions Under Prior Law

General Reputation.

General reputation or common report cannot be shown to establish partnership relation except in connection with duly established facts that person sought to be charged has permitted or impliedly consented to be held out as partner, and that such holding out induced party extending credit to become creditor of firm. Orofino Rochdale Co. v. Shore Lumber Co., 43 Idaho 425, 252 P. 487 (1927).

Partner by Estoppel.

Where a creditor fails to show that representations of partnership were made to him, on the faith of which he extended credit, he cannot establish estoppel on the part of an alleged partner. Orofino Rochdale Co. v. Shore Lumber Co., 43 Idaho 425, 252 P. 487 (1927).

Representations.

It must be shown that parties sought to be held had by words spoken or written or by their contract represented themselves, or consented to be represented, as partners, on faith of which representation credit had been extended; or that such representations had been made in public manner and communicated to party extending credit. Orofino Rochdale Co. v. Shore Lumber Co., 43 Idaho 425, 252 P. 487 (1927).

Official Comment

UPA (1997) § 308 continued the basic principles of partnership by estoppel stated in UPA (1914) § 16. To the extent a partnership liability results under Section 3-308, Section 3-307 applies. *See* Section 3-307(e). The Harmonization Project made no substantive changes to this section.

Subsections (a) and (b) — Even though these subdivisions refer to "reliance" without expressly imposing a reasonableness requirement, the requirement exists in the case law. *See, e.g., In re Cay Clubs*, 319 P.3d 625, 633 (Nev. 2014) (adopting the requirement and stating that, "although the requirement is not explicitly stated in [the statute,] [g]enerally, jurisdictions provide that the partnership-by-estoppel doctrine conditions liability on the plaintiff having reasonably relied on the representation of partnership, which often involves an exercise of due diligence to ascertain the facts").

Subsection (a) — This subsection continues the distinction between representations made to specific persons and those made in a public manner. In both circumstances, the claimant must show reliance.

Like UPA (1914) § 16, this section imposes no duty of denial; thus, a person held out by another as a partner is not liable without having actually consented to the representation. See Subsection (c) (no duty to file statement of denial); Subsection (d) (no duty to file statement of dissociation or to amend statement of partnership authority).

Subsections (c) and (d) — These subsections were new in UPA (1997) and preclude negative inferences from outdated information in filed statements.

Subsection (e) — Derived from UPA (1914) § 7(1), this subsection circumscribes the circumstances in which a person can be liable as a partner to third parties for the obligations of the partnership — *i.e.*, only if (i) the person is a partner in the partnership; or (ii) the person is liable under Section 3-308(a) or (b).

Part 4
Relations of Partners to Each Other and to Partnership

Idaho Code § 30-23-401

§ 30-23-401. Partner's rights and duties. — (a) Each partner is entitled to an equal share of the partnership profits and, except in the case of a limited liability partnership, is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

(b) A partnership shall reimburse a partner for any payment made by the partner in the course of the partner's activities on behalf of the partnership, if the partner complied with this section and section 30-23-409, Idaho Code, in making the payment.

(c) A partnership shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as partner, if the claim, demand, debt, obligation, or other liability does not arise from the person's breach of this section or section 30-23-407 or 30-23-409, Idaho Code.

(d) In the ordinary course of its business, a partnership may advance reasonable expenses, including attorney's fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a partner, if the person promises to repay the partnership if the person ultimately is determined not to be entitled to be indemnified under subsection (c) of this section.

(e) A partnership may purchase and maintain insurance on behalf of a partner against liability asserted against or incurred by the partner in that capacity or arising from that status even if, under section 30-23-105(c)(7), Idaho Code, the partnership agreement could not eliminate or limit the person's liability to the partnership for the conduct giving rise to the liability.

(f) A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.

(g) A payment or advance made by a partner which gives rise to a partnership obligation under subsection (b) or (f) of this section constitutes a loan to the partnership which accrues interest from the date of the payment or advance.

(h) Each partner has equal rights in the management and conduct of the partnership's business.

(i) A partner may use or possess partnership property only on behalf of the partnership.

(j) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

(k) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership, and an amendment to the partnership agreement, may be undertaken only with the affirmative vote or consent of all of the partners.

History.

I.C., § 30-23-401, as added by 2015, ch. 243, § 26, p. 758; am. 2020, ch. 82, § 23, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "section 30-23-105(c)(7), Idaho Code" for "section 33-22-105(c)(7), Idaho Code" near the middle of subsection (e).

CASE NOTES

Decisions Under Prior Law

Agreements of partners.

Authority of partners.

Bankruptcy actions.

Compensation.

Demand for accounting.

Reimbursement for partnership expenses.

Sale of interest.

Winding up.

Agreements of Partners.

Admission in pleadings that partners agreed to share profits equally held not to preclude one partner from showing by competent evidence that he was entitled to a salary for managing the partnership business, as "profits" are funds remaining after all sums including salaries are deducted. Duthweiler v. Hanson, 54 Idaho 46, 28 P.2d 210 (1933).

Where the partners mutually agreed that the partnership was to be dissolved, either partner had the right to wind up the partnership affairs in accordance with the agreement. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Any agreements made between the partners, pertaining to the rights and duties of the partners in relation to the partnership, are controlling as to the partners and the partnership. Treasure Valley Bank v. Butcher, 117 Idaho 974, 793 P.2d 206 (1990).

Authority of Partners.

An equal partner in a two-man partnership does not have the authority to hire a new employee in disregard of the objection of the other partner and the objecting partner may not be charged with the costs incurred as a result of the unilateral decision to hire a third party. Summers v. Dooley, 94 Idaho 87, 481 P.2d 318 (1971).

Bankruptcy Actions.

A partnership may file a voluntary bankruptcy petition under Chapter 7 or 11 of the United States Code and a general partner may file an involuntary petition against a partnership. Only in such a situation are the assets of the partnership part of the estate and subject to the bankruptcy court's control and only then may such court act to prevent any allegedly

wrongful disposition of partnership property. In re Wallen, 43 Bankr. 408 (Bankr. D. Idaho 1984).

Compensation.

Compensation to a partner for services outside those contemplated by the partnership agreement, which benefit the partnership, may properly be awarded. Thomas v. Schmelzer, 118 Idaho 353, 796 P.2d 1026 (Ct. App. 1990).

Demand for Accounting.

In suit by pledgee against partnership to foreclose pledges of assets in form of bonds, two partners having sold their interest in bonds to pledgee without consent of third, court properly decreed partnership accounting and settlement on application of third partner. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

Reimbursement for Partnership Expenses.

Where finding that partners made full and complete settlement and accounting of all their dealings in 1931 was sustained by evidence, any indebtedness owing to partner, who allegedly paid purchase price, freight and cost of handling of seed potatoes purchased by partnership in 1928, was discharged, and partner was not entitled in subsequent accounting proceeding to credit for such expenditures. Bussell v. Barry, 61 Idaho 350, 102 P.2d 280 (1940).

Sale of Interest.

Where three copartners pledged bonds and two of partners without consent of the other sold their interest to pledgee as payment of two-thirds of partnership indebtedness, it was proper to treat this transfer as advancement to partnership, and therefore pledgee suing partnership was entitled, as successor to two partners, to interest from date of advancement to date of final decree on partnership settlement. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

Winding Up.

Where claims of the dominant or managing partner against the partnership are questioned, the managing partner has the burden of proving

that the claimed expenses, incurred during dissolution, are reasonable and necessary. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Where partnership combines were sold through partners' corporation during winding up, the reasonable costs of repairing combines and a customary ten percent sales commission to corporation were properly charged to the partnership; however, a $500 finder's fee for the person who found buyer of combine could not be so charged. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

RESEARCH REFERENCES

ALR. — Licensed real-estate broker's right to compensation as affected by lack of license on the part of partners, coadventurers, employees, or other associates. 8 A.L.R.3d 523.

Construction and application of expulsion provision in medical partnership agreement. 87 A.L.R.3d 328.

Tort action for personal injury or property damage by partner against another partner or the partnership. 39 A.L.R.4th 139.

Official Comment

For the most part, Section 401 merely restates the rules of UPA (1914) § 18, thereby establishing many of the default rules that govern the relations among partners. All of these rules are, however, subject to contrary agreement of the partners as provided in Sections 3-105 through 3-107.

UPA (1997) § 401(a) experimented with providing a default configuration for capital accounts. For the reasons stated in Section 3-405, comment, the Harmonization Project ended the experiment and eliminated the configuration

Subsection (a) — This subsection continues the approach of UPA (1914) § 18(a), although for the reasons stated in Section 3-405, comment, the Harmonization Project substituted "distribution" for "profits." Distributions are shared equally and losses are shared in proportion to each partner's share of distributions. Thus, under this default rule, partners share

distributions per capita and not in proportion to capital contribution (per capital).

If partners agree to share distributions other than equally, losses will be shared in the same proportion as distributions, absent agreement to do otherwise. This rule, carried over from UPA (1914) rests on the assumption that partners would likely agree to share losses on the same basis as distributions, but may fail to say so. Of course, by agreement, they may share losses on a different basis from distributions.

Subject to contrary agreement and the effect of Section 3-806(e), this subsection's loss sharing rules apply, even where one or more of the partners contribute no capital. The rule was the same under UPA (1914) § 18(a), although there is some case law to the contrary. *See, e.g., Kovacik v. Reed*, 315 P.2d 314 (Cal. 1957); *Becker v. Killarney*, 523 N.E.2d 467 (Ill. App. Ct. 1988). It may seem unfair that the contributor of services, who contributes little or no capital, should be obligated to contribute toward the capital loss of the large contributor who contributed no services. In entering a partnership with such a capital structure, the partners should foresee that application of the default rule might bring about unusual results and take advantage of their power to vary by agreement the allocation of capital losses.

Subsections (b) and (c) — A partnership's obligation, if any, to reimburse or indemnify others (*e.g.*, employees, other agents, and independent contractors) is a question for other law, including the law of agency, contract, and restitution. The fact a person has dissociated as a partner does not affect any obligations incurred by the partnership under these subsections for conduct occurring before the dissociation.

To the extent a partnership agreement modifies or displaces the default rules stated in Sections 3-401 and 3-409, the agreement should also address these sections. For example, if the partnership agreement establishes a duty of ordinary care (modifying Section 3-409(c)), the agreement should specify which level of care is necessary to satisfy Subsections (b) and (c). It is not necessary that the levels of care be the same, only that the partnership agreement make the situation clear and thereby avoid difficult issues of interpretation.

Subsection (b) — UPA (1997) derived this subsection from UPA (1914) § 18(b). The Harmonization Project made two changes: (i) deleting "for the preservation of its business or property" as a separate category for reimbursement, because that category is a subset of the category of "payments made . . . in the course of the partner's activities on behalf of the partnership"; and (ii) conditioning reimbursement on the partner's having complied with the duties stated in Section 3-409.

The reimbursement obligation stated here is a default rule and roughly parallels a rule of agency law. Restatement (Third) of Agency § 8.14(2) (2006) (stating that "[a] principal has a duty to indemnify an agent . . . when the agent makes a payment (i) within the scope of the agent's actual authority, or (ii) that is beneficial to the principal, unless the agent acts officiously in making the payment").

Subsection (c) — This subsection provides for indemnification, but the provision is a default rule.

The rule's eligibility requirements correspond to the default rules on management duties, which is appropriate because otherwise the statutory default rule on indemnification could undercut or even vitiate the statutory default rules on duty. However, subject only to Section 3-105(c)(8), the partnership agreement can substantially relax the eligibility requirements. The agreement can also impose stricter preconditions.

Although referring broadly to any "person," this subsection is actually limited to present and former partners. The indemnification obligation applies to only a "debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a partner." Thus, by its terms this subsection does not apply to a person in the capacity of an officer, manager, *etc*.

Of course, the partnership agreement may mandate indemnification to persons in such positions, as well as to other persons providing services to or acting for the partnership. Within the limitations stated in Section 3-105(c)(8), a partnership agreement may obligate a partnership to indemnify a person even though the person has breached a duty to the partnership.

A separate agreement between a partnership and another person may also provide for indemnification. For example, a management contract between

a partnership and its managing partner may contain an indemnification provision. The limitations stated in Section 3-105(c)(8) apply to such separate agreements, for the reasons stated in the comment to that paragraph.

Subsection (d) — This subsection authorizes but does not require a partnership to provide advances to cover expenses. *Cf. Majkowski v. Am. Imaging Mgmt. Servs., L.L.C.*, 913 A.2d 572, 589 (Del. Ch. 2006) ("Because rights to indemnification and advancement differ in important ways, our courts have refused to recognize claims for advancement not granted in specific language clearly suggesting such rights."). The phrase "hold harmless" likewise does not encompass advances. *Id.* The authorization applies only to those persons eligible for indemnification under Subsection (c), but the partnership agreement certainly can authorize a broader scope and can also make advances obligatory.

The reference to "ordinary course" pertains to Subsection (k) (stating that any "difference arising in the ordinary course of the business of the partnership may be decided by a majority of the partners").

Subsection (e) — This subsection's language is very broad and authorizes a partnership to purchase insurance to cover (*e.g.*, a partner's intentional misconduct). It is unlikely that such insurance would be available. This authorization comes from the article, not the partnership agreement, and therefore is not subject to Section 3-105(c)(8) (precluding the partnership agreement from "reliev[ing] or exonerate[ing] a person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law").

Subsection (f) — This subsection was UPA (1997) § 401(d) and is based on UPA (1914) § 18(c).

Subsection (g) — This subsection was UPA (1997) § 401(c) and is based on UPA (1914) § 18(c).

Subsection (h) — This subsection was UPA (1997) § 401(f) and is based on UPA (1914) § 18(e). UPA (1997) § 401, comment 7, suggests that UPA (1914) § 18(e) case law continues to be relevant and notes that Section 18(e) "has been interpreted broadly to mean that, absent contrary agreement, each partner has a continuing right to participate in the

management of the partnership and to be informed about the partnership business, even if, per the partnership agreement, the partner's assent to partnership business decisions is not required."

Note also that for some decisions this article requires the affirmative vote or consent of all partners. *See, e.g.*, Subsection (k) ("an act outside the ordinary course of business of a partnership and an amendment to the partnership agreement"); Section 3-402(b)(3) (becoming a partner after formation of the partnership).

The subsection has important implications for a partner's actual authority to act on behalf of the partnership. The actual authority of a partner is a question of agency law and depends fundamentally on the contents of the partnership agreement. If, however, the partnership agreement is silent on the issue, this subsection helps delineate that actual authority. Acting individually, a partner:

• has no actual authority to commit the partnership to any matter for which this article requires the affirmative vote or consent of all partners;

• has the actual authority to commit the partnership to usual and customary matters, unless the partner has reason to know that: (i) other partners might disagree; or (ii) for some other reason consultation with fellow partners is appropriate; and

• has no actual authority to take unusual or non-customary actions that will have a substantial effect on the partnership.

The first point follows self-evidently from the language of this article. Where this article requires unanimity, no partner could reasonably believe to the contrary (unless the partnership agreement provided otherwise).

The second point follows because:

□• Subsection (h) serves as the gap-filler manifestation from the partnership to its partners and does *not* require partners to act only in concert or after consultation. To the contrary, subject to the partnership agreement, this subsection expressly provides that "each partner has equal rights in the management and conduct of the partnership's business."

□• It would be impractical to require collective action on even the smallest of decisions.

□• However, to the extent a partner has reason to know of a possible difference of opinion among the partner, Subsection (k) requires a decision by at least “a majority of the partners” and by unanimous consent if the matter is “outside the ordinary course of the business.”

The third point is a matter of common sense. The more serious the matter, the less likely it is that a partner has actual authority to act unilaterally. *Cf.* Restatement (Third) of Agency § 3.03, cmt. c (2006) (noting the unreasonableness of believing, without more facts, that an individual has “an unusual degree of unilateral authority over a matter fraught with enduring consequences for the institution” and stating that “[t]he gravity of the matter from the standpoint of the organization is relevant to whether a third party could reasonably believe that the manager has authority to proceed unilaterally”).

Finally, the authority granted by this subsection includes the authority to delegate. Delegation does not relieve the delegating partner or partners of their duties under Section 3-409. However, the fact of delegation is a fact relevant to any breach of duty analysis.

EXAMPLE: A partner personally handles all important paperwork for a partnership. The partner neglects to renew the fire insurance coverage on a building owned by the partnership, despite having received and read a warning notice from the insurance company. The building subsequently burns to the ground and is a total loss. The partner might be liable for breach of the duty of care under Section 3-409(c) (gross negligence).

EXAMPLE: A partner delegates responsibility for insurance renewals to the partnership’s office manager, and that manager neglects to renew the fire insurance coverage on the building. Even assuming that the office manager has been grossly negligent, the partner is not necessarily liable under Section 3-409(c). The office manager’s gross negligence is not automatically attributed to the partner. Under Section 3-409(c), the question is whether the partner was grossly negligent (or worse) in selecting the office manager, delegating insurance renewal matters to the office manager, and supervising the office manager after the delegation.

The partnership agreement may also provide for delegation and, subject to Section 3-105(c), may modify a partner’s duties under Section 3-409 accordingly.

Subsection (i) — This subsection states directly what UPA (1914) § 25(2)(a) provides indirectly, through the "tenancy in partnership." That tenancy reflected the aggregate view of partnership (in the extreme), stated management rights as property rights, and was eliminated by UPA (1997) 401(g). The Harmonization Project relocated the UPA (1997) provision into this subsection.

The substance of UPA (1997) § 401(i), which continued the substance of UPA (1914) § 18(g), now appears in Section 3-402(b)(3) (providing that no person can become a partner without the affirmative vote or consent of all partners).

Subsection (j) — This subsection (i) follows the default rule of UPA (1914) § 18(f) (providing that a partner is not entitled to remuneration for services performed, except in winding up the partnership); while (ii) expanding the exception to include any partner who undertakes winding up. "[R]easonable compensation" includes reimbursement for reasonable expenses. *Moran v. Willensky*, 339 S.W.3d 651, 663 (Tenn. Ct. App. 2010) (stating that "the winding up partner . . . [is] entitled to recover costs associated with the winding up process"); *see also O'Reilly's Adm'r v. Brady*, 28 Ala. 530, 535 (1856) (holding that "the surviving partner is entitled, at least, to an allowance and deduction for 'tavern bills,' [sic] and 'other expenses incurred' 'in the adjustment and settling up' of the affairs of the partnership."). Reasonable expenses include reasonable attorney's fees, even when the winding up partner has (rightfully) caused the partnership to sue one of the partners. *Moran*, 339 S.W.3d at 663 ("Because Mr. Willensky's capital account had a negative balance, Ms. Moran was well within her rights to sue him to make up that balance.").

In UPA (1997), this subsection was Subsection (h). The Harmonization Project made no change except to relocate the provision.

Subsection (k) — UPA (1997) continued the allocation of management authority stated by UPA (1914) § 18(h), with one important clarification. UPA (1914) § 18(h) requires majority consent for ordinary matters and unanimous consent for amending the partnership but is silent regarding extraordinary matters. Courts have generally required the consent of all partners for those matters. *See, e.g.*, *Paciaroni v. Crane*, 408 A.2d 946 (Del. Ch. 1989); *Thomas v. Marvin E. Jewell & Co.*, 440 N.W.2d 437(Neb.

1989); *Duell v. Hancock*, 83 A.D.2d 762 (N.Y. 1981). UPA (1997) codified those cases in § 401(j). The Harmonization Project made no substantive change but relocated the provision to Subsection (k).

Other provisions of this article also contain default rules providing for unanimous consent. *E.g.*, Sections 3-402(b)(3) (for a person to become a partner), 3-504(c) (for compromising a person's obligation to make a contribution). In addition, absent a contrary provision in the partnership agreement, the transactions authorized under Article 2 each require unanimous consent.

§ 30-23-402. Becoming partner. — (a) Upon formation of a partnership, a person becomes a partner under section 30-23-202(a), Idaho Code.

(b) After formation of a partnership, a person becomes a partner: (1) As provided in the partnership agreement; (2) As a result of a transaction effective under chapter 22, title 30, Idaho Code; or (3) With the affirmative vote or consent of all the partners.

(c) A person may become a partner without:

(1) Acquiring a transferable interest; or

(2) Making or being obligated to make a contribution to the partnership.

History.

I.C., § 30-23-402, as added by 2015, ch. 243, § 26, p. 758; am. 2020, ch. 82, § 24, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "chapter 22, title 30, Idaho Code" for "chapter 21, title 30, Idaho Code" at the end of paragraph (b)(2).

Official Comment

This section was adopted in the 2011 and 2013 Harmonization amendments and changes UPA (1997) both in style and substance.

Subsection (b)(2) — Article 2 deals with entity transactions (*e.g.*, mergers and conversions). This reference is new, although UPA (1997) Article 9 did contemplate mergers and conversions.

Subsection (b)(3) — A partnership being a creature of contract, consent is determined on an objective basis (*i.e.*, contract law's "reasonable person" standard). Depending on the terms of the partnership agreement, the partners' manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the

partnership agreement might reduce the quantum of consent necessary or shift the consent right to a management committee or managing partner.

A partnership being a voluntary association, a person cannot become a partner without manifesting consent to do so. That consent also is judged objectively.

Under Section 3-106(b), "[a] person that becomes a partner is deemed to assent to the partnership agreement," and the agreement binds the partner regardless of whether the partner has actually indicated assent in any way.

Subsection (c)(1) — To accommodate business practices, this provision permits so-called "non-economic partners."

§ 30-23-403. Form of contribution. — A contribution may consist of property transferred to, services performed for, or another benefit provided to the partnership or an agreement to transfer property to, perform services for, or provide another benefit to the partnership.

History.

I.C., § 30-23-403, as added by 2015, ch. 243, § 26, p. 758.

Official Comment

This section is derived from ULLCA (2006) § 402, was adopted as part of the 2011 and 2013 Harmonization amendments, is intentionally quite broad, and encompasses past, present, and promised benefits.

Partnership law and practice are in accord. *E.g., Canet v. Gooch Ware Travelstead*, 917 F. Supp. 969, 974 (E.D.N.Y. 1996) (referring to "Travelstead's acknowledged use of 'sweat equity' participations" in two projects); *In re Jones*, 445 B.R. 677, 717 (Bankr. N.D. Tex. 2011) (stating that "Ex-Mrs. Mullen essentially put 'sweat equity' (*i.e*., the provision of modeling services and related consultation) into Simple Beaute and not a significant monetary investment"); *Tumminaro v. Tumminaro*, 556 N.E.2d 293, 299 (Ill. App. Ct. 1990) ("A partner's contribution to the partnership may consist of 'services, skill, know-how', or 'sweat equity.'") (quoting *Becker v. Killarney*, 532 N.E.2d 931 (Ill. App. Ct. 1988)).

This article does not contain a statute of frauds specifically applicable to promised contributions. Generally applicable statutes of fraud might apply, however. For example, a promise to contribute land to a partnership would be subject to the statute of frauds pertaining to land transfers. Likewise, a promise that by its terms requires performance that extends beyond one year from the making of the contract would be subject to the one-year provision of the statute of frauds. See the comment to Section 3-102(12).

§ 30-23-404. Liability for contribution. — (a) A person's obligation to make a contribution to a partnership is not excused by the person's death, disability, termination, or other inability to perform personally.

(b) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the partnership to contribute money equal to the value of the part of the contribution which has not been made.

(c) The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all the partners. If a creditor of a limited liability partnership extends credit or otherwise acts in reliance on an obligation described in subsection (a) of this section, without knowledge or notice of a compromise under this subsection, the creditor may enforce the obligation.

History.

I.C., § 30-23-404, as added by 2015, ch. 243, § 26, p. 758.

Official Comment

Subsection (a) — Under common law principles of impracticability, an individual's death or incapacity will sometimes discharge a duty to render performance. Restatement (Second) f Contracts §§ 261 (Discharge by Supervening Impracticability), 262 (Death or Incapacity of Person Necessary For Performance) (1981). This subsection overrides those principles. Moreover, the reference to "perform personally" is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

Subsection (b) — This subsection is a statutory liquidated damage provision, exercisable at the option of the partnership, with the damage amount set according to the value of the promised, non-monetary contribution.

EXAMPLE: In order to become a partner, a person promises to contribute to the partnership various assets "free and clear," which the

partnership agreement values at $150,000. In return for the person's promise, and in light of the agreed value, the partnership admits the person as a partnership with a right to receive twenty-five percent of the partnership's distributions.

However, the promised assets are subject to a security agreement, and, before the partner can contribute the assets, the secured party forecloses on the security interest and sells the assets at a public sale for $75,000. Even if the $75,000 reflects the actual fair market value of the assets, under this subsection the partnership has a claim against the partner for "money equal to the value of the part of the contribution which has not been made" — *i.e.*, $150,000.

EXAMPLE: Same facts as the previous example, except that the public sale brings $225,000. The limited liability company is neither obliged to invoke this subsection nor limited to the $150,000. The LLC may instead sue for breach of the promise to make the contribution, asserting the $225,000 figure as evidence of the actual loss suffered as a result of the breach.

Subsection (c) — The unanimity requirement expressed in the first sentence might indirectly benefit creditors, but the requirement is nonetheless a default rule and therefore may be varied in the partnership agreement. The right of each partner to consent is not a "right[] under this [article] of a person other than a partner." *See* Section 3-105(c)(17) (preventing the partnership agreement from affecting such rights). In contrast, the right stated in the second sentence fits squarely within Section 3-105(c)(17) and therefore may not be varied by the partnership agreement.

§ 30-23-405. Sharing of and right to distributions before dissolution. — (a) Any distributions made by a partnership before its dissolution and winding up must be in equal shares among partners, except to the extent necessary to comply with a transfer effective under section 30-23-503, Idaho Code, or charging order in effect under section 30-23-504, Idaho Code.

(b) Subject to section 30-23-701, Idaho Code, a person has a right to a distribution before the dissolution and winding up of a partnership only if the partnership decides to make an interim distribution.

(c) A person does not have a right to demand or receive a distribution from a partnership in any form other than money. Except as otherwise provided in section 30-23-806, Idaho Code, a partnership may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(d) If a partner or transferee becomes entitled to receive a distribution, the partner or transferee is entitled to all remedies available to a creditor of the partnership with respect to the distribution. However, the partnership's obligation to make a distribution is subject to offset for any amount owed to the partnership by the partner or a person dissociated as partner on whose account the distribution is made.

History.

I.C., § 30-23-405, as added by 2015, ch. 243, § 26, p. 758.

Official Comment

Past uniform unincorporated entity acts and many current limited liability company acts provide default rules for allocation of profits, and UPA (1997) even provides a default configuration for maintaining capital accounts. For the following reasons, this article, incorporating changes made by the Harmonization Project, provides a default rule only for rights to share in distributions:

• Capital accounts are maintained for one purpose, to determine how distributions will be made to partners. The rules for maintenance of capital accounts can be very complex. Generally, however, profits increase capital account balances (and increase the amounts that will be distributed to the partners) and losses reduce capital account balances (and reduce the amounts that will be distributed to the partners). If the statute has a simple default rule for how distributions are to be made to the partners, providing an additional set of default profit and loss allocation provisions and capital account rules will be, at best, duplicative and, at worse, inconsistent with the distribution rules.

• Some argue that capital account rules and profit and loss allocation provisions are necessary to comply with tax requirements. Tax income or loss is allocated to partners according to the partners' economic interests in the partnership, and these interests are based on distributions that would be made to partners on liquidation of the partnership. By including default distribution provisions, this article includes the information necessary to make these tax determinations. To the extent the tax law allows partners to make further tax elections or satisfy alternative safe harbors, the partners may look to the tax law for guidance and include necessary provisions in their agreements.

Subsection (a) — The rule stated applies to redemptions as well as operating distributions but is a default rule in both contexts. *See* the comment to Section 3-102(a)(3)(A).

Subsection (b) — Section 3-701 provides a default rule for buying out a person dissociated as a partner when the dissociation does not lead to dissolution of the partnership.

Subsection (d) — For the rights of partners and transferees that receive a distribution in the form of indebtedness, see Section 3-406(d).

§ 30-23-406. Limitations on distributions by limited liability partnership. — (a) A limited liability partnership may not make a distribution, including a distribution under section 30-23-806, Idaho Code, if after the distribution:

(1) The partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's business; or

(2) The partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to the rights of persons receiving the distribution.

(b) A limited liability partnership may base a determination that a distribution is not prohibited under subsection (a) of this section on:

(1) Financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(2) A fair valuation or other method that is reasonable under the circumstances.

(c) Except as otherwise provided in subsection (e) of this section, the effect of a distribution under subsection (a) of this section is measured:

(1) In the case of a distribution as defined in section 30-23-102(a)(3)(A), Idaho Code, as of the earlier of:

(A) The date money or other property is transferred or debt is incurred by the limited liability partnership; or

(B) The date the person entitled to the distribution ceases to own the interest or rights being acquired by the partnership in return for the distribution;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) In all other cases, as of the date:

(A) The distribution is authorized, if the payment occurs not later than one hundred twenty (120) days after that date; or

(B) The payment is made, if the payment occurs more than one hundred twenty (120) days after the distribution is authorized.

(d) A limited liability partnership's indebtedness to a partner or transferee incurred by reason of a distribution made in accordance with this section is at parity with the partnership's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

(e) A limited liability partnership's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of subsection (a) of this section if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that a payment of a distribution could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

(f) In measuring the effect of a distribution under section 30-23-806, Idaho Code, the liabilities of a dissolved limited liability partnership do not include any claim that has been disposed of under section 30-23-807, 30-23-808 or 30-23-809, Idaho Code.

History.

I.C., § 30-23-406, as added by 2015, ch. 243, § 26, p. 758; am. 2020, ch. 82, § 25, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "section 30-23-102(a)(3)(A), Idaho Code" for "section 30-23-102(4)(A), Idaho Code" near the end of the introductory paragraph in paragraph (c)(1).

Official Comment

Both this section and Section 3-407 were derived essentially from the Model Business Corporation Act section 6.40, and were added during the

Harmonization Project. Both sections are necessary and appropriate because a limited liability partnership provides the partners a corporate-like liability shield. With the exception noted in the comment to Subsection (a)(2), the provisions of this section are non-waivable. Section 3-105(c)(17).

"Distribution" does not include "amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program." Section 3-102(a)(4)(B).

Subsection (a) — Insolvency is a fundamental issue under this section, and this subsection provides two tests of insolvency. The tests are disjunctive; a distribution violates this section if after the distribution the LLP fails either of the tests. The subsection applies both to interim and liquidating distributions.

Solvency is also a fundamental issue under bankruptcy and fraudulent transfer law, which provide their own respective definitions of the concept.

Subsection (a)(2) — The reference to "preferential rights upon dissolution and winding up" is a default rule, because removing this protection for preferred partners or transferees is an inter se matter. See Section 3-105(d)(1)(B). The rest of the section is not subject to change in the partnership agreement. Section 3-105(c)(17).

Subsection (b) — This subsection states a standard of ordinary care, in contrast with the generally applicable standard stated in Section 3-409(c) (gross negligence).

Subsection (b)(2) — This alternative valuation provision is likely to be both useful and fair when the partnership has appreciated assets but for accounting purposes these assets are valued at book value less depreciation.

Subsection (c) — This subsection provides three alternative rules for determining the point(s) in time of as which to apply the solvency tests stated in Subsection (a). The timing depends on which of three categories encompasses a distribution: (i) a distribution in the nature of a redemption (regardless of whether the distribution includes a distribution of indebtedness); (ii) any distribution of indebtedness other than a distribution in the nature of a redemption; and (iii) any distribution that involves neither a redemption nor a distribution of indebtedness. A requirement for

additional solvency testing pertaining to distributions of indebtedness appears in Subsection (e).

Subsection (c)(1) — Section 3-102(a)(3)(A) encompasses distributions in the nature of a redemption.

Subsection (c)(1)(A) and (B) — Under Subparagraph (A), any beginning of payment activity triggers the rule and sets the date as of when to apply the solvency tests. Under Subparagraph (B), the partnership's complete acquisition of the rights is necessary to trigger the rule.

Subsection (c)(2) — This provision states the general rule for distributions in the form of debt and which are not connected with a redemption.

Subsection (c)(3) — This provision states alternative rules for all distributions of money or property (*i.e.*, not debt). The measuring date depends on the length of time between the authorization and payment of the distribution.

Subsection (d) — For a related provision, characterizing as a creditor a person who has become entitled to receive a distribution, see Section 3-405(d).

Subsection (e) — This subsection contains two rules pertaining to indebtedness issued as part of a distribution and the Subsection (a) solvency tests. The first sentence states the sensible rule that indebtedness that is essentially subordinated to the solvency requirement (*i.e.*, not payable if making payment would transgress that requirement) is not counted in determining liabilities for purposes of the solvency tests. The second sentence applies the solvency tests to each payment of principal and interest on any indebtedness issued as a distribution, in addition to any previous testing required by Subsection (c)(1)(A) or (c)(2).

> EXAMPLE: A limited liability partnership and one of its partners agree that the LLP will buy out the person's entire ownership interest in the LLP in return for a promissory note from the LLP, payable in installments. Under the redemption agreement: (i) on January 15 the person surrenders all its interests and rights and dissociates as a partner; and (ii) the LLP signs and delivers the note to the person on February 15.

Under the note, payment of interest is due monthly beginning March 15, with a balloon payment of the principal due December 30.

Under Subsection (c)(1)(B), the solvency tests are applied as of January 15. Under Subsection (e), the solvency tests are again applied on the March 15, April 15, etc., and again on December 30.

Subsection (f) — The cited sections provide methods for extinguishing or limiting the debts of an LLP that is winding up its affairs and activities and thus any debt affected by any of the cited sections is irrelevant for purposes of solvency testing.

§ 30-23-407. Liability of improper distributions by limited liability partnership. — (a) Except as provided in subsection (b) of this section, if a partner of a limited liability partnership consents to a distribution made in violation of section 30-23-406, Idaho Code, and in consenting to the distribution fails to comply with section 30-23-409, Idaho Code, the partner is personally liable to the partnership for the amount of the distribution that exceeds the amount that could have been distributed without the violation of section 30-23-406, Idaho Code.

(b) To the extent the partnership agreement of a limited liability partnership expressly relieves a partner of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one (1) or more other partners, the liability stated in subsection (a) of this section applies to the other partners and not to the partner that the partnership agreement relieves of the authority and responsibility.

(c) A person that receives a distribution knowing that the distribution violated section 30-23-406, Idaho Code, is personally liable to the limited liability partnership but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under section 30-23-406, Idaho Code.

(d) A person against which an action is commenced because the person is liable under subsection (a) of this section may: (1) Implead any other person that is liable under subsection (a) of this section and seek to enforce a right of contribution from the person; and (2) Implead any person that received a distribution in violation of subsection (c) of this section and seek to enforce a right of contribution from the person in the amount the person received in violation of subsection (c) of this section.

(e) An action under this section is barred unless commenced not later than two (2) years after the distribution.

History.

I.C., § 30-23-407, as added by 2015, ch. 243, § 26, p. 758.

Official Comment This section and Section 3-406 were derived essentially from Model Business Corporation Act section § 6.40. The provisions of this section are non-waivable. Section 3-105(c)(17).

This section contemplates two categories of liability: liability of those who have authorized improper distributions (Subsection (a) — *i.e.*, the partners) and the liability of those who have received improper distributions (Subsection (c) — *i.e.*, partners and transferees). Neither dissociating as a partner nor ceasing to be a transferee affects liability previously incurred under this section.

The liability is to the LLP, not to the creditors of an insolvent LLP. *Weinstein v. Colborne Foodbotics, L.L.C.*, 302 P.3d 263, 268 (Colo. 2013); *Rev O, Inc. v. Woo*, 725 S.E.2d 45, 52 (N.C. Ct. App. 2012).

This section does not preclude or interfere with claims for fraudulent transfer. *See* the comment to Subsection (e).

Subsection (a) — The liability is not strict liability but rather attaches only to the extent a decision maker has failed to comply with the duties stated in Section 3-409. To the extent those duties have been permissibly revised by the partnership agreement, the revised standards apply to this subsection. See Section 3-406(b)(1) (permitting reasonable reliance on specified financial information).

Subsection (b) — *Compare* Section 3-407(b), *with* Section 3-105(d)(2) (generally permitting provisions of this type).

Subsection (c) — Actual knowledge is necessary to impose liability. Reason to know does not suffice. *Compare* Section 3-407(c), *with* Section 3-103(a), (b).

Subsections (c) and (d)(2) — Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a partner.

Subsection (e) — When the distribution is in the form of indebtedness, the distribution may occur on several different dates. See the comment to Section 3-406(e).

This statute of limitations applies only to actions "under this section" and does not affect claims under other applicable law, which most often is fraudulent transfer law. For a different approach, see Delaware Code Annotated title 6, section 15-309(c) (West 2013) (applying a three-year statute of limitations to claims "under this chapter or other applicable law"); New York Limited Liability Company section 508(c) (2013) (same). *But see, e.g., In re The Heritage Org., L.L.C.*, 413 B.R. 438, 461 (Bankr. ND Tex. 2009) (invoking the Texas Uniform Fraudulent Transfers Act (TUFTA) to recover distributions made by a Delaware LLC headquartered in Texas; rejecting Delaware Code title 6, section 18-607(c) on choice of law grounds; stating that "the Delaware legislature cannot limit the reach of TUFTA").

§ 30-23-408. Rights to information of partners and persons dissociated as partner. — (a) A partnership shall keep its books and records, if any, at its principal office.

(b) On reasonable notice, a partner may inspect and copy during regular business hours, at a reasonable location specified by the partnership, any record maintained by the partnership regarding the partnership's business, financial condition, and other circumstances, to the extent the information is material to the partner's rights and duties under the partnership agreement or this act.

(c) The partnership shall furnish to each partner:

(1) Without demand, any information concerning the partnership's business, financial condition, and other circumstances that the partnership knows and is material to the proper exercise of the partner's rights and duties under the partnership agreement or this act, except to the extent the partnership can establish that it reasonably believes the member already knows the information; and

(2) On demand, any other information concerning the partnership's business, financial condition, and other circumstances, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(d) The duty to furnish information under subsection (c) of this section also applies to each partner to the extent the partner knows any of the information described in subsection (c) of this section.

(e) Subject to subsection (j) of this section, on ten (10) days' demand made in a record received by a partnership, a person dissociated as a partner may have access to information to which the person was entitled while a partner if:

(1) The information pertains to the period during which the person was a partner;

(2) The person seeks the information in good faith; and

(3) The person satisfies the requirements imposed on a partner by subsection (b) of this section.

(f) Not later than ten (10) days after receiving a demand under subsection (e) of this section, the partnership in a record shall inform the person that made the demand of:

(1) The information that the partnership will provide in response to the demand and when and where the partnership will provide the information; and

(2) The partnership's reasons for declining, if the partnership declines to provide any demanded information.

(g) A partnership may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(h) A partner or person dissociated as a partner may exercise the rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the partnership agreement or under subsection (j) of this section applies both to the agent or legal representative and to the partner or person dissociated as a partner.

(i) Subject to section 30-23-505, Idaho Code, the rights under this section do not extend to a person as transferee.

(j) In addition to any restriction or condition stated in the partnership agreement, a partnership, as a matter within the ordinary course of its business, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

History.

I.C., § 30-23-408, as added by 2015, ch. 243, § 26, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Subsections (a) and (c) derive from UPA (1997). The other subsections are derived from the ULPA (2001) § 401 (rights to information of general partners and former general partners) and were adopted as part of the 2011 and 2103 Harmonization amendments. The rules stated here might be termed "quasi-default rules" — subject to some change by the partnership agreement. See Section 3-105(c)(4) (prohibiting unreasonable restrictions on the information rights stated in this section).

Although the rights and duties stated in this section are extensive, they are not necessarily all-inclusive. This article's statement of fiduciary duties is not exhaustive, see the comment to Section 3-409(a), and some cases characterize owners' information rights as reflecting a fiduciary duty of those with management power. *E.g. Bakerman v. Sidney Frank Importing Co., Inc.*, No. Civ.A. 1844-N, 2006 WL 3927242, at *14 (Del. Ch. Oct. 16, 2006) (holding that an LLC manager owed "certain duties to members of the LLC" and stating that "[w]hen fiduciaries communicate with their beneficiaries in the context of asking the beneficiary to make a discretionary decision — such as whether to consent to a sale of substantially all the assets of an LLC — the fiduciary has a duty to disclose all material facts bearing on the decision at issue") (citing *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 137 (Del. 1997)).

Subsection (a) — A general partnership is often a very informal organization. Accordingly, this subsection states a default-required location for any books and records a partnership may have but does not require that books and records be kept. Other law may so require, however — particularly tax law. This subsection applies to any books and records kept to satisfy other law.

Subsection (b) — This subsection states the rule pertaining to information memorialized in "any record maintained by the partnership." For the meaning of "material" as applied to information, see Section 3-409(f), comment.

Subsections (c) and (d) — In appropriate circumstances, violation of either or both of these provisions might cause a court to enjoin or even

rescind action taken by the partnership, especially when the violation has interfered with an approval or veto mechanism involving partner consent. *E.g., Blue Chip Emerald L.L.C. v. Allied Partners Inc.*, 299 A.D.2d 278, 279-80 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that "[a]bsent such full disclosure, the transaction is voidable").

Subsection (c) — This subsection imposes a duty on the partnership, not the partners. However, a partner could be liable in damages if the partner were to: (i) breach a duty under Section 3-409 or the partnership agreement; and (ii) in doing so cause or suffer the partnership to breach the duty stated in this paragraph.

Subsection (c)(1) — This provision imposes an affirmative duty to volunteer information. However, given the assumption that each partner will be active in management, the obligation ceases "to the extent the partnership can establish that it reasonably believes the partner already knows the information."

In any event, the obligation is limited to information that is both material and known by the partnership. "Knowledge" is viewed subjectively (*i.e.*, actual knowledge). Section 3-103(a)(1). Materiality is viewed objectively. Thus, the duty applies to known, material information, even if the partnership does not know that the information is material.

A partnership will "know" what its partners know. Under Section 3-103(e), "[a] partner's knowledge . . . of a fact relating to the partnership is effective immediately as knowledge of or notice to the partnership." As to others acting or reasonably appearing to act on behalf of the partnership, common law agency rules will apply. Restatement (Third) of Agency § 5.03 (2006) (Imputation of Notice of Fact to Principal).

Typically a partner's duties are continuous, and therefore a partner's right to information is not just transaction-specific. Ongoing managerial responsibilities require ongoing information— both periodically and *ad hoc* when a situation warrants.

For the meaning of "material" as applied to information, *see* Section 3-409(f), comment.

Subsection (c)(2) — Other law determines which party has the burden of proof as to the stated exception.

Subsection (d) — This subsection imposes a duty directly on each partner, "except to the extent the [partner] can establish that it reasonably believes [another] partner already knows the information."

> EXAMPLE: A partnership has two partners: each of whom is regularly engaged in conducting the partnership's activities; both of which are aware of and have regular access to all significant partnership records; and neither of which has special responsibility for or knowledge of any particular aspect of those activities or the relevant partnership records. Most likely, neither partner is obliged to draw the other general partner's attention to information apparent in the partnership's records.

> EXAMPLE: Although a partnership has three partners, one is the managing partner with day-to-day responsibility for running the partnership's activities. The other two meet periodically with the managing partner and together with that partner function in a manner analogous to a corporate board of directors. Most likely, the managing partner has a duty to draw the attention of the other partners to important information, even if that information would be apparent from a review of the partnership's records.

Because this subsection imposes duties directly on partner, the duties are in the nature of a contractual obligation, and breach is a matter of strict liability. For example, it is no defense for a partner under this section to assert that, although the partner failed to furnish required information, the failure did not amount to gross negligence under Section 3-409(c).

Subsection (e) — Codifying the information rights of former owners began with UPA (1997) § 403(b).

For the additional information rights of the legal representative of a deceased partner, see Section 3-505.

Subsection (e)(1) — A person dissociated as a partner has information rights in that capacity only as to the period during which the person was a partner. To the extent that further information is accessible under Section 3-505(2) (providing access to the legal representative of a deceased partner),

that access is limited both in purpose ("for purposes of settling the estate") and in scope ("the rights the deceased partner had under Section 3-408").

Subsection (e)(2) — A duty of good faith is needed here, because a person claiming access under this subsection is no longer a partner and is no longer subject to a partner's obligation of good faith and fair dealing under Section 3-409(d). *See* Section 3-603(b)(2) (stating a person's dissociation as a partner terminates as to subsequent events the person's duties under Section 3-409, including the contractual obligation of good faith). *But see id*., comment (noting that the common law implied covenant will continue to be relevant if the partnership agreement provides continuing rights and obligations for a person dissociated as a partner).

In the context of Subsection (e)(2), "good faith" is properly understood to mean an honest belief that the request is made for a proper purpose. *Associated Indem. Corp. v. CAT Contracting, Inc*., 964 S.W.2d 276, 285 (Tex. 1998) (holding that "'good faith' in the surety agreement before us refers to conduct which is honest in fact, free of improper motive or willful ignorance of the facts at hand"); *Andrews v. Bible*, 812 S.W.2d 284, 288 (Tenn. 1991) (describing "subjective good faith" as "[a] pure heart but an empty head") (quoting *Whittington v. Ohio River Co*., 115 F.R.D. 201, 209 (E.D.Ky.1987)). Willful ignorance includes being an ostrich. "While 'honesty' may require no more than a pure heart, it is questionable that a pure heart can co-exist with closed eyes. It is not honest to close one's eyes so as to maintain an empty head." *J.R. Hale Contracting Co. v. United New Mexico Bank at Albuquerque*, 799 P.2d 581, 591 (NM 1990). *See also* UPA (1914) § (3)(1) ("A person has 'knowledge' of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.").

Subsection (h) — For the avoidance of doubt, this subsection expressly authorizes taking action through an agent. The doubt might arise from old corporate cases in which the parties contested a shareholder's right to exercise inspection rights through another person. *White v. Coeur D'Alene Big Creek Mining Co*., 55 P.2d 720, 723 (Idaho 1936) (stating that "[t]he refusal to permit respondent [shareholder] to appoint his own attorney or agent to make the examination [of the corporation's books] was in effect a denial of his right" of inspection); *State v. Monida & Yellowstone Stage Co*.,

124 N.W. 971, 972 (Minn. 1910) (upholding a trial court's mandamus order, "which shall provide that [the shareholder complainant], or such attorney or agent as he may select, . . . shall be allowed to inspect the books, records, and papers of the defendant [corporation]").

No negative inference should be drawn about using agents to take other action under this article.

Subsection (j) — This subsection provides fallback protection for gaps in the partnership agreement. For example, the partners may protect trade secrets from disclosure and prohibit various misuses of confidential information even if the partnership agreement omits to do so.

The reference to "ordinary course" pertains to Section 3-401(k) (stating that any "matter in the ordinary course of business of a partnership may be decided by a majority of the partners"). This approach is necessary, lest a requesting partner have the power to block imposition of a reasonable restriction or condition needed to prevent the requestor from abusing the partnership.

The burden of persuasion under this subsection contrasts with the burden of persuasion under Section 3-105(c)(4) (prohibiting unreasonable limitations on the information rights provided by this section). Under that paragraph, as a matter of ordinary procedural law the burden is on the person making the claim.

§ 30-23-409. Standards of conduct for partners. — (a) A partner owes to the partnership and the other partners the duties of loyalty and care stated in subsections (b) and (c) of this section.

(b) The fiduciary duty of loyalty of a partner includes the duties:

(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner:

(A) In the conduct or winding up of the partnership's business;

(B) From a use by the partner of the partnership's property; or

(C) From the appropriation of a partnership opportunity;

(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a person having an interest adverse to the partnership; and

(3) To refrain from competing with the partnership in the conduct of the partnership's business before the dissolution of the partnership.

(c) The duty of care of a partner in the conduct or winding up of the partnership business is to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties and obligations under this chapter or under the partnership agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this act or under the partnership agreement solely because the partner's conduct furthers the partner's own interest.

(f) All the partners may authorize or ratify, after full disclosure of all material facts, a specific act or transaction by a partner that otherwise would violate the duty of loyalty.

(g) It is a defense to a claim under subsection (b)(2) of this section and any comparable claim in equity or at common law that the transaction was

fair to the partnership.

(h) If, as permitted by subsection (f) of this section or by the partnership agreement, a partner enters into a transaction with the partnership that otherwise would be prohibited by subsection (b)(2) of this section, the partner's rights and obligations arising from the transaction are the same as those of a person that is not a partner.

History.

I.C., § 30-23-409, as added by 2015, ch. 243, § 26, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

CASE NOTES

Decisions Under Prior Law

Accounting during dissolution.

Business judgment rule.

Dissolution.

Fiduciary duties.

Misappropriation of profits.

Accounting During Dissolution.

Given the fiduciary duty of a winding-up partner during the winding-up period, it would be reasonable to provide for a right to an accounting measured, not by the period of time from the date of dissolution, but rather by a period of time from the date of the last transaction connected with the winding-up process which follows upon dissolution. Ramseyer v. Ramseyer, 98 Idaho 47, 558 P.2d 76 (1976).

Where claims of the dominant or managing partner against the partnership are questioned, the managing partner has the burden of proving the claimed expenses, incurred during dissolution, are reasonable and necessary. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Where partnership combines were sold through partners' corporation during winding up, the reasonable costs of repairing combines and a customary ten percent sales commission to corporation were properly charged to the partnership; however, a $500 finder's fee for the person who found buyer of combine could not be so charged. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Where it was impossible to account for the partnership's profits during a prolonged period of winding-up, the trial court did not err in charging the surviving partners rent and interest for their use of partnership property during the winding-up period. Murgoitio v. Murgoitio, 111 Idaho 573, 726 P.2d 685 (1986); Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Court's award of prejudgment interest as an alternative to an accounting for profits from the use of partnership assets during prolonged winding up was not improper. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Generally, the only action which will lie between partners regarding partnership business is an action for an accounting; other actions are premature until the business is wound up and accounts are settled, and dissolution alone does not change this rule. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

The ultimate goal of an accounting is to ascertain the value of a plaintiff's interest in the partnership as of the date of dissolution and then to determine any profits attributable to the use of the plaintiff's right in the property of the dissolved partnership. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Business Judgment Rule.

Defendant/partner was authorized to act as managing partner for construction of ponds in accordance with the terms and conditions of the partnership agreement and although some of defendant's decisions regarding the ponds might not have been the best, they did not constitute a breach of defendant's fiduciary duty to the partnership and defendant's actions were completely covered by the business judgment rule, which was incorporated into the partnership agreement, besides which evidence

adduced at trial tended to prove that the other members of the partnership had ratified defendant's conduct; therefore, defendant's conduct did not affect prejudicially the carrying on of the business. Weaver v. Millard, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991).

Dissolution.

Where partnership was dissolved by agreement of two partners to sell their interest to third partner, buyer occupied a fiduciary position in respect to the partnership he was liquidating. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Fiduciary Duties.

The purchase of the partnership's obligation by partner on June 6, and the concealment of it during the June 19 winding up negotiations, was a breach of the fiduciary duties to account and to render full information to the other partners, even if the motive was justifiable. Thomas v. Schmelzer, 118 Idaho 353, 796 P.2d 1026 (Ct. App. 1990).

Misappropriation of Profits.

The district court's finding that partner had not breached his fiduciary duty to other partners under this section was not clearly erroneous, where there was no evidence that partnership profits had been misappropriated and claim actually involved partner exceeding the construction expenditure authority granted by the partnership. Weaver v. Millard, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991).

Official Comment

This section originated as UPA (1997) § 404. The 2011 and 2013 Harmonization amendments made one major substantive change; they "uncabined" fiduciary duty. UPA (1997) § 404 had deviated substantially from UPA (1914) by purporting to codify all fiduciary duties owed by partners. This approach had a number of problems. Most notably, the exhaustive list of fiduciary duties left no room for the fiduciary duty owed by partners to each other — *i.e.*, "the punctilio of an honor the most sensitive"). *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Although UPA (1997) § 404(b) purported to state "[a] partner's duty of loyalty to the partnership *and the*

other partners " (emphasis added), the three listed duties each protected the partnership and not the partners.

"Un-cabining" harmonized this article to ULLCA (2006), and this section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the contractual obligation of good faith and fair dealing. The duties stated in this section are subject to the partnership agreement, but Sections 3-105(c) and (d) contain important limitations on the power of the partnership agreement to affect fiduciary and other duties and the obligation of good faith and fair dealing.

For the effect of dissociation on a person's duties under this section, see Section 3-603(b)(2).

Subsection (a) — This subsection recognizes two core managerial duties but, unlike UPA (1997), does not purport to be exhaustive. For example, many cases characterize a manager's duty to disclose as a fiduciary duty. *E.g., Lonergan v. EPE Holdings, L.L.C.*, 5 A.3d 1008, 1023 (Del. Ch. 2010) (stating that "in the limited partnership context, absent contractual modification, a general partner owes fiduciary duties that include a duty of full disclosure") (quotation marks omitted) (citation omitted); *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1298 (5th Cir. 1993) ("Under Alaska law, a general partner stands in a fiduciary relationship with the limited partnership and thereby owes 'a fiduciary duty . . . to disclose information concerning partnership affairs.'") (quoting *Parker v. N. Mixing Co.*, 756 P.2d 881, 894 (Alaska 1988)).

Subsection (b) — This subsection states three core aspects of the fiduciary duty of loyalty: (i) not "usurping" partnership opportunities or otherwise wrongly benefiting from the partnership's operations or property; (ii) avoiding conflict of interests in dealing with the partnership (whether directly or on behalf of another); and (iii) refraining from competing with the partnership. Essentially the same duties exist in agency law and under the law of all types of business organizations.

This subsection applies beginning with "the partnership's business," which by definition cannot exist before the partnership does; thus the stated duties do not apply to pre-formation activities.

The stated duties comprise a default rule. Under Section 3-105(d)(3)(A): "If not manifestly unreasonable, the partnership agreement may . . . alter or eliminate the aspects of the duty of loyalty stated in Section 3-409(b)."

Subsection (b)(1) — The phrase "hold as trustee" dates back to UPA (1914) § 21 and reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the governing instrument and other sources of information. *Cf.* Uniform Statutory Trust Entity Act (2009) (Last Amended 2013) § 506 ("A trustee [of a statutory trust] . . . is not liable to the trust or to a beneficial owner for breach of any duty, *including a fiduciary duty*, to the extent the breach results from reasonable reliance on: (i) a term of the governing instrument; (ii) a record of the statutory trust; or (iii) an opinion, report, or statement of another person that the person to which the opinion, report, or statement is made or delivered reasonably believes is within the other person's professional or expert competence and is made or delivered to the trustee . . . .") (emphasis added).

Subsection (b)(1)(A) — This provision is consistent with a basic principle of agency law — namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. Restatement (Third) of Agency § 8.06, cmt. c. (2006). Typically, however, the partnership agreement will legitimize particular benefits — *e.g.*, a management fee paid to a managing partner in addition to that partner's share of distributions. Also, an agreed allocation of distributions takes those benefits outside the reach of this provision.

Subsection (b)(1)(B) — For the expansive meaning of "property," see Section 1-102(41). The term includes confidential information.

Subsection (b)(1)(C) — This article does not specify what constitutes "a partnership opportunity," but ample case law exists. *See, e.g., Triple Five of Minn., Inc. v. Simon*, 404 F.3d 1088, 1096 (8th Cir. 2005) ("An opportunity that is closely related to the entity's existing or prospective line of business, would competitively advantage the partnership, and is one that the partnership has the financial ability, knowledge and experience to pursue is a partnership opportunity."); *Knudson v. Kyllo*, 831 N.W.2d 763, 767 (N.D.

2013) (explaining why conducting farming operations on land owned by others was a partnership opportunity while purchasing farmland was not).

The duty stated here continues through winding up, although in that context the scope of partnership opportunities inevitably narrows.

In most, if not all, situations, usurping a partnership opportunity also breaches the duty not to compete, Paragraph (b)(3), but not vice versa.

Subsection (b)(2) — In this context, the phrase “adverse interest” is a term of art, meaning “to be on the other side of the table” in some dealing with the partnership. Absent informed consent by the partnership, this duty is breached by the mere existence of the conflict of interest and the partnership need not prove that the outcome of the dealing was adverse to the partnership. *But see* Subsection (g) (permitting the defense of fairness). This duty continues through winding up.

Subsection (b)(3) — Although competition is often thought of in terms of potential customers, this duty applies equally to competition for resources, including employees. This duty ends when the partnership dissolves.

Subsection (c) — This article no longer refers to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission.

The change in label is consistent with the Restatement (Third) of Agency § 8.02 (2006), which refers to the agent’s “fiduciary duty” to act loyally, but eschews the word “fiduciary” when stating the agent’s duties of “care, competence, and diligence.” *Id.* § 8.08. However, the label change is merely semantics; no change in the law is intended.

The partnership agreement can raise the standard of care, or subject to Sections 3-105(c)(8) and (d)(3)(C), lower it. A person’s practical exposure for breaching the duty of care involves not only the standard of care but also any partnership agreement provision that: (i) exonerates the person from liability for breach of the duty of care, Section 3-105(c)(8); or (ii) entitles the person to indemnification despite such breach, Section 3-408(b), comment.

Subsection (d) — This subsection refers to the "*contractual obligation* of good faith and fair dealing" (emphasis added) and thereby invokes the implied obligation that exists in every contract. *See* Restatement (Second) Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). The adjective ("contractual") should help avoid decisions like *Phelps v. Frampton*, 170 P.3d 474, 483 (Mont. 2007) (holding that Montana's version of UPA (1997) creates a statutory obligation of good faith and fair dealing separate from the implied contractual covenant).

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights — *i.e.*, duties and rights "under this [Code]." However, for the most part those duties and rights apply to relationships *inter se* the partners and the partnership and function only to the extent not displaced by the partnership agreement. Those statutory default rules are thus intended to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.

The contractual obligation of "good faith" has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware's famous corporate law exoneration provision; and (ii) that provision's exception "for acts or omissions not in good faith." Del. Code Ann. tit. 8, § 102(b)(7) (2012). In that context, good faith is an aspect of the duty of loyalty. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the "utmost good faith" sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other. *See, e.g., Meinhard v. Salmon*, 477, 164 N.E. 545, 551 (NY 1928) ("[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost good faith in all that relates to their common venture. Within its scope they stand in a fiduciary relationship."); *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 515 (Mass. 1975) ("[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the utmost good faith and loyalty.") (footnotes omitted) (citations omitted) (internal quotations omitted).

To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner's own self-interest:

> "Fair dealing" is not akin to the fair process component of entire fairness, i.e., whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care . . . . It is rather a commitment to deal "fairly" in the sense of consistently with the terms of the parties' agreement and its purpose. Likewise "good faith" does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.

Gerber v. Enter. Prods. Holdings, L.L.C., 67 A.3d 400, 418-19 (Del. 2013) (quoting ASB Allegiance *Real Estate Fund v. Scion Breckenridge Managing Member, L.L.C.*, 50 A.3d 434, 440-42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013); *see also* Subsection (e).

Courts should not use the contractual obligation to change ex post facto the parties' or this article's allocation of risk and power. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.

The partnership agreement or this article may grant discretion to a partner, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a partner may properly exercise discretion even though another partner suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur.

The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly held purpose that legitimately comports with the parties' agreed-upon arrangements:

> An implied covenant claim . . . looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but *rather what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting*.

Gerber v. Enter. Prods. Holdings, L.L.C., 67 A.3d 400, 418 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member*, L.L.C., 50 A.3d 434, 440-42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)).

In sum, the purpose of the contractual obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

As to the power of the partnership agreement to affect the contractual obligation of good faith and fair dealing, see Section 3-105(c)(6) (prohibiting elimination but allowing the agreement to "prescribe standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured"). For examples, see Section 3-105(c)(6), comment. As to whether the obligation stated in this subsection applies to the benefit of transferees, see Section 3-107(b), comment.

Subsection (e) — A partner in a general partnership has at least two different roles: (i) as a party to the partnership agreement, with rights and obligations under that agreement; and (ii) as co-manager of the enterprise. This provision pertains to the first role. A partner's exercise of rights under the partnership agreement is subject to the obligation of good faith and fair dealing, Subsection (d), but a partner does not breach that contractual obligation "solely because the partner's conduct furthers the partner's own interest." In contrast, this provision is ineffective with regard to a partner's duties as co-manager. For example, a partner's liability under Section 3-409(b)(3) (prohibiting competition) is not "solely because the partner's conduct furthers the partner's own interest." Rather, the liability results from the breach of a specific obligation — *i.e.*, the codified aspect of the duty of loyalty that prohibits competition.

Subsection (f) — Here and elsewhere in this article, information "is material if there is a substantial likelihood that a reasonable [decision maker] would consider it important in deciding how to vote" or take other action under this Code or the partnership agreements. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

The partnership agreement can provide additional or different methods of authorization or ratification, subject to the strictures of Section 3-105(c)(5), (d)(1), and (d)(3)(A)(B) and (D).

Subsection (g) — This subsection codifies judge-made law applicable to all business entities. *See, e.g., Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994) (discussing "entire fairness" in the context of a corporation's merger with an affiliate); *Lonergan v. EPE Holdings, L.L.C.*, 5 A.3d 1008, 1019 (Del. Ch. 2010) (discussing "entire fairness" in the context of a limited partnership); *Gottsacker v. Monnier*, 697 N.W.2d 436, 444 (Wis. 2005) (referring to "a willful failure to deal fairly with the LLC or its other members").

Subsection (h) — This subsection is the modern, reformulated version of a language that sought to overturn the now-defunct notion that debts to partners were categorically inferior to debts to non-partner creditors. *See, e.g.*, ULPA (2001) § 112 ("A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner."). The reformulation makes clear that this provision has nothing to do with the fiduciary duty pertaining to conflict of interests. *See BT-I v. Equitable Life Assurance Soc'y of the U.S.*, 75 Cal. App. 4th 1406, 1415 (Cal. Ct. App. 1999) (examining the prior formulation, explaining its history and stating "[w]e cannot discern anything in the purpose of [the prior formulation] that suggests an intent to affect a general partner's fiduciary duty to limited partners").

This subsection states a default rule. The partnership agreement may provide that debt to a partner (or partners generally) is subordinate to other partnership obligations. The agreement that creates the debt may do likewise.

§ 30-23-410. Actions by partnership and partners. — (a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.

(b) A partner may maintain an action against the partnership or another partner, with or without an accounting as to partnership business, to enforce the partner's rights and protect the partner's interests, including rights and interests under the partnership agreement or this act or arising independently of the partnership relationship.

(c) A right to an accounting on dissolution and winding up does not revive a claim barred by law.

History.

I.C., § 30-23-410, as added by 2015, ch. 243, § 26, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

In UPA (1997) this section was Section 405. The Harmonization Project did not change the section other than to renumber it.

Subsection (a) — This subsection originated in UPA (1997) § 405(a) and reflects the entity theory of partnership.

Subsection (b) — This subsection is the successor to UPA (1914) § 22 but with significant changes.

UPA (1914) § 22 itself had made significant changes to the common law. "It . . . generally was established at common law that an equitable accounting was a condition precedent to an action in law between partners," *Thompson v. Coughlin*, 997 P.2d 191, 194 (Or. 2000), and an accounting was generally not available before dissolution. Thus, claims among partners pertaining the partnership could not be asserted except through an action for

dissolution and accounting. UPA (1914) § 22 modified this "exclusivity rule," specifying certain circumstances in which an accounting action is available without requiring an action to dissolve the partnership.

UPA (1997) eliminated the "exclusivity rule" entirely; an action of dissolution and accounting remains available but is no longer "a condition precedent" to other claims.

This subsection authorizes a partner to bring claims "to enforce the partner's rights and protect the partner's interests" — *i.e.*, direct claims. The statutory language does not contemplate derivative claims; thus, this article neither authorizes nor precludes such claims. *See Tzolis v. Wolff*, 884 N.E.2d 1005 (N.Y. 2008) (rejecting the argument that "members of a limited liability company (LLC) may [not] bring derivative suits on the LLC's behalf, . . . [because] there are no provisions governing such suits in the Limited Liability Company Law").

The case law does generally recognize the direct/derivative distinction in the context of general partnerships, and some cases permit a partner to sue derivatively. *E.g., Hill v. Vanderbilt Capital Advisors, L.L.C.*, 834 F. Supp. 2d 1228, 1246 (D.N.M. 2011) (stating that "[t]he Supreme Court of New Mexico extended the scope of derivative suits beyond the corporate context . . . and allowed a partner's derivative suit on behalf of a general partnership") (citations omitted).

In general, however, the cases are conflicting and somewhat confused. A decision of the Maryland Court of Special Appeals illustrates the situation. At one point the court states: We agree that the term "derivative" is an inappropriate and confusing term to use in the general partnership context. "Derivative" actions are necessary in the corporate and limited partnership context, where the shareholders and limited partners have no managerial rights and thus must "derive" the right to sue from the entity itself. Unlike shareholders and limited partners, however, general partners all have the ability to act on behalf of the partnership, and all have management rights [citations omitted]. Thus, general partners have no need for "derivative" action.

George Wasserman & Janice Wasserman Goldsten Family L.L.C. v. Kay, 14 A.3d 1193, 1215 (Md. Ct. Spec. App. 2011) (citing the comment to the UPA (1997) version of this section). However, later in the opinion the court

recognizes that the partners' "ability to act on behalf of the partnership, and . . . [the partners'] management rights" are ineffective when a partner with a controlling interest declines to cause the partnership to sue the controlling partner for alleged misconduct.

The court concludes that such a "partnership claim may be enforced by all of the disinterested partners." *Wasserman*, 14 A.3d at 1216. In addition, the court cites with approval *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161 (5th Cir. 1985), which includes a lengthy discussion of circumstances in which a partner in a general partnership might be entitled to bring a derivative claim on behalf of the partnership. *Cates*, 756 F.2d at 1178 (referring to the possible "availability of a derivative action" but cautioning "[w]e do not hold that Texas law would necessarily allow a derivative action on the part of a minority partner") (emphasis added).

Despite the conflict and confusion in the cases, one proposition does appear reasonably certain: A minority partner in a general partnership must have some right to sue "where the controlling partners, for improper, ulterior motives and not because of what they in good faith believe to be the best interests of the partnership, decline to sue on a valid, valuable *partnership cause of action* which it is advantageous to the partnership to pursue." *Cates*, F.2d at 1179 (emphasis added).

Subsection (c) — This subsection originated as UPA (1997) § 405(c) and reversed the rule stated in UPA (1914) § 43. This subsection inevitably implies that other law governs the accrual of a claim under Subsection (b) as well as the statute of limitations applicable to those claims. As a result, partners must take care not to "to sit on their claims" waiting for the partnership to dissolve. *Veloski v. State Farm Mut. Auto Ins. Co.*, 719 N.E.2d 574, 576 (Ohio Ct. App. 1998).

§ 30-23-411. Continuation of partnership beyond definite term or particular undertaking. — (a) If a partnership for a definite term or particular undertaking is continued, without an express agreement, after the expiration of the term or completion of the undertaking, the rights and duties of the partners remain the same as they were at the expiration or completion, so far as is consistent with a partnership at will.

(b) If the partners, or those of them who habitually acted in the business during the term or undertaking, continue the business without any settlement or liquidation of the partnership, they are presumed to have agreed that the partnership will continue.

History.

I.C., § 30-23-411, as added by 2015, ch. 243, § 26, p. 758.

CASE NOTES

Decisions Under Prior Law

Compensation.

Evidence sustained finding for plaintiff partner on issue as to whether plaintiff partner was to be paid wages under an oral agreement to continue the partnership after expiration of the written partnership agreement. Knauss v. Hale, 64 Idaho 218, 131 P.2d 292 (1942).

Official Comment

This section originated as UPA (1997) § 406 and continues the approach of UPA (1997) (1914) § 23, with no substantive change.

Subsection (a) —Continuation beyond an agreed term or undertaking results in a partnership at will, not an automatic renewal of the term or extension of the undertaking. See the comment to Section 3-102(10) (partnership at will).

Subsection (b) — In general, a pattern of conduct can imply a term in a partnership agreement. Section 3-102(9) (defining partnership agreement

and referring to an agreement among all the partners, “whether oral, implied, in a record, or in any combination thereof”). In particular, this subsection creates a presumption that by their conduct the partners have agreed to continue the business. The presumption shifts the burden of persuasion to the person claiming that the partnership is dissolved.

Part 5
Transferable Interests and Rights of Transferees and Creditors

« Title 30 •, « Ch. 23 », « Pt. 5 », • § 30-23-501 »

§ 30-23-501. Partner not co-owner of partnership property. — A partner is not a co-owner of partnership property and has no interest in partnership property that can be transferred, either voluntarily or involuntarily.

History.

I.C., § 30-23-501, as added by 2015, ch. 243, § 27, p. 758.

Official Comment

This section originated in UPA (1997), followed ineluctably from the concept of a partnership as an entity, Section 3-201, abolished the UPA (1914) construct of "partnership in tenancy," and was retained during the Harmonization Project as a "belt and suspenders" approach to reinforcing the entity construct. See Section 3-203 (providing that property transferred to or otherwise acquired by the partnership is property of the partnership and not of the partners individually).

§ 30-23-502. Nature of transferable interest. — A transferable interest is personal property.

History.

I.C., § 30-23-502, as added by 2015, ch. 243, § 27, p. 758.

Official Comment

For the definition of transferable interest, see Section 3-102(11). Absent a contrary provision in the partnership agreement or the consent of the partners, a "transferable interest" is the only interest in a partnership that can be transferred to a person not already a partner. *See* Section 3-503. As to whether a partner may transfer governance rights to a fellow partner, the question is moot absent a provision in the partnership agreement changing the default rule, *see* Section 3-401(h) (allocating governance rights *per capita*). In the default mode, a partner's transfer of governance rights to another partner: (i) does not increase the transferee's governance rights; (ii) eliminates the transferor's governance rights; (iii) and thereby changes the denominator but not the numerator in calculating governance rights.

EXAMPLE: LCN Company is a general partnership with three partners, Laura, Charles, and Nora. The partnership agreement does not displace this article's default rule on the allocation of governance rights among general partners. Thus, each partner has 1/3 of those rights. Laura transfers her entire ownership interest to Charles. The transfer does not increase Charles's governance rights but does eliminate Laura's. After the transfer, Laura has no governance rights (regardless of whether Charles and Nora agree to expel Laura under Section 3-601(4)(B)). As a result, Charles and Nora each have ½ of the governance rights.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the rules stated in those Articles.

§ 30-23-503. Transfer of transferable interest. — (a) A transfer, in whole or in part, of a transferable interest:

(1) Is permissible, except the transfer of a transferable interest in a professional entity is not permissible without compliance with section 30-21-901(i), Idaho Code;

(2) Does not by itself cause a partner's dissociation or a dissolution and winding up of the partnership business; and

(3) Subject to section 30-23-505, Idaho Code, does not entitle the transferee to:

(A) Participate in the management or conduct of the partnership's business; or

(B) Except as otherwise provided in subsection (c) of this section, have access to records or other information concerning the partnership's business.

(b) A transferee has the right to:

(1) Receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled; and

(2) Seek under section 30-23-801(5), Idaho Code, a judicial determination that it is equitable to wind up the partnership business.

(c) In a dissolution and winding up of a partnership, a transferee is entitled to an account of the partnership's transactions only from the date of dissolution.

(d) A partnership need not give effect to a transferee's rights under this section until the partnership knows or has notice of the transfer.

(e) A transfer of a transferable interest in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having knowledge or notice of the restriction at the time of transfer.

(f) Except as otherwise provided in section 30-23-601(4)(B), Idaho Code, if a partner transfers a transferable interest, the transferor retains the rights

of a partner other than the transferable interest transferred and retains all the duties and obligations of a partner.

(g) If a partner transfers a transferable interest to a person that becomes a partner with respect to the transferred interest, the transferee is liable for the partner's obligations under sections 30-23-404 and 30-23-407, Idaho Code, known to the transferee when the transferee becomes a partner.

History.

I.C., § 30-23-503, as added by 2015, ch. 243, § 27, p. 758.

CASE NOTES

Decisions Under Prior Law

Bankruptcy.

The debtor in bankruptcy had no authority as a general partner to bind the partnership to an involuntary bankruptcy petition; as a result of the debtor's individual bankruptcy petition, the non-bankrupt partner had the right to wind up the partnership affairs, and the debtor was entitled to the value of his interest in the partnership. In re Sunset Developers, 69 Bankr. 710 (Bankr. D. Idaho 1987).

Divorced Wife.

Where divorced wife of withdrawing partner was granted his interest in farming partnership by divorce decree, she did not thereby become a partner; she became, in effect, his assignee, the successor in interest of her husband's interest in the assets of the partnership, subject to dissolution and the payment of its existing obligations. Elliot v. Elliot, 88 Idaho 81, 396 P.2d 719 (1964).

Final Settlement of Partnership Indebtedness.

When one partner purchases the interest of the other, the transaction presumptively includes a final settlement of all partnership indebtedness existing between the partners. Thomas v. Schmelzer, 118 Idaho 353, 796 P.2d 1026 (Ct. App. 1990).

Pledge of Partnership Property.

Transaction, by which partnership pledged its assets in form of bonds, and two partners without consent of the other sold their interest in bonds to pledgee, amounted to sale of partnership profits and did not make pledgee a partner nor dissolve partnership. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

RESEARCH REFERENCES

ALR. — Ademption of legacy of business or interest therein. 65 A.L.R.3d 541.

Official Comment

One of the most fundamental characteristics of partnership law is its fidelity to the "pick your partner" principle. *See, e.g., Bynum v. Frisby*, 311 P.2d 972, 975 (Nev. 1957) (stating that (i) "the assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners"; and (ii) absent consent by the remaining partners "[t]he stranger remains a stranger" with no rights to management or even information). This section is the core of this article's provisions reflecting and protecting that principle. A partner's rights in a partnership are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the partnership agreement otherwise provides, a partner acting without the consent of all other partners lacks both the power and the right to: (i) bestow partnership on a non-partner, Section 3-402(b)(3); or (ii) transfer to a non-partner anything other than some or all of the partner's transferable interest, Section 3-503(a)(3). The rights of a mere transferee are quite limited (*i.e.*, to receive distributions), Section 3-503(b), and, if the partnership dissolves and winds up, to receive specified information pertaining to the partnership from the date of dissolution, Section 3-503(c).

This section applies regardless of whether the transferor is a partner, a transferee of a partner, a transferee of a transferee, *etc*. *See* Section 3-102(11) (defining "transferable interest" in terms of a right "initially owned by a person in the person's capacity as a partner" regardless of "whether or not the person remains a partner or continues to own any part of the right").

This section does not directly consider whether a partner may transfer governance rights to another partner without obtaining consent from all the other partners. As noted in the comment to Section 3-502, the question is moot under this article's default rule for allocating governance rights.

However, the question can be pivotal when the partnership agreement displaces the default rule on governance rights but does not determine whether transfer restrictions (whether contractual, statutory, or both) apply to transfers of governance rights from one partner to another. Case law is scant and pertains to limited liability companies. Nonetheless, the cases suggest that this article does not protect partners from control shifts that result from transfers among partners. *Blythe v. Bell*, No. 11 CVS 933, 2012 WL 7807800, at ¶ 6 (N.C. Dist. Dec. 10, 2012) (holding in a case of "first impression in North Carolina" that "in the absence of articles of incorporation or an operating agreement to the contrary . . . the assignment of control [*i.e.*, governance] interests between members is effective without unanimous member consent"); *Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800, 810 (Del. Ch. 2011) (Strine, Ch.) (holding that the terms of the LLC agreement did not preclude one member of a three-member LLC from transferring the member's entire interest (including governance rights) to a second member without first having the consent of the third member; stating that the third member's "argument relies on a very thinly sliced version of [the 'pick-your-partner' principle, the strained version being] . . .that once one chooses his initial co-members, one continues to hold a veto over how much additional voting power they may acquire'" explaining that "[t]he problem for [the third member] is that nothing in the LLC Agreement supports [that member's] reading of it that would require an already admitted Member, like [the acquirer — *i.e.*, the second member], to be become once, twice (or even three times) a Member each and every time that Member acquires an additional block of Interests").

Other law may affect the applicability of this section. *See* 11 U.S.C. § 541(c)(1) (providing that, initially at least, all property of a debtor becomes

part of the bankruptcy estate regardless of restrictions on transfer); UCC §§ 9-406 and 9-408 (overriding specified restrictions on assignment in specified circumstances, regardless of whether state law or a contract imposes the restrictions).

In any event, this section does not apply to the transfer of ownership interests in a partner that is an entity

EXAMPLE: ABC, Partnership ("ABC") has three partners: Ralph (an individual), Alice, Inc. ("Alice"), and Norton, LLC ("Norton"). Section 3-502 applies to any attempt by Ralph, Alice, or Norton to transfer their respective partnership interest in ABC. Section 3-502 is inapplicable, however, to a change in control of Alice or Norton or even a complete change in their respective ownership.

Subsection (a) — The definition of "transfer," Section 1-102(a)(50), and this subsection's reference to "in whole or in part" combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones. Thus, for example, a charging order under Section 3-504 effects a transfer of part of the judgment debtor's transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a partner's rights to distribution.

Subsection (a)(2) — The phrase "by itself" contemplates Section 3-601(4)(B), which creates a risk of dissociation via expulsion when a partner transfers all of the partner's transferable interest.

Subsection (a)(3) — Mere transferees have no right to participate in management or otherwise intrude as the partners carry on the business of the partnership and their activities as partners.

Because Section 1-102(a)(50) defines "transfer" to include "a transfer by operation of law," this section affects the power of other law to effect transfers of a partner's ownership interest. For example, a divorce court lacks the power to award a partner's spouse anything beyond the partner's transferable interest. Nor does the partner have the power to enter into a property settlement purporting to effect any greater transfer.

For the divorce court, the best solution is to value the partner's complete ownership interest (*i.e.*, the transferable interest as enhanced by the

management and information rights and the standing to sue) and: (i) if possible, award the partner's spouse marital property of equal value; or (ii) if not possible, award the partner's spouse a money judgment and a charging order to enforce the judgment.

Granting the non-partner any part of a partner's transferable interest is almost always imprudent; marital discord will almost inevitably carry over into the business relationship. Granting the partner's ex-spouse the entire transferable interest is rarely a viable alternative. If the partner is active participant in the partnership, the approach is impossible. The partner's transferable interest will typically constitute much or all of the partner's remuneration for the partner's activity. Even if the partner is essentially passive, granting the transferable interest to the ex-spouse puts him or her at great risk as a "bare naked assignee." *See* the comment to Section 3-107(b).

When a partner dies, subject to the partnership agreement other law may effect a transfer of the partner's transferable interest to the partner's estate or personal representative. However, for the reasons just stated, other law lacks the power to transfer anything more than a transferable interest. (Section 3-505 does provide extra information rights for the purposes of settling the estate of the deceased partner.)

Subsection (a)(3)(B) — For a related provision, providing that that section's information rights do not apply to transferees, see Section 3-408(i).

Subsection (b) — Amounts due under this subsection are of course subject to offset for any amount owed to the partnership by the partner or person dissociated as a partner on whose account the distribution is made. Section 3-405(d). As to whether a partnership may properly offset for claims against a transferor that was never a partner is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (c) — This very limited grant of information rights encompasses only transactions occurring at or after the date of the partnership's dissolution. The transferee has only the right to information as to the allocation of net assets among the partnership's creditors, partners, and transferees — and only from the date of dissolution.

This subsection does not prevent a transferee from contracting with a partner-transferor to require the partner-transferor to disclose further information to the transferee. Whether such an agreement would breach the partnership agreement, the implied contractual obligation of good faith and fair dealing, Section 3-409(d), or a fiduciary duty depends on the circumstances.

If a dissolved partnership rescinds its dissolution, Section 3-803, this subsection no longer applies.

Subsection (e) — This provision originated as UPA (1997) § 503(e), was then consistent with Uniform Commercial Code § 9-318(3), and is now consistent with UCC § 9-406(a) (stating that "an account debtor . . . may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee").

The term "notice" includes "reason to know," Section 3-103(b)(1), and ordinarily a potential transferee has reason to inquire about transfer restrictions that might be contained in the partnership agreement.

Subsection (f) — Under this subsection, a partner remains a partner (with all attendant rights and obligations) even after permanently transferring the entirety of the transferable interest, unless: (i) the other partners opt for expulsion under Section 3-601(4)(B); or (ii) as otherwise provided in the partnership agreement.

§ 30-23-504. Charging order. — (a) On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the partnership to pay over to the person to which the charging order was issued any distribution that otherwise would be paid to the judgment debtor.

(b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a) of this section, the court may:

(1) Appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

(2) Make all other orders necessary to give effect to the charging order.

(c) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a partner, and is subject to section 30-23-503, Idaho Code.

(d) At any time before foreclosure under subsection (c) of this section, the partner or transferee whose transferable interest is subject to a charging order under subsection (a) of this section may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(e) At any time before foreclosure under subsection (c) of this section, a partnership or one (1) or more partners whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

(f) This chapter does not deprive any partner or transferee of the benefit of any exemption law applicable to the transferable interest of the partner or transferee.

(g) This section provides the exclusive remedy by which a person seeking, in the capacity of a judgment creditor, to enforce a judgment against a partner or transferee may satisfy the judgment from the judgment debtor's transferable interest.

History.

I.C., § 30-23-504, as added by 2015, ch. 243, § 27, p. 758.

Official Comment

The charging order concept dates back to the English Partnership Act of 1890 and in the United States has been a fundamental part of law of unincorporated business organizations since 1914. *See* UPA (1914) § 28. As much a remedy limitation as a remedy, the charging order is the sole method by which a person acting as judgment creditor of a partner or transferee can extract value from the partner's or transferee's ownership interest in a partnership. *See* the comment to Subsection (g).

Under this section, the judgment creditor of a partner or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the partner or transferee whose interest is subject to the order. However, the judgment creditor has no say in the timing or amount of those distributions. The charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise interfere with the management and activities of the partnership.

By its terms, this section does not apply to foreign partnerships. *See* Section 3-102(8) (defining "partnership" to mean "an association of two or more persons to carry on as co-owners a business for profit formed under this [act]") (emphasis added). *See also Fannie Mae v. Heather Apartments Ltd. P'ship*, A13-0562, 2013 WL 6223564, at *6 (Minn. Ct. App. Dec. 2, 2013) (considering the remedies available to a judgment creditor with respect to the judgment debtor's interest in a Cook Islands LLC; rejecting the debtor's argument that the creditor's "only remedy is to obtain a charging order under" the Minnesota LLC statute; explaining that "this argument fails because that statute only applies to Minnesota limited liability companies" which that statute "defines . . . as 'a limited liability

company, other than a foreign limited liability company, *organized or governed by this chapter* '") (emphasis added) (statutory citations omitted).

The partnership agreement has no power to alter the provisions of this section to the prejudice of third parties. Section 3-105(c)(17).

Subsection (a) — The phrase "judgment debtor" encompasses both partners and transferees. The lien pertains only to a distribution, which excludes "amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program." Section 3-102(a)(3)(B). A judgment creditor that wishes to levy on such amounts should use the appropriate creditor's remedy, such as garnishment (which may be subject to exemptions or exclusions not relevant to a charging order). *Cf. PB Real Estate, Inc. v. Dem II Props.*, 719 A.2d 73, 76 (Conn. Ct. App. 1998) (rejecting the contention of an LLC's two members that "payments of $28,000 to each of them" should be treated "as expenses for wages" rather than as distributions).

Whether an application for a charging order must be served on the partnership, the judgment debtor, or both is a matter for other law, principally the law of remedies and civil procedure. The order itself must be served on the partnership. Whether the order must also be served on the judgment debtor is a matter for other law.

If a distribution consists of rights to acquire interests in a partnership, the charging order applies only to those rights within the definition of transferable interest. See Section 3-102(11) (defining transferable interest).

Subsection (b) — Paragraph (2) refers to "other orders" rather than "additional orders." Therefore, given appropriate circumstances, a court may invoke Paragraph (1), Paragraph (2), or both.

Subsection (b)(1) — The receiver contemplated here is emphatically not a receiver for the partnership, but rather a receiver for the distributions subject to the charging order. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than "the extent necessary to effectuate the collections of distributions pursuant to a charging order." For a correctly narrow reading of this provision, see *Wells Fargo Bank, Nat. Ass'n v. Continuous Control*

Solutions, Inc., No. 11-1285, 2012 WL 3195759 (Iowa Ct. App. Aug. 8, 2012).

Subsection (b)(2) — This paragraph must be understood in the context of: (i) the very limited nature of the charging order; and (ii) the importance of preventing overreaching on behalf of a person that is not a judgment creditor of the partnership, has no claim on the partnership's assets, and has no right to interfere in the activities, affairs, and management of the partnership. In particular, the court's power to make "all other orders" is limited to "orders necessary to give effect to the charging order."

EXAMPLE: A judgment creditor with a charging order believes that the partnership should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the partnership to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

EXAMPLE: A judgment creditor with a judgment for $10,000 against a partner obtains a charging order against the partner's transferable interest. Having been properly served with the order, the partnership nonetheless fails to comply and makes a $3000 distribution to the partner. The court has the power to order the partnership to pay $3000 to the judgment creditor to "give effect to the charging order."

Under Subsection (b)(2), the court has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order.

EXAMPLE: Partner A of ABC, a general partnership, has for some years received distributions from the partnership. However, when a judgment creditor of Partner A obtains a charging order against Partner A's transferable interest, the partnership ceases to make distributions to Partner A and instead provides a salary to Partner A equivalent to former distributions. A court might deem this salary a disguised distribution. (In any event, the salary will be subject to garnishment.)

This article has no specific rules for determining the fate or effect of a charging order when the partnership undergoes a merger, conversion, interest exchange, or domestication under Article 2. In the proper

circumstances, such an organic change might trigger an order under Subsection (b)(2).

Subsection (c) — The phrase "that distributions under the charging order will not pay the judgment debt within a reasonable period of time" comes from case law. *See, e.g., Nigri v. Lotz*, 453 S.E.2d 780, 783 (Ga. Ct. App. 1995); *Stewart v. Lanier Park Med. Office Bldg., Ltd.*, 578 S.E.2d 572, 574 (Ga. Ct. App. 2003) ("Judicial sale may be appropriate where . . . it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable amount of time."). A purchaser at a foreclosure sale obtains only the very limited rights of a transferee under Section 3-503 and is in some ways more vulnerable and less powerful than the holder of a charging order. After foreclosure and sale, Subsection (b) no longer applies. More generally, the court is no longer involved in the matter. For the vulnerability of a transferee, see Sections 3-503(a)(3) comment; 3-107(b), comment.

Subsection (d) — This provision allows the judgment debtor to end the charging order without need for a hearing.

Subsection (e) — Traditionally, charging order provisions referred to the possibility of "redeeming" an interest subject to a charging order. That usage was confusing, leaving several important questions unanswered. This article substitutes a far simpler approach, contemplating the partnership or its partners buying the underlying judgment and thereby dispensing with any interference the judgment creditor might seek to inflict on the partnership.

In many circumstances, buying the judgment is superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment; and (ii) the partnership or the other partners might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor's consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the partnership.

Whether a partnership's decision to invoke this subsection is "ordinary course" or "outside the ordinary course," Section 3-401(k), depends on the circumstances. However, the involvement of this subsection does not by itself make the decision "outside the ordinary course."

Subsection (f) — This subsection preserves otherwise applicable exemptions but does not create any. *In re Foos*, 405 B.R. 604, 609 (Bankr. N. D. Ohio 2009) (interpreting the comparable provision in UPA (1997) and stating that "it is clear that [the provision] does not create an exemption").

Subsection (g) — This subsection does not override Uniform Commercial Code, Article 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a "reverse pierce" where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 312 (Conn. App. Ct. 2002) (approving a reverse pierce where a judgment debtor had established a partnership in a patent attempt to frustrate the judgment creditor), *overruled on other grounds by, Robinson v. Coughlin*, 830 A.2d 1114 (Conn. 2003). Likewise, this subsection does not supplant fraudulent transfer law.

§ 30-23-505. Power of legal representative of deceased partner. — If a partner dies, the deceased partner's legal representative may exercise:

(1) The rights of a transferee provided in section 30-23-503(c), Idaho Code; and (2) For purposes of settling the estate, the rights the deceased partner had under section 30-23-408, Idaho Code.

History.

I.C., § 30-23-505, as added by 2015, ch. 243, § 27, p. 758.

Official Comment

The estate and those claiming through the estate are transferees, and as such they have very limited rights to information. This section provides temporary, additional information rights to the legal representative of the estate. Sections 3-408 and 3-503(c) pertain only to information rights.

Part 6
Dissociation

Idaho Code § 30-23-601

§ 30-23-601. Events causing dissociation. — A person is dissociated as a partner when:

(1) The partnership has notice of the person's express will to withdraw as a partner, but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date;

(2) An event stated in the partnership agreement as causing the person's dissociation occurs;

(3) The person is expelled as a partner pursuant to the partnership agreement;

(4) The person is expelled as a partner by the affirmative vote or consent of all the other partners if:

(A) It is unlawful to carry on the partnership business with the person as a partner;

(B) There has been a transfer of all of the person's transferable interest in the partnership other than:

(i) A transfer for security purposes; or

(ii) A charging order in effect under section 30-23-504, Idaho Code, that has not been foreclosed;

(C) The person is an entity and:

(i) The partnership notifies the person that it will be expelled as a partner because the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, the person's charter or the equivalent has been revoked, or the person's right to conduct business has been suspended by the person's jurisdiction of formation; and

(ii) Not later than ninety (90) days after the notification, the statement of dissolution or the equivalent has not been withdrawn, rescinded or revoked or the person's charter or the equivalent or right to conduct business has not been reinstated; or

(D) The person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up;

(5) On application by the partnership or another partner, the person is expelled as a partner by judicial order because the person:

(A) Has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership's business;

(B) Has committed willfully or persistently, or is committing willfully or persistently, a material breach of the partnership agreement or a duty or obligation under section 30-23-409, Idaho Code; or

(C) Has engaged or is engaging in conduct relating to the partnership's business which makes it not reasonably practicable to carry on the business with the person as a partner;

(6) The person:

(A) Becomes a debtor in bankruptcy;

(B) Executes an assignment for the benefit of creditors; or

(C) Seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all the person's property;

(7) In the case of an individual:

(A) The individual dies;

(B) A guardian or general conservator for the individual is appointed; or

(C) A court orders that the individual has otherwise become incapable of performing the individual's duties as a partner under this chapter or the partnership agreement;

(8) In the case of a person that is a testamentary or inter vivos trust or is acting as a partner by virtue of being a trustee of such a trust, the trust's

entire transferable interest in the partnership is distributed;

(9) In the case of a person that is an estate or is acting as a partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the partnership is distributed;

(10) In the case of a person that is not an individual, the existence of the person terminates;

(11) The partnership participates in a merger under chapter 22, title 30, Idaho Code, and:

(A) The partnership is not the surviving entity; or

(B) Otherwise as a result of the merger, the person ceases to be a partner;

(12) The partnership participates in an interest exchange under chapter 22, title 30, Idaho Code, and, as a result of the interest exchange, the person ceases to be a partner;

(13) The partnership participates in a conversion under chapter 22, title 30, Idaho Code;

(14) The partnership participates in a domestication under chapter 22, title 30, Idaho Code, and, as a result of the domestication, the person ceases to be a partner;

(15) The partnership dissolves and completes winding up;

(16) In the case of a professional entity, restrictions or limitations are placed upon a partner's ability to continue to render professional services.

History.

I.C., § 30-23-601, as added by 2015, ch. 243, § 28, p. 758; am. 2020, ch. 82, § 26, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "chapter 22, title 30, Idaho Code" for "chapter 21, title 30, Idaho Code" in subsections (11), (12), (13), and (14).

CASE NOTES

No Express Provision.

From a general partner's attempt to dissociate from an LLP, the district court erred in ruling in favor of the LLP in the LLP's wrongful dissociation counterclaim, as a provision of the partnership agreement was not an express provision limiting the right to dissociate rightfully. St. Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 148 Idaho 479, 224 P.3d 1068 (2009).

Official Comment

This section mostly states default rules, which the partnership agreement may vary. However, it makes no sense to vary some of the rules — *e.g.*, that the death of a partner who is an individual does *not* cause the individual's dissociation as a partner, Paragraph (7)(A), or that a entity remains a partner even *after* the existence of the entity has terminated, Paragraph (10).

Paragraph (1) — Partnership agreements often require notice of dissociation to be in writing and to specify the effective date of the dissociation. The partnership cannot eliminate the power of a partner to dissociate by express will, Section 3-110(c)(9), but can eliminate the right and thereby make the dissociation wrongful.

Paragraph (3) — General partnership agreements often provide for "no cause" expulsion, and courts differ somewhat in how they approach such provisions. *Compare Gelder Med. Grp. v. Webber*, 363 N.E.2d 573, 576 (N.Y. 1977), *with Winston & Strawn v. Nosal*, 664 N.E.2d 239, 245 (Ill. App. Ct. 1996). *See also* the comment to Section 3-409(d) (stating and explaining the implied contractual covenant of good faith and fair dealing).

Paragraph (4)(B) — This paragraph permits expulsion when a partner no longer has any "skin in the game." Although Part 7 provides for the buy-out of a dissociated partner's transferable interest, in this context the dissociated partner has no transferable interest.

Paragraph (5) — For examples of conduct warranting an expulsion order, see *Della Ratta v. Dyas*, 961 A.2d 629, 642 (Md. Ct. Spec. App. 2008), *aff'd*, 996 A.2d 382 (Md. 2010) (noting that "[t]he trial court

expressly found that [two major capital] calls 'were issued in bad faith' . . . [and the] court also found that, '[by] another improper accounting movement' in [the partnership], $580,000 was taken 'for executive office expenses which was improper'"); *Brennan v. Brennan Assocs.*, 977 A.2d 107, 117-18 (Conn. 2009) (referring to the expelled partner's "moral turpitude, criminal fraud, and failure to be honest in court as to the extent of his criminal wrongdoing" as well as "his baseless claims of fraud" against a fellow partner; stating "he has rung the bell and it cannot be unrung").

For an analysis that helps distinguish Paragraph (5)(C) from Paragraphs (5)(A) and (B), *see All Saints University of Medicine Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510, at *15 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (interpreting predecessor law and noting that the "not reasonably practicable standard" does not require a showing of wrongful conduct). *Cf. Dunnagan v. Watson*, 204 S.W.3d 30, 40 (Tex. Ct. App. 2006) (same issue in the context of dissolution).

Where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. *Robertson v. Jacobs Cattle Co.*, 830 N.W.2d 191, 201-02 (Neb. 2013). "[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution." *Brennan v. Brennan Assocs.*, 977 A.2d 107, 121 (Conn. 2009).

The partnership agreement cannot vary the stated grounds for expulsion, Section 3-105(c)(10), but can choose an alternate forum — *e.g.*, arbitration. *Compare* Section 3-801(a)(4) (containing analogous grounds for dissolution by court order), *with* Section 3-105(c)(11) (making the Section 3-701(a)(4) grounds non-waivable).

Paragraph (6)(A) — This provision is subject to bankruptcy law. *See, e.g.*, 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Paragraphs (8) and (9) — A change in trustee or personal representative does not cause dissociation.

Paragraph (11)(A) — If a partnership disappears as part of a merger, no person can continue as a partner of the partnership. When the merger takes effect, those partners of the disappearing company are perforce dissociated. Depending on the plan of merger, those persons may become partners of a

surviving partnership. In those circumstances, the merger will have dissociated them from one partnership and admitted them into partnership in the surviving partnership. See Sections 3-402(b)(2) and 2-206(a)(10).

Paragraph (11)(B) — It is possible for a plan of merger to "shuffle the equity" of the surviving entity, even to the extent of "taking out" some or all of the owners of the surviving entity. A reverse triangular merger involving a partnership as the surviving entity would dissociate all the partners of the partnership.

Paragraph (13) — By definition, a partnership that converts ceases to be a partnership. See Section 2-406. Thus, when the plan of conversion takes effect, all the partners of the converted entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will "shuffle the equity" and "take out" some of the partners of the converting partnership.

Paragraph (14) — Domestication does not by itself dissociate a partner, because the domesticated entity remains both a partnership and "the same entity without interruption as the domesticating company." Section 2-506(a)(1)(B). However, an "equity shuffle" could dissociate a partner.

§ 30-23-602. Power to dissociate as partner — Wrongful dissociation. — (a) A person has the power to dissociate as a partner at any time, rightfully or wrongfully, by withdrawing as a partner by express will under section 30-23-601(1), Idaho Code.

(b) A person's dissociation as a partner is wrongful only if the dissociation:

(1) Is in breach of an express provision of the partnership agreement; or

(2) In the case of a partnership for a definite term or particular undertaking, occurs before the expiration of the term or the completion of the undertaking and:

(A) The person withdraws as a partner by express will, unless the withdrawal follows not later than ninety (90) days after another person's dissociation by death or otherwise under section 30-23-601(6) through (10), Idaho Code, or wrongful dissociation under this subsection;

(B) The person is expelled as a partner by judicial order under section 30-23-601(5), Idaho Code;

(C) The person is dissociated under section 30-23-601(6), Idaho Code; or

(D) In the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a partner is liable to the partnership and to the other partners for damages caused by the dissociation. The liability is in addition to any debt, obligation, or other liability of the partner to the partnership or the other partners.

History.

I.C., § 30-23-602, as added by 2015, ch. 243, § 28, p. 758.

CASE NOTES

No Express Provision.

From a general partner's attempt to dissociate from an LLP, the district court erred in ruling in favor of the LLP in the LLP's wrongful dissociation counterclaim, as a provision of the partnership agreement was not an express provision limiting the right to dissociate rightfully. St. Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 148 Idaho 479, 224 P.3d 1068 (2009).

Official Comment

Subsection (a) — A general partnership is a voluntary association, *see* Section 3-105(c)(9), and voluntary in this context means "proceeding from the will or from one's own choice or consent . . . having power of free choice." Black's Law Dictionary (9th ed. 2009). Necessarily therefore, a general partner always has the power to dissociate by express will. Accordingly, the partnership agreement cannot vary this subsection except to the extent of requiring the notice of dissociation to be in writing. Section 3-105(c)(9).

The phrase "rightfully or wrongfully" reflects the distinction between a partner's *power* to withdraw in contravention of the partnership agreement and a partner's *right* to do so. Thus, although a partner cannot be enjoined from exercising the power to dissociate, the dissociation may be wrongful under Subsection (b).

Subsection (b) — This subsection list exhaustively ("only if") the dissociations that are "wrongful." The label has three consequences:

• under Subsection (c) liability for resulting damages, which, under Section 3-701(c), may be offset against the amount of the buyout price due to the partner under Section 3-701(a);

• under Section 3-701(h) postponement of payment of the buyout price until the term expires or the undertaking is completed; and

• under Section 3-804, exclusion from the winding up process, if the dissociation results in dissolution of the partnership.

This subsection states a default rule. The partnership agreement can expand the list (e.g., by making wrongful a dissociation that beaches the

implied contractual covenant of good faith and fair dealing). In theory, the partnership agreement can provide for liquidated damages (subject to the requirements of contract law) and, in theory, can also shrink or even eliminate the list of wrongful dissociations.

Subsection (b)(2)(A) — This paragraph protects a partner's reactive withdrawal from a term partnership after the premature departure of another partner, such as the partnership's rainmaker or main supplier of capital, under the same circumstances that may result in the dissolution of the partnership under Section 3-801(2)(A). Under that provision, a term partnership is dissolved ninety days after the bankruptcy, incapacity, death (or similar dissociation of a partner that is an entity), or wrongful dissociation of any partner, unless a majority in interest of the remaining partners agree to continue the partnership. Under this provision, a partner's exercise of the right of withdrawal by express will under those circumstances is rendered "rightful," even if the partnership is continued by others, and does not expose the withdrawing partner to damages for wrongful dissociation under Section 3-602(c).

Subsection (b)(2)(C) — This provision refers to Section 3-601(6), which involves *inter alia* dissociation on account of bankruptcy, which in turn is subject to bankruptcy law. *See, e.g.*, 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Subsection (c) — A partner who prematurely dissociates from a partnership for an agreed term or undertaking risks liability for any resulting damages. For example, the partnership might incur substantial expenses in replacing the general partner's expertise, reputation, or creditworthiness.

In effect, this subsection equates wrongful dissociation with breach of contract. Accordingly, courts should look to contract law to determine what consequential damages are recoverable. *See Hadley v. Baxendale*, 9 Exch. 341 (1854); Restatement (Second) of Contracts § 351 (1981); *see also Williams v. Hildebrand*, 247 S.W.2d 356, 358 (Ark. 1952) (interpreting UPA (1914) § 38(2)(a)(II), pertaining to wrongful dissolution, and stating that "the measure of damages, when the partnership was to have continued for a fixed term, is the profits that the injured partner would have received").

§ 30-23-603. Effect of dissociation. — (a) If a person's dissociation results in a dissolution and winding up of the partnership business, part 8 of this chapter applies; otherwise, part 7 of this chapter applies.

(b) If a person is dissociated as a partner: (1) The person's right to participate in the management and conduct of the partnership business terminates, except as otherwise provided in section 30-23-802(c), Idaho Code; and (2) The person's duties and obligations under section 30-23-409, Idaho Code, end with regard to matters arising and events occurring after the person's dissociation except to the extent the partner participates in winding up the partnership's business pursuant to section 30-23-802, Idaho Code.

(c) A person's dissociation does not of itself discharge the person from a debt, obligation, or other liability to the partnership or the other partners that the person incurred while a partner.

History.

I.C., § 30-23-603, as added by 2015, ch. 243, § 28, p. 758.

Official Comment Subsection (a) — This subsection is a "switching" provision, invoking either Part 7 or 8 depending on whether a person's dissociation as a partner results in dissolution.

Subsection (b) — This section originated as UPA (1997) § 603(b) and deals with some of the internal effects of a person's dissociation as a partner.

Subsection (b)(1) — A person's dissociation as a partner ends immediately the person's right to participate in the management of the business, unless the dissociation results in dissolution of the partnership. See Section 3-802(c) ("A person whose dissociation as a partner resulted in dissolution may participate in winding up as if still a partner, unless the dissociation was wrongful.").

Subsection (b)(2) — Unless a person's dissociation as a partner results in dissolution and the person participates in winding up, Section 3-802(c), this

provision establishes a dividing line, separating out "matters arising and events occurring after the person's dissociation." If the partnership has continuing projects with clients, ongoing relationships with clients, or both, the dividing line requires special attention with regard to non-competition and partnership opportunities duties. *See* Section 3-409(b)(1), (3).

Disputes involving law firms have generated much of the relevant case law. *See, e.g., Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1257 (Mass. 1989); *Jewel v. Boxer*, 156 Cal. App. 3d 171, 175 (Cal. Ct. App. 1984). To a large extent a well-drawn partnership agreement can delineate the parties' respective rights and responsibilities and thereby avoid problems. However, if the partnership becomes insolvent, the bankruptcy court may well scrutinize the partners' inter se arrangements. *See Geron v. Robinson & Cole L.L.P.*, 476 B.R. 732, 743 (Bankr. S.D.N.Y. 2012) (considering whether a law firm had "fraudulently transferred . . . assets when its partners adopted the Jewel Waiver [releasing rights recognized by Jewel v. Boxer] on the eve of dissolution without consideration").

This provision does not determine the effect of a person's dissociation as a partner on the person's future obligations or rights under the partnership agreement. Some contractual obligations typically extend beyond dissociation — *e.g.*, non-competition agreements, buyout arrangements. To the extent provisions of the partnership agreement continue to apply, the common law obligation of good faith continues to apply as well. *See* the comment to Section 3-409(d) (explaining that the subsection "invokes the implied obligation that exists in every contract" as a matter of common law).

Subsection (c) — A partner's obligation to safeguard trade secrets and other confidential or proprietary information is incurred when the partner learns or otherwise obtains the information. This subsection preserves the obligation post-dissociation.

Part 7
Partner's Dissociation When Business Not Wound Up

Idaho Code § 30-23-701

§ 30-23-701. Persons dissociated as a partner without dissolution of partnership. — (a) If a person is dissociated as a partner without the dissociation resulting in a dissolution and winding up of the partnership business under section 30-23-801, Idaho Code, the partnership shall cause the person's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b) of this section.

(b) The buyout price of the interest of a person dissociated as a partner is the amount that would have been distributable to the person under section 30-23-806(b), Idaho Code, if, on the date of dissociation, the assets of the partnership were sold and the partnership were wound up, with the sale price equal to the greater of:

(1) The liquidation value; or

(2) The value based on a sale of the entire business as a going concern without the person.

(c) Interest accrues on the buyout price from the date of dissociation to the date of payment, but damages for wrongful dissociation under section 30-23-602(b), Idaho Code, and all other amounts owing, whether or not presently due, from the person dissociated as a partner to the partnership, must be offset against the buyout price.

(d) A partnership shall defend, indemnify, and hold harmless a person dissociated as a partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the person under section 30-23-702, Idaho Code.

(e) If no agreement for the purchase of the interest of a person dissociated as a partner is reached not later than one hundred twenty (120) days after a written demand for payment, the partnership shall pay, or cause to be paid, in money to the person the amount the partnership estimates to be the

buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c) of this section.

(f) If a deferred payment is authorized under subsection (h) of this section, the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c) of this section, stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsection (e) or (f) of this section must be accompanied by the following:

(1) A statement of partnership assets and liabilities as of the date of dissociation;

(2) The latest available partnership balance sheet and income statement, if any;

(3) An explanation of how the estimated amount of the payment was calculated; and

(4) Written notice that the payment is in full satisfaction of the obligation to purchase unless, not later than one hundred twenty (120) days after the written notice, the person dissociated as a partner commences an action to determine the buyout price, any offsets under subsection (c) of this section, or other terms of the obligation to purchase.

(h) A person that wrongfully dissociates as a partner before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any part of the buyout price until the expiration of the term or completion of the undertaking, unless the person establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) A person dissociated as a partner may maintain an action against the partnership, pursuant to section 30-23-410(2)(b), Idaho Code, to determine the buyout price of that person's interest, any offsets under subsection (c) of this section, or other terms of the obligation to purchase. The action must be commenced not later than one hundred twenty (120) days after the partnership has tendered payment or an offer to pay or within one (1) year

after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the person's interest, any offset due under subsection (c) of this section, and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h) of this section, the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. The finding may be based on the partnership's failure to tender payment or an offer to pay or to comply with subsection (g) of this section.

History.

I.C., § 30-23-701, as added by 2015, ch. 243, § 29, p. 758.

Official Comment

Part 7 originated in UPA (1997) and provides for the buyout of the interest of a person dissociated as a partner if the dissociation does not result in a dissolution and winding up of the partnership's business under Part 8. *See* Section 3-603(a). If there is no dissolution, the remaining partners have a right to continue the business and the person dissociated as a partner has a right to be bought out. These rights can, of course, be varied in the partnership agreement. *See* Section 3-105. A person dissociated as a partner has a continuing relationship with the partnership and third parties as provided in Sections 3-603(b), 3-702, and 3-703. *See* Section 3-408(e) (access to information of person dissociated as a partner).

The rules in this section are merely default rules. The partners may, in the partnership agreement, fix the method or formula for determining the buyout price and all of the other terms and conditions of the buyout right. Indeed, the very right to a buyout itself may be modified, although a provision providing for a complete forfeiture would probably not be enforceable. *See* Section 1-702 (Supplemental Principles of Law).

Subsection (a) — This subsection provides that, if a person's dissociation as a partner does not result in a windup of the business, the partnership shall cause the interest of the dissociating partner to be

purchased for a buyout price determined pursuant to Subsection (b). The buyout is mandatory, unless the partnership provides otherwise. The "cause to be purchased" language is intended to accommodate a purchase by the partnership, one or more of the remaining partners, or a third party.

Subsection (b) — This subsection provides how the "buyout price" is to be determined. The terms "fair market value" or "fair value" were not used because they are often considered terms of art having a special meaning depending on the context, such as in tax or corporate law. "Buyout price" was a new term in UPA (1997). Under Subsection (b), the buyout price is the amount that would have been distributable to the dissociating partner under Section 3-807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of liquidation value or going concern value without the departing partner. Liquidation value is not intended to mean distress sale value. Under general principles of valuation, the hypothetical selling price in either case should be the price that a willing and informed buyer would pay a willing and informed seller, with neither being under any compulsion to deal. The notion of a minority discount in determining the buyout price is negated by valuing the business as a going concern. Other discounts, such as for a lack of marketability or the loss of a key partner, may be appropriate, however. For a case applying the concept, see *Fotouhi v. Mansdorf*, 427 B.R. 798, 803-05 (Bankr. N.D. Cal. 2010).

Since the buyout price is based on the value of the business at the time of dissociation, the partnership must pay interest on the amount due from the date of dissociation until payment to compensate the dissociating partner for the use of his interest in the firm. Under UPA (1914) § 42, the person dissociated as a partner could elect a share of the profits in lieu of interest. UPA (1997) eliminated that option.

UPA (1914) § 38(2)(c)(II) provides that the good will of the business not be considered in valuing a wrongfully dissociating partner's interest. UPA (1997) implicitly rejected that approach. Under this section, unless the partnership's goodwill is damaged by the wrongful dissociation, the value of the wrongfully dissociating partner's interest will include any goodwill value of the partnership. If the firm's goodwill is damaged, the amount of the damages suffered by the partnership and the remaining partners will be offset against the buyout price.

Subsection (c) — This subsection provides that the partnership may offset against the buyout price all amounts owing by the person dissociated as a partner to the partnership, whether or not presently due, including any damages for wrongful dissociation under Section 602(c). This rule has the effect of accelerating payment of amounts not yet due from the former partner to the partnership, including a long-term loan by the partnership to the former partner. Where appropriate, the amounts not yet due should be discounted to present value. A dissociating partner, on the other hand, is not entitled to an add-on for amounts owing to him by the partnership. Thus, a departing partner who has made a long-term loan to the partnership must wait for repayment, unless the terms of the loan agreement provide for acceleration upon dissociation.

The partnership's right of setoff does not limit the amount of damages the partnership may claim for the wrongful dissociation and does not alter any other amounts owed to the partnership. Those amounts may result in a net sum due to the partnership from the person dissociated as a partner.

Subsection (d) — Following the rule stated in UPA (1914) § 38, this section requires the partnership to indemnify a person dissociated as a partner against all partnership liabilities, whether incurred before or after the dissociation, except those incurred by the person under Section 3-702. The rationale for covering post-dissociation liabilities is the fact of dissociation; the person dissociated as a partner is no longer a co-owner of the enterprise. As for pre-existing liabilities, the determination of the buyout price necessarily assumes that these liabilities will be paid. Thus, in effect the person's share of these liabilities has already been paid through the valuation process.

Subsection (e) — If a person dissociated as a partner makes a written demand for payment and no agreement for the purchase of the interest is reached within 120 days after the demand, the partnership must pay, or cause to be paid, in cash the amount it estimates to be the buyout price, adjusted for any offsets allowed and accrued interest. Thus, the person dissociated as a partner will receive in cash within 120 days of dissociation the undisputed minimum value of the person's partnership interest. If the person claims that the buyout price should be higher, suit may thereafter be brought as provided in Subsection (i) to have the amount of the buyout price determined by the court. This is similar to the procedure for

determining the value of dissenting shareholders' shares under the Model Business Corporation Act §§ 13.20 through 13.28.

The "cause to be paid" language of Subsection (a) is repeated here to permit either the partnership, one or more of the continuing partners, or a third-party purchaser to tender payment of the estimated amount due.

Subsection (f) — Under this subsection, when deferred payment is authorized in the case of a wrongfully dissociating partner, a written offer stating the amount the partnership estimates to be the purchase price should be tendered within the 120-day period, even though actual payment of the amount may be deferred, possibly for many years. *See* the comment to Subsection (h). The dissociated partner is entitled to know at the time of dissociation what amount the remaining partners think is due, including the estimated amount of any damages allegedly caused by the partner's wrongful dissociation that may be offset against the buyout price.

Subsection (g) — This subsection provides that the payment of the estimated price (or tender of a written offer under Subsection (f)) by the partnership must be accompanied by: (i) a statement of the partnership's assets and liabilities as of the date of the person's dissociation as a partner; (ii) the latest available balance sheet and income statement, if the partnership maintains such financial statements; (iii) an explanation of how the estimated amount of the payment was calculated; and (iv) a written notice that the payment will be in full satisfaction of the partnership's buyout obligation unless the person dissociated as a partner commences an action to determine the price within 120 days of the notice. Subsection (g) is based in part on the dissenters' rights provisions of Model Business Corporation Act § 13.25(b).

Those disclosures should serve to identify and narrow substantially the items of dispute between the person dissociated as a partner and the partnership over the valuation of the partnership interest. The disclosures will also serve to pin down the parties as to their claims of partnership assets and values and as to the existence and amount of all known liabilities. Lastly, the disclosures will force the remaining partners to consider thoughtfully the difficult and important questions as to the appropriate method of valuation under the circumstances, and in particular, whether they should use going concern or liquidation value. Simply getting

that information on the record in a timely fashion should increase the likelihood of a negotiated resolution of the parties' differences during the 120-day period within which the person dissociated as a partner must bring suit.

Subsection (h) — UPA (1914) § 38 contemplates a buyout in the context of the partnership business being continued after a partner's wrongful dissociation has (inevitably) caused dissolution. UPA (1914) § 38(2)(c) entitles the wrongfully dissociating partner to have the buyout price "paid to him in cash, or the payment secured by bond approved by the court." UPA (1997) took a different approach, which the Harmonization Project did not change. Under Subsection (h), a wrongfully dissociating partner is not entitled to receive any portion of the buyout price before the expiration of the term or completion of the undertaking, unless the person dissociated as a partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership.

Subsection (i) — This subsection provides that a person dissociated as a partner may maintain an action against the partnership to determine the buyout price, any offsets, or other terms of the purchase obligation. The action must be commenced within 120 days after the partnership tenders payment of the amount it estimates to be due or, if deferred payment is authorized, its written offer. This provision creates a 120-day "cooling off" period. It also allows the parties an opportunity to negotiate their differences after disclosure by the partnership of its financial statements and other required information.

If the partnership fails to tender payment of the estimated amount due (or a written offer, if deferred payment is authorized), the person dissociated as a partner has one year after written demand for payment in which to commence suit

§ 30-23-702. Power to bind and liability of person dissociated as partner. — (a) After a person is dissociated as a partner without the dissociation resulting in a dissolution and winding up of the partnership business and before the partnership is merged out of existence, converted, or domesticated under chapter 22, title 30, Idaho Code, or dissolved, the partnership is bound by an act of the person only if:

(1) The act would have bound the partnership under section 30-23-301, Idaho Code, before dissociation; and

(2) At the time the other party enters into the transaction:

(A) Less than two (2) years has passed since the dissociation; and

(B) The other party does not know or have notice of the dissociation and reasonably believes that the person is a partner.

(b) If a partnership is bound under subsection (a) of this section, the person dissociated as a partner that caused the partnership to be bound is liable:

(1) To the partnership for any damage caused to the partnership arising from the obligation incurred under subsection (a) of this section; and

(2) If a partner or another person dissociated as a partner is liable for the obligation to the partner or other person for any damage caused to the partner or other person arising from the liability.

History.

I.C., § 30-23-702, as added by 2015, ch. 243, § 29, p. 758; am. 2020, ch. 82, § 27, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "chapter 22, title 30, Idaho Code" for "chapter 21, title 30, Idaho Code" near the end of the introductory paragraph in subsection (a).

Official Comment

A person's dissociation as a partner ends immediately the person's actual authority to act for the partnership, unless the dissociation results in a dissolution and winding up of the business of the partnership. *See* Section 3-603(b)(1). However, the person's apparent authority may linger.

This section does not affect a person's power to bind a partnership in another capacity — *e.g.*, as an employee with actual authority.

Subsection (a) — This subsection codifies and constrains the lingering apparent authority of a person dissociated as a partner. The constraint is in the phrase "only if."

The provision applies until the partnership dissolves or under Article 2 ceases to be governed by this article. Once a partnership dissolves, Section 3-804 applies.

With respect to authority of a person dissociated as a partner to transfer partnership real property, Section 3-303(e) provides that third parties are deemed to have knowledge of a limitation on the person's authority to transfer real property held in the partnership name upon the proper recording of a statement containing such a limitation. Section 3-704(b) provides that a statement of dissociation operates as a limitation on the person's authority for the purposes of Section 3-303(e). Thus, a properly recorded statement of dissociation provides, immediately upon recording, constructive knowledge of the lack of authority of a person dissociated as a partner to transfer real property held in the partnership name.

Subsection (a)(1) — It is the statutory apparent authority from Section 3-301 which lingers.

Subsection (a)(2)(A) — In any event, any lingering apparent authority ends two years after the dissociation.

Subsection (a)(2)(B) — A person might have notice under Section 3-103(d)(2)(A) (statement of dissociation) as well as under Section 3-103(b)(1) (person "ha[ving] reason to know the fact from all the facts known to the person at the time in question").

Subsection (b) — The liability stated in this subsection is not exhaustive. For example, if a person dissociated as a partner causes a partnership to be

bound under Subsection (a) and, due to a guaranty, some other person — not a partner nor a person dissociated as a partner — is liable on the resulting obligation, that other person may have a claim under other law against the person dissociated as a partner.

§ 30-23-703. Liability of person dissociated as partner to other persons. — (a) Except as otherwise provided in subsection (b) of this section, a person dissociated as a partner is not liable for a partnership obligation incurred after dissociation.

(b) A person that is dissociated as a partner is liable on a transaction entered into by the partnership after the dissociation only if:

(1) The partner would be liable on the transaction; and

(2) At the time the other party enters into the transaction:

(A) Less than two (2) years has passed since the dissociation; and

(B) The other party does not have knowledge or notice of the dissociation and reasonably believes that the person is a partner.

(c) By agreement with a creditor of a partnership and the partnership, a person dissociated as a partner may be released from liability for a debt, obligation, or other liability of the partnership.

(d) A person dissociated as a partner is released from liability for a debt, obligation, or other liability of the partnership if the partnership's creditor, with knowledge or notice of the person's dissociation but without the person's consent, agrees to a material alteration in the nature or time of payment of the debt, obligation or other liability.

History.

I.C., § 30-23-703, as added by 2015, ch. 243, § 29, p. 758.

Official Comment

To the extent a partnership has been a limited liability partnership throughout its existence, the liability rules stated in this section are moot. *See* Subsection (b)(1).

This section parallels Section 3-805.

Subsection (a) — As stated in Section 3-306(b), comment and 3-306(c), comment, other law determines when a partnership obligation is "incurred."

Subsection (b) — The rule stated here for the "lingering liability" of a person dissociated a partner parallels the rule stated in Section 3-702 for the lingering apparent authority of a person dissociated as a partner.

Subsection (b)(2)(A) — In any event, the lingering liability ends two years after the dissociation.

Subsection (b)(2)(B) — A person might have notice under Section 3-103(d)(2)(A) (statement of dissociation) as well as under Section 3-103(b)(1) (person "ha[ving] reason to know the fact from all the facts known to the person at the time in question").

Subsections (c) and (d) — These provisions trace back to UPA (1914) § 36(2), (3).

§ 30-23-704. Statement of dissociation. — (a) A person dissociated as a partner or the partnership may deliver to the secretary of state for filing a statement of dissociation stating the name of the partnership and that the person has dissociated from the partnership.

(b) A statement of dissociation is a limitation on the authority of a person dissociated as a partner for the purposes of section 30-23-303(d) and (e), Idaho Code.

History.

I.C., § 30-23-704, as added by 2015, ch. 243, § 29, p. 758.

Official Comment

A partnership and a person dissociated as a partner each have the right (but not an obligation) to deliver to the filing office a statement of dissociation, and each has an incentive to do so. *See* Sections 3-702(a)(2)(B) (extinguishing the lingering apparent authority of a person dissociated as a partner as to any party that has notice of the dissociation), 3-703(b)(2)(B) (extinguishing the lingering liability of a person dissociated as a partner as to any party that has notice of the dissociation).

This section originated as UPA (1997) § 704 and was unchanged by the Harmonization Project.

Subsection (a) — "A person not a partner is deemed . . . to have notice of a person's dissociation as a partner 90 days after a statement of dissociation under Section 3-704 becomes effective." Section 3-103(d)(2)(A). This constructive notice ends both the lingering apparent authority and lingering liability exposure of the person dissociated as a partner. *See* Sections 3-702(a)(2)(B), 3-703(b)(2)(B).

Subsection (b) — This subsection interrelates a statement of dissociation with this article's intricate section on statements of authority. *See* Section 3-303.

§ 30-23-705. Continued use of partnership name. — Continued use of a partnership name, or the name of a person dissociated as a partner as part of the partnership name, by partners continuing the business does not of itself make the person dissociated as a partner liable for an obligation of the partners or the partnership continuing the business.

History.

I.C., § 30-23-705, as added by 2015, ch. 243, § 29, p. 758.

Official Comment

Section 3-705 originated in UPA (1997) and is an edited version of UPA (1914) § 41(10). The section merely protects a person dissociated as a person from liability in case the partnership continues to use the person's name. Whether a partnership has a right to the continued use is a matter for the partnership agreement; this article states no rule on the subject.

If the partnership agreement does not expressly address the issue, custom may imply a term. *See Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 684 S.E.2d 756, 762, n.6 (S.C. 2009) ("This Court takes judicial notice of the custom and practice in this state of law firms continuing to use the names of deceased members in their firm names. Heretofore, the basis has been the taking for granted that the deceased partner would consent. Hereafter, it is presumed, unless proven otherwise, that the deceased partner consented to the continued use of his or her name in the partnership's name.").

Part 8
Dissolution and Winding Up

Idaho Code § 30-23-801

§ 30-23-801. Events causing dissolution. — A partnership is dissolved, and its business must be wound up, upon the occurrence of any of the following:

(1) In a partnership at will, the partnership knows or has notice of a person's express will to withdraw as a partner, other than a partner that has dissociated under section 30-23-601(2) through (10), Idaho Code, but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on the later date;

(2) In a partnership for a definite term or particular undertaking:

(A) Within ninety (90) days after a person's dissociation by death or otherwise under section 30-23-601(6) through (10), Idaho Code, or wrongful dissociation under section 30-23-602(b), Idaho Code, the affirmative vote or consent of at least half of the remaining partners to wind up the partnership business, for which purpose a person's rightful dissociation pursuant to section 30-23-602(b)(2)(A), Idaho Code, constitutes the expression of that partner's expression of consent to wind up the partnership business;

(B) The affirmative vote or consent of all the partners to wind up the partnership business; or

(C) The expiration of the term or the completion of the undertaking;

(3) An event or circumstance that the partnership agreement states causes dissolution;

(4) On application by a partner, the entry by the district court of an order dissolving the partnership on the ground that:

(A) Conduct of all or substantially all the partnership's business is unlawful;

(B) The economic purpose of the partnership is likely to be unreasonably frustrated;

(C) Another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner; or

(D) It is otherwise not reasonably practicable to carry on the partnership business in conformity with the partnership agreement;

(5) On application by a transferee, the entry by the district court of an order dissolving the partnership on the ground that it is equitable to wind up the partnership business:

(A) After the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or

(B) At any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer;

(6) The passage of ninety (90) consecutive days during which the partnership does not have at least two (2) partners.

History.

I.C., § 30-23-801, as added by 2015, ch. 243, § 30, p. 758.

CASE NOTES

Decisions Under Prior Law

Bankruptcy.

Exchange of assets.

Time of dissolution.

Withdrawal.

Bankruptcy.

The debtor in bankruptcy had no authority as a general partner to bind the partnership to an involuntary bankruptcy petition; as a result of the debtor's

individual bankruptcy petition, the non-bankrupt partner had the right to wind up the partnership affairs, and the debtor was entitled to the value of his interest in the partnership. In re Sunset Developers, 69 Bankr. 710 (Bankr. D. Idaho 1987).

Exchange of Assets.

Where partnership assets were exchanged and former partners ceased to be associated in the carrying on of the business, the partnership was dissolved. Ramseyer v. Ramseyer, 98 Idaho 47, 558 P.2d 76 (1976).

Time of Dissolution.

Where partners in company entered into contract dissolving the partnership, under which contract one partner would purchase the other partners' interest in the real property owned by the partnership as appraised at "present market value," the term "present market value" referred to the value at the time of the contract, not at the time of appraisal since, as of the date of the contract, the parties were changing their former business relationship so that dissolution occurred at that time. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Withdrawal.

A farming partnership, conducted under an oral agreement, was dissolved by the withdrawal of one partner. Elliot v. Elliot, 88 Idaho 81, 396 P.2d 719 (1964).

RESEARCH REFERENCES

ALR. — Court-ordered dissolution, inability to operate at a profit as justification for. 44 A.L.R.4th 122.

Official Comment

"Dissolution" has been a term of art in the law of unincorporated business organizations since at least the time of Roman law. Joseph Story, Commentaries on the Law of Partnership § 266, at 408 (2d ed. 1850) ("The Roman law . . . declared, that partnership might be dissolved in various ways. . . ."). Dissolution does not end a partnership's existence but rather changes the purpose of that existence: "A dissolved partnership shall wind

up its business and . . . the partnership continues after dissolution only for the purpose of winding up." Section 3-802(a). The partnership may, but need not, file a statement of dissolution. Section 3-802(b)(2)(A). The partnership terminates when winding up is complete. The partnership may, but need not, file a statement of termination. Section 3-802(b)(2)(F).

UPA (1914) took a strictly aggregate approach to dissolution; under UPA (1914) § 29, the departure of any partner under any circumstances inevitably caused the partnership to dissolve. A partnership agreement had no power to avoid this result, although many partnership agreements purported to do so. A partnership agreement could provide for the continuation of the partnership business in a successor partnership, UPA (1914) § 38(2)(b), but that approach was often problematic. See the comment to Section 3-201(a).

UPA (1997) fundamentally changed this aspect of the law of general partnerships, making the partnership entity much more durable than the UPA (1914) aggregate. For example, expelling a partner does not cause the partnership to dissolve, even if the partnership is at-will. Section 3-801(1). More generally, the grounds for dissolution stated in Section 3-801 are exhaustive, unless the partnership agreement states otherwise.

Given this article's built-in transfer restrictions, Section 3-503, increasing the partnership's durability necessarily decreases each partner's exit rights. Under UPA (1914), each partner has a non-waivable power to exit the enterprise; dissociation inevitably causes dissolution, which in most instances will lead to a buyout of the dissociating partner, subject to any damages for wrongful dissolution. UPA (1914) § 38. Eliminating that power creates a risk of "lock-in."

UPA (1997) addressed the lock-in issue through UPA (1997) § 701. When a person dissociates as a partner, whether rightfully or wrongfully, the partnership is obligated to buy out the person's interest. Note, however, that Section 3-701, like UPA (1997) § 701, is a default rule.

Except for Paragraphs 4 and 5, this section comprises default rules. Paragraphs 4 and 5 are mandatory only with regard to the stated grounds for dissolution. See the comment to Section 3-105(c)(11). Variations to the statutory causes of dissolution are commonplace.

Section 3-803 permits rescission of dissolution in some circumstances. In some circumstances, an amendment to the partnership agreement might avert dissolution — e.g., by revising an agreed-upon deadline for selling the partnership assets and winding up the business. A retroactive amendment may also be possible. *See Kindred Ltd. P'ship v. Screen Actors Guild, Inc.*, CV082220PSGPJWX, 2009 WL 279080, at *5-6 (C.D. Cal. Feb. 3, 2009) (giving effect to an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997) § 802(b) permitted a partnership to rescind dissolution).

The Harmonization Project added Paragraph 6 but otherwise made no significant changes to this section.

Paragraph (1) — This paragraph: (i) recognizes the power of any partner in a partnership at will to dissolve the partnership at any time "by express will"; and (ii) provides that a partner who has already been dissociated under some other provision of this section lacks the power to dissolve the partnership. The latter proposition seems self-evident; a person dissociated as a partner is no longer a partner.

Paragraph (2) — This paragraph provides three ways in which a term partnership may be dissolved before the expiration of the term.

Paragraph (2)(A) — This provision: (i) originated in UPA (1997); (ii) helps make the partnership entity more durable; (iii) protects the remaining partners where the dissociating partner is crucial to the successful continuation of the business; and (iv) reverses the approach of UPA (1914).

Under UPA (1914), any dissociation dissolves the partnership, and unanimous consent of the remaining partners to continue the business. Thus each partner has the right to cause liquidation. *See* UPA (1914) § 38(2)(b). Under this article, a term partnership is more durable.

A person's dissociation as a partner by death or otherwise under Section 3-601(6) to (10) or wrongful dissociation under Section 3-602(b), makes a term partnership *susceptible* to dissolution. If within ninety days after the dissociation at least half of the remaining partners express their will to dissolve the partnership, the partnership dissolves. Section 3-601(6) to (10) pertain, respectively, to a partner's bankruptcy or similar financial impairment (6); a partner's death or incapacity (7); the distribution by a

trust-partner of its entire transferable interest (8); the distribution by an estate-partner of its entire transferable interest; and the termination of an entity-partner (10).

During the same ninety-day window, Section 3-602(b)(2)(A) permits each remaining partner to withdraw rightfully by express will. A partner does not express a desire to withdraw solely by reason of voting for or consenting to the winding up of the partnership business. However, the converse is true: "[A] person's rightful dissociation pursuant to Section 3-602(b)(2)(A) constitutes the expression of that partner's consent to wind up the partnership business." Section 3-801(2)(A).

EXAMPLE: A term partnership has seven partners, and one of the partners dissociates by dying before the end of the term. Section 3-601(7). The partnership will dissolve if within ninety days after the dissociation three of the remaining five partners affirmatively vote or consent to dissolution.

EXAMPLE: Same facts, except the partner dissociates in breach of the partnership agreement. Same result.

EXAMPLE: Same facts, except that the partner is "a person that . . . is acting as a partner by virtue of being a trustee of . . . a trust, [and] the trust's entire transferable interest in the partnership [has been] distributed." Section 3-601(8). Same result.

Paragraph (2)(B) — This provision states that a term partnership may be dissolved and wound up at any time by the express will of all the partners. The provision merely reflects the general rule that the partnership agreement may override the statutory default rules and that the partnership agreement, like any contract, can be amended at any time by unanimous consent.

Paragraph (2)(C) — This rule is inherent in the concept of a partnership for a specified term or undertaking. This provision must be read in conjunction with Section 3-411. Under Section 3-411(a), if the partners continue the business after the expiration of the term or the completion of the undertaking, the partnership will be treated as a partnership at will. Moreover, if the partners continue the business without any settlement or liquidation of the partnership, under Section 3-411(b) they are presumed to

have agreed that the partnership will continue, despite the lack of a formal agreement.

Paragraph (3) — The partners can avoid the effects of this paragraph either by amending the partnership agreement before dissolution occurs or using Section 3-803 to rescind dissolution. A retroactive amendment may also be possible. *See Kindred Ltd. P'ship v. Screen Actors Guild, Inc.*, CV082220PSGPJWX, 2009 WL 279080, at *5-6 (C.D. Cal. Feb. 3, 2009) (giving effect to an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997) § 802(b) permitted a partnership to rescind dissolution).

Paragraph (4) — The partnership agreement cannot vary the stated grounds for dissolution.

Paragraph (4)(A) — The "all or substantially all" proviso is intended to avoid dissolution for insubstantial or innocent regulatory violations.

Paragraph (4)(B)-(D) — The Virginia Supreme Court has referred to "these statutory bases for judicial dissolution as the economic purpose test, the partner conduct test, and the business operations test, respectively." *Russell Realty Assocs. v. Russell*, 724 S.E.2d 690, 693 (Va. 2012). These tests somewhat overlap and are often pled together. *E.g., Wood v. Apodaca*, 375 F. Supp. 2d 942, 948 (N.D. Cal. 2005).

Some courts have held that, if the trial court finds grounds for dissolution under one or more of these provisions, that court has no power to order a lesser remedy, such as a buyout. *Pankratz Farms, Inc. v. Pankratz*, 95 P.3d 671, 679-80 (Mont. 2004) (so holding even though: (i) "judicial dissolution of the Partnership would trigger significant adverse tax consequences to all the parties involved, including Marvin [who commenced the action seeking dissolution"; and (ii) "Marvin [had] requested monetary damages as an alternative to dissolution"); *Navarro v. Perron*, 122 Cal. App. 4th 797, 801, 19 Cal. Rptr. 3d 198, 201 (2004) ("Where the court determines it is not reasonably practical to carry on the partnership, the court has no discretion to deny a partner's application to dissolve it.").

Paragraph (4)(B) — "[P]oor financial performance" is neither sufficient nor necessary to satisfy this provision. *Russell Realty Assocs. v. Russell*, 724 S.E.2d 690, 694 (Va. 2012). The provision's history substantiates the first

point (not by itself sufficient). *See* UPA (1997) § 801, comment 8 ("RUPA deletes UPA Section 32(1)(e) which provides for dissolution when the business can only be carried on at a loss. That provision might result in a dissolution contrary to the partners' expectations in a start-up or tax shelter situation, in which case 'book' or 'tax' losses do not signify business failure.").

As for the second point (not always necessary), see *Russell Realty Assocs. v. Russell*, 724 S.E.2d 690, 694-55 (Va. 2012) (noting that the partnership's purpose was "to acquire, hold, invest in, and lease and sell investment properties"; stating with regard to the Virginia analog to Paragraph 4(B) that "[t]he partners' expectations for realizing these purposes included not only expectations of economic success, but also the ability to undertake these activities in an efficient and productive manner to maximize return to the partnership"; and listing numerous ways in which the relationship between the partners frustrated the economic purpose of the partnership).

Paragraph (4)(C) — A partner can trigger this provision without necessarily breaching the partnership agreement. *E.g., Robertson v. Jacobs Cattle Co.*, 830 N.W.2d 191, 202 (Neb. 2013) (stating that "the somewhat autocratic manner in which Ardith conducted the affairs of the partnership in recent years, even if not in violation of the partnership agreement, would constitute grounds for dissolution under [the UPA (1997) version of] this provision").

Paragraph (4)(D) — The specific terms of the partnership agreement are the frame of reference for applying this provision. *Sriram v. Preferred Income Fund III Ltd. P'ship*, 22 F.3d 498, 502 (2d Cir. 1994) ("The issue is not whether the partnerships can effectively carry out the general purpose of the Agreements after considerable modification of their terms. Rather, the query . . . is whether the purpose of the Agreements can be carried out 'in conformity with the partnership agreement,' that is, in conformity with the terms and conditions of the Agreements to which the limited partners ascribed and on which they relied when choosing to part with their capital.") (applying the provision of RULPA (1976/1985) that is analogous to Paragraph (4)(C)).

Paragraph (5) — This paragraph gives a transferee rights comparable to a partner who seeks dissolution because the other partners are continuing the business in derogation of the partner's rights to obtain dissolution. The paragraph is based on UPA (1914) § 32(2) but UPA (1997) added the requirement that the court determine that it is equitable to wind up the business. The rights of a transferee under this section cannot be varied in the partnership agreement. See Section 3-105(c)(11). Neither ULPA (2001) (Last Amended 2013) nor ULLCA (2006) (Last Amended 2013) have a comparable provision, because both those acts provide for perpetual existence. *See* Sections 4-110 and 5-108.

Paragraph (6) — The Harmonization Project added this provision, which is consistent with Section 3-202(a) (stating that "the association of two or more persons to carry on as co-owners a business for profit forms a partnership"). *See* the comment to Section 302(d); *Pemstein v. Pemstein*, G030217, 2004 WL 1260034 (Cal. Ct. App. June 9, 2004) ("'Can one person carry on a partnership?' In short, the answer is no . . . . Just as it takes two to form a marriage, it takes a minimum of two to run a viable partnership. We were unable to find any contrary authority, and appellants fail to provide any, holding a partnership can be carried on by less than two persons.")

§ 30-23-802. Winding up. — (a) A dissolved partnership shall wind up its business and, except as otherwise provided in section 30-23-803, Idaho Code, the partnership continues after dissolution only for the purpose of winding up.

(b) In winding up its business, the partnership:

(1) Shall discharge the partnership's debts, obligations, and other liabilities, settle and close the partnership's business, and marshal and distribute the assets of the partnership; and

(2) May:

(A) Deliver to the secretary of state for filing a statement of dissolution stating the name of the partnership and that the partnership is dissolved;

(B) Preserve the partnership business and property as a going concern for a reasonable time;

(C) Prosecute and defend actions and proceedings, whether civil, criminal or administrative;

(D) Transfer the partnership's property;

(E) Settle disputes by mediation or arbitration;

(F) Deliver to the secretary of state for filing a statement of termination stating the name of the partnership and that the partnership is terminated; and

(G) Perform other acts necessary or appropriate to the winding up.

(c) A person whose dissociation as a partner resulted in dissolution may participate in winding up as if still a partner, unless the dissociation was wrongful.

(d) If a dissolved partnership does not have a partner and no person has the right to participate in winding up under subsection (c) of this section, the personal or legal representative of the last person to have been a partner may wind up the partnership's business. If the representative does not

exercise that right, a person to wind up the partnership's business may be appointed by the affirmative vote or consent of transferees owning a majority of the rights to receive distributions at the time the consent is to be effective. A person appointed under this subsection has the powers of a partner under section 30-23-804, Idaho Code, but is not liable for the debts, obligations, and other liabilities of the partnership solely by reason of having or exercising those powers or otherwise acting to wind up the partnership's business.

(e) On the application of any partner or person entitled under subsection (c) of this section to participate in winding up, the district court may order judicial supervision of the winding up of a dissolved partnership, including the appointment of a person to wind up the partnership's business, if:

(1) The partnership does not have a partner and within a reasonable time following the dissolution no person has been appointed under subsection (d) of this section; or

(2) The applicant establishes other good cause.

History.

I.C., § 30-23-802, as added by 2015, ch. 243, § 30, p. 758.

CASE NOTES

Decisions Under Prior Law

Accounting.

Generally, the only action which will lie between partners regarding partnership business is an action for an accounting; other actions are premature until the business is wound up and accounts are settled, and dissolution alone does not change this rule. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

The ultimate goal of an accounting is to ascertain the value of a plaintiff's interest in the partnership, as of the date of dissolution, and then to determine any profits attributable to the use of the plaintiff's right in the property of the dissolved partnership. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Continuation While Winding Up.

Even if a partnership has been dissolved in fact, for any breach on the part of two of the three partners, the relationship continued until the affairs of the firm were wound up. Barron v. Koenig, 80 Idaho 28, 324 P.2d 388 (1958).

Dissolution Agreement.

Where the partners mutually agreed that the partnership was to be dissolved, either partner had the right to wind up the partnership affairs in accordance with the agreement. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Expenses.

Where claims of the dominant or managing partner against the partnership are questioned, the managing partner has the burden of proving the claimed expenses, incurred during dissolution, are reasonable and necessary. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Fiduciary Duty of Surviving Partners.

Surviving partners have a duty to wind up the partnership affairs and, in so doing, a fiduciary duty to disclose all facts pertinent to valuation of a deceased partner's interest, especially when surviving partners seek to purchase such interest. Spencer v. Spencer, 91 Idaho 880, 434 P.2d 98 (1967).

Finality of Winding Up.

A winding up is presumed to include all disputed matters among the partners and will be final and conclusive upon them in the absence of fraud, mistake or duress. Ramseyer v. Ramseyer, 98 Idaho 47, 558 P.2d 76 (1976).

Where partners to a dissolved partnership have agreed upon a settlement and disposition of their partnership accounts, liabilities inter se and obligations to partnership creditors, they have accomplished a winding-up of partnership affairs. Ramseyer v. Ramseyer, 98 Idaho 47, 558 P.2d 76 (1976).

Money Judgment.

Under the circumstances, it was not improper for the trial court to enter a money judgment for one partner against the remaining partners where substantial partnership liabilities were still outstanding. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Time of Dissolution.

Where partners in company entered into contract dissolving the partnership, under which contract one partner would purchase the other partners' interest in the real property owned by the partnership as appraised at "present market value," the term "present market value" referred to the value at the time of the contract, not at the time of appraisal since, as of the date of the contract, the parties were changing their former business relationship so that dissolution occurred at that time. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Use of Partnership Property During Winding-Up.

Where it was impossible to account for the partnership's profits during a prolonged period of winding-up, the trial court did not err in charging the surviving partners rent and interest for their use of partnership property during the winding-up period. Murgoitio v. Murgoitio, 111 Idaho 573, 726 P.2d 685 (1986).

Official Comment

Under the default rules of this article, dissolution does not change governance arrangements. However, dissolution does change the context for

determining whether a matter is in or outside "the ordinary course of business of [the] partnership." Section 3-401(k). In addition, dissolution triggers a default rule entitling each partner to "reasonable compensation for services rendered in winding up the business of the partnership." Section 3-401(j).

Section 3-804 governs the post-dissolution power of a partner to bind the partnership, and Section 3-805 governs the "liability after dissolution of partner and person dissociated as general partner."

Subsection (a) — For more information on the impact of a partnership's dissolution, see Section 3-801, comment.

Subsection (b) — The particular circumstances determine how long winding up may continue without giving "good cause" for court intervention under Section 3-802(e). There is no "hard and fast" rule. *See, e.g., Mathis v. Meyeres*, 574 P.2d 447, 450 (Alaska 1978) (stating "we are aware of [no authority] requiring that deadlines be set in the winding up of a partnership"); *8182 Md. Assocs., Ltd. P'ship v. Sheehan*, 14 S.W.3d 576, 581 (Mo. 2000) ("The Uniform Partnership Law contemplates that dissolved partnerships may continue in business for a short, long or indefinite period of time.") (quoting *Schoeller v. Schoeller*, 497 S.W.2d 860, 867 (Mo. Ct. App. 1973)).

"Winding up usually entails the time necessary for the partners to finish old business, collect and pay debts, and finally distribute remaining assets to the partners." *Gibson v. Deuth*, 270 N.W.2d 632, 635 (Iowa 1978). "Generally the best interests of the partnership will be served by winding up the partnership affairs as quickly as possible." *Doting v. Trunk*, 856 P.2d 536, 540 (Mont. 1993). However, in some circumstances, a long period of winding up is not only appropriate but necessary. *Lebanon Trotting Ass'n v. Battista*, 306 N.E.2d 769, 772 (Ohio Ct. App. 1972) ("[I]f the only means of availing the partners of the benefit of the value of the lease would be to continue to operate under such lease until its expiration, then such operation may continue as part of the winding up of the partnership affairs after dissolution. It is not necessary that a partnership, in the absence of the consent of all the partners, abandon a valuable asset upon dissolution merely because it may have no ready market value, but the value of such

asset can continue to inure to the benefit of the partners through the continuation of the partnership after dissolution.").

Subsection (b)(2)(A) and (F) — For the constructive notice effect of a statement of dissolution or termination, *see* Sections 3-103(d)(2)(A) and (B) and 3-303.

Subsection (c) — This provision applies only to "[a] partner whose [rightful] dissociation resulted in dissolution."

> EXAMPLE: Partner A dissociates from the Killarney Company ("Killarney"), a general partnership. Partner A's dissociation does not result in dissolution, and, per the Killarney partnership agreement, Partner A's transferable interest is being redeemed over five years. One year after Partner A's dissociation, Partner B dissociates rightfully, and dissolution results. Partner B may participate in Killarney's winding up; Partner A may not.

> EXAMPLE: Partner A wrongfully dissociates from Killarney, and the dissociation results in the dissolution of Killarney. Partner A may not participate in winding up.

A partner's duties and obligation under Section 3-409 extend to winding up. Section 3-603(b)(2). However, under Section 3-409(b)(3), each partner's duty not to compete ends when the partnership dissolves.

Subsection (d) — A person appointed under this section will normally be an agent of the dissolved partnership, acting pursuant to a contract. Agency and contract law will determine the person's duties; by its terms Section 3-409 does not apply.

§ 30-23-803. Rescinding dissolution. — (a) A partnership may rescind its dissolution, unless a statement of termination applicable to the partnership is effective or the district court has entered an order under section 30-23-801(4) or (5), Idaho Code, dissolving the partnership.

(b) Rescinding dissolution under this section requires:

(1) The affirmative vote or consent of each partner;

(2) If the partnership has delivered to the secretary of state for filing a statement of dissolution and:

(A) The statement of dissolution has not become effective, delivery to the secretary of state for filing of a statement of withdrawal under section 30-21-204, Idaho Code, applicable to the statement of dissolution; or

(B) If a statement of dissolution applicable to the partnership is effective, the delivery to the secretary of state for filing of a statement of recession stating the name of the partnership and that dissolution has been rescinded under this section.

(c) If a partnership rescinds its dissolution:

(1) The partnership resumes carrying on its business as if dissolution had never occurred;

(2) Subject to paragraph (3) of this subsection, any liability incurred by the partnership after the dissolution and before the rescission is effective is determined as if dissolution had never occurred; and

(3) The rights of a third party arising out of conduct in reliance on the dissolution before the third party knew or had notice of the rescission may not be adversely affected.

History.

I.C., § 30-23-803, as added by 2015, ch. 243, § 30, p. 758; am. 2020, ch. 82, § 28, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "section 30-21-204, Idaho Code" for "section 30-21-114, Idaho Code" near the end of paragraph (b)(2)(A).

CASE NOTES

Decisions Under Prior Law

Assets.

Where, following dissolution of farming partnership by the withdrawal of one partner, surviving partner refused to wind up partnership affairs, continued the business and refused to account, successive renewals of leases to land were properly held to be assets of the partnership. Elliot v. Elliot, 88 Idaho 81, 396 P.2d 719 (1964).

Official Comment

The Harmonization Project added this section, replacing UPA (1997) § 802(b) (permitting the partners to "waive the right to have the partnership's business wound up and the partnership terminated" after which "the partnership resumes carrying on its business as if dissolution had never occurred").

Subsection (a) — The first exclusion results inevitably from the effect of a statement of termination, Section 3-802(b)(2)(F) — *i.e.*, the partnership ceases to exist. A "dead" entity lacks both the capacity and power to bring itself back from the dead.

The second and third exclusions pertain to dissolutions effected by outsiders - i.e., the court and the filing office.

Subsections (b)(1) — The requirement of unanimous consent protects any vested rights or reliance by partners. However, the partnership agreement may vary this provision

Subsection (c)(3) — This paragraph protects third parties. *E.g., Neurobehavorial Associates, P.A. v. Cypress Creek Hosp., Inc.*, 995 S.W.2d 326, 331 (Tex. App. 1999) ("If the Hospital had the right to terminate the Agreement when it did because the Association was then dissolved, then

even though the Association can revoke articles of dissolution and have that relate back to the date of dissolution, it would be grossly unfair to let the Association assert its ex post facto change as a defense. Surely the Association would be estopped from doing so, having created the very conditions that gave the Hospital the correct impression that it was then dissolved.").

§ 30-23-804. Power to bind partnership after dissolution. — (a) A partnership is bound by a partner's act after dissolution which:

(1) Is appropriate for winding up the partnership business; or (2) Would have bound the partnership under section 30-23-301, Idaho Code, before dissolution, if, at the time the other party enters into the transaction, the other party does not know or have notice of the dissolution.

(b) A person dissociated as a general partner binds a partnership through an act occurring after dissolution if: (1) At the time the other party enters into the transaction: (A) Less than two (2) years has passed since the dissociation; and (B) The other party does not know or have notice of the dissociation and reasonably believes that the person is a partner; and (2) The act:

(A) Is appropriate for winding up the partnership's business; or (B) Would have bound the partnership under section 30-23-301, Idaho Code, before dissolution and at the time the other party enters into the transaction the other party does not know or have notice of the dissolution.

History.

I.C., § 30-23-804, as added by 2015, ch. 243, § 30, p. 758.

CASE NOTES

Decisions Under Prior Law

Bankruptcy.

The debtor in bankruptcy had no authority as a general partner to bind the partnership to an involuntary bankruptcy petition; as a result of the debtor's individual bankruptcy petition, the non-bankrupt partner had the right to wind up the partnership affairs, and the debtor was entitled to the value of

his interest in the partnership. In re Sunset Developers, 69 Bankr. 710 (Bankr. D. Idaho 1987).

Winding Up.

Where the partners mutually agreed that the partnership was to be dissolved, either partner had the right to wind up the partnership affairs in accordance with the agreement. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Where claims of the dominant or managing partner against the partnership are questioned, the managing partner has the burden of proving the claimed expenses, incurred during dissolution, are reasonable and necessary. Burnham v. Bray, 104 Idaho 550, 661 P.2d 335 (Ct. App. 1983).

Official Comment

This section provides the "power to bind" rules applicable once dissolution occurs. The section originated in UPA (1997), which significantly departed from the approach of UPA (1914). The Harmonization Project revised this section to conform to ULPA (2001). However, the revisions are essentially stylistic.

In general, this section parallels Section 3-702 (power to bind of a person dissociated as partner when dissolution does not result from the dissociation). However, one significant difference exists. Section 3-702(a)(2)(A) contains a provision analogous to a statute of repose. A person's power to bind the partnership terminates two years after the date of dissociation. Subsection (b) contains a comparable provision, but Subsection (a) does not.

Subsections (a) and (b) — Subsection (a) states the power-to-bind rules for persons still partners when dissolution occurs. Subsection (b) pertains to persons dissociated before dissolution, including a partner whose dissociation results in dissolution. *Compare* Section 804, with Section 3-802(c) (stating that as an *inter se* matter a person whose rightful dissociation results in dissolution may participate in winding up "as if still a partner.").

Subsection (a)(1) — This paragraph states a rule of inherent agency power. *See* Restatement (Second) of Agency § 8A (defining "inherent

agency power" as "the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent"). Thus, a partner might act without actual or apparent authority and still bind the partnership. The partnership agreement cannot change the stated rule because the rule pertains to the rights under this article of third parties. *See* Section 3-105(c)(17).

If a partner's words or conduct trigger this paragraph, thereby binding the partnership, and the partner lacks the actual authority to do so, the partner breaches an agent's duty to act within authority, and is liable to the partnership for any resulting damages. Restatement (Third) of Agency § 8.09(1) ("An agent has a duty to take action only within the scope of the agent's actual authority"). The partner might also be liable for breach of the partnership agreement.

Subsection (a)(2) — A person might have notice under Section 3-103(d)(2)(B)(i) (statement of dissolution) as well as under Section 3-103(b)(1) (reason to know).

Subsection (b) — This subsection deals with the post-dissolution power to bind of a person dissociated as a partner. For the most part: (i) Paragraph 1 replicates Section 3-702, pertaining to the pre-dissolution power to bind of a person dissociated as a partner; and (ii) Paragraph 2 replicates Subsection (a) of this section, which states the post-dissolution power to bind of a person is still a partner.

For a person dissociated as a partner to bind a dissolved partnership: • the person's dissociation must have:

- been rightful; and
- resulted in dissolution; and

• the person's act must satisfy both Paragraphs 1 and 2.

Subsection (b)(1)(B) — A person might have notice under Section 3-103(d)(2)(B)(i) (statement of dissolution) as well as under Section 3-103(b)(1) (reason to know).

Subsection (b)(2)(B) — A person might have notice under Section 3-103(d)(2)(B)(i) (statement of dissolution) as well as under Section 3-103(b)

(1) (reason to know).

§ 30-23-805. Liability after dissolution of partner and person dissociated as general partner. — (a) If a partner having knowledge of the dissolution causes a partnership to incur an obligation under section 30-23-804(a), Idaho Code, by an act that is not appropriate for winding up the partnership business, the partner is liable:

(1) To the partnership for any damage caused to the partnership arising from the obligation; and

(2) If another partner or person dissociated as a partner is liable for the obligation, to that other partner or person for any damage caused to that other partner or person arising from the liability.

(b) Except as otherwise provided in [this] subsection (c) of this section, if a person dissociated as a partner causes a partnership to incur an obligation under section 30-23-804(b), Idaho Code, the person is liable:

(1) To the partnership for any damage caused to the partnership arising from the obligation; and

(2) If a partner or another person dissociated as a partner is liable for the obligation, to the partner or other person for any damage caused to the partner or other person arising from the obligation.

(c) A person dissociated as a general partner is not liable under this subsection [subsection (b)] if:

(1) Section 30-23-802(c), Idaho Code, permits the person to participate in winding up; and

(2) The act that causes the partnership to be bound under section 30-23-804(b), Idaho Code, is appropriate for winding up the partnership's business.

History.

I.C., § 30-23-805, as added by 2015, ch. 243, § 30, p. 758.

STATUTORY NOTES

Compiler's Notes.

The word “this” in the introductory paragraph in subsection (b) was placed in brackets by the compiler as it does not contextually belong in that sentence.

The bracketed insertion in the introductory paragraph in subsection (c) was added by the compiler to correct the enacting legislation.

Official Comment

This section parallels Section 3-702. It is possible for more than one person to be liable under this section on account of the same partnership obligation. This article does not provide any rule for apportioning liability in that circumstance.

Subsection (a)(2) — If the partnership is not a limited liability partnership, the liability created by this paragraph includes liability under Sections 3-306(a) and 3-703(b). The paragraph also applies when a partner or person dissociated as a general partner suffers damage due to a contract of guaranty.

Other law determines liability (if any) to a person that is neither a partner nor dissociated as a partner.

§ 30-23-806. Disposition of assets in winding up — When contributions required. — (a) In winding up its business, a partnership shall apply its assets, including the contributions required by this section, to discharge the partnership's obligations to creditors, including partners that are creditors.

(b) After a partnership complies with subsection (a) of this section, any surplus must be distributed in the following order, subject to any charging order in effect under section 30-23-504, Idaho Code:

(1) To each person owning a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and

(2) Among partners in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership, except to the extent necessary to comply with any transfer effective under section 30-23-503, Idaho Code.

(c) If a partnership's assets are insufficient to satisfy all its obligations under subsection (a) of this section, with respect to each unsatisfied obligation incurred when the partnership was not a limited liability partnership, the following rules apply:

(1) Each person that was a partner when the obligation was incurred and that has not been released from the obligation under section 30-23-703(c) and (d), Idaho Code, shall contribute to the partnership for the purpose of enabling the partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of a partner in effect for each of those persons when the obligation was incurred.

(2) If a person does not contribute the full amount required under paragraph (1) of this subsection with respect to an unsatisfied obligation of the partnership, the other persons required to contribute by paragraph (a) of this section [paragraph (1) of this subsection] on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other

persons is in proportion to the right to receive distributions in the capacity of a partner in effect for each of those other persons when the obligation was incurred.

(3) If a person does not make the additional contribution required by paragraph (2) of this subsection, further additional contributions are determined and due in the same manner as provided in that paragraph.

(d) A person that makes an additional contribution under subsection (c)(2) or (3) of this section may recover from any person whose failure to contribute under subsection (c)(1) or (2) of this section necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person's liability under this subsection may not exceed the amount the person failed to contribute.

(e) If a partnership does not have sufficient surplus to comply with subsection (b)(1) of this section, any surplus must be distributed among the owners of transferable interests in proportion to the value of the respective unreturned contributions.

(f) All distributions made under subsections (b) and (c) of this section must be paid in money.

History.

I.C., § 30-23-806, as added by 2015, ch. 243, § 30, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in paragraph (c)(2) was added by the compiler.

CASE NOTES

Decisions Under Prior Law

Accounting.

The decree in an accounting action should provide for a final adjustment of all controverted questions before the trial court with respect to a partnership accounting and distribution. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Bankruptcy.

The debtor in bankruptcy had no authority as a general partner to bind the partnership to an involuntary bankruptcy petition; as a result of the debtor's individual bankruptcy petition, the non-bankrupt partner had the right to wind up the partnership affairs, and the debtor was entitled to the value of his interest in the partnership. In re Sunset Developers, 69 Bankr. 710 (Bankr. D. Idaho 1987).

Credits.

Claim of partner for credit in partnership accounting for expenditures made by partner in looking after affairs of partnership during certain years was properly rejected, where partner had kept no account of the expenses and did not specify what they were for. Bussell v. Barry, 61 Idaho 350, 102 P.2d 280 (1940).

Claim of partner to credit in partnership accounting for purchase-price of automobile allegedly used in interest of the partnership was properly

rejected, where evidence failed to establish that purchase of automobile was discussed between partners and to show to what extent automobile was used for partnership purposes. Bussell v. Barry, 61 Idaho 350, 102 P.2d 280 (1940).

In action for partnership accounting, record established that member of partnership was charged with certain amounts which did not come into his possession but which represented duplications of other amounts properly charged against the member, so that member was entitled to a credit for the duplications. Bussell v. Barry, 61 Idaho 350, 102 P.2d 280 (1940).

Continuance of Partnership Business.

Where the surviving partners and the administratrix of a deceased partner knew that it was for the best interest for the business to be continued to be operated by the surviving partners, and the administratrix made no demand that the business cease, there was no violation of statute by the administratrix in that she failed to consent to a continuance of the business, or any action on her part that was prejudicial to the surviving partners. Varkas v. Varkas, 64 Idaho 297, 130 P.2d 867 (1942).

Credit for Expenses Paid.

Where plaintiff partner had contributed a homestead to the partnership without charge, and the partnership had constructed a reservoir, cistern and other improvements on the homestead for use of the partnership, and plaintiff partner had not agreed to pay for the improvements, the expense of the improvements was not chargeable against plaintiff partner upon dissolution of the partnership. Knauss v. Hale, 64 Idaho 218, 131 P.2d 292 (1942).

Demand for Accounting.

In suit by pledgee against partnership to foreclose pledges of assets in form of bonds, two partners having sold their interest in bonds to pledgee without consent of third, court properly decreed partnership accounting and settlement on application of third partner. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

Disposal of Partnership Property.

Where partnership property consisted of bonds, it was proper to decree that bonds be sold and proceeds divided, or to enter judgment apportioning bonds as equally as possible and awarding money judgment for balance. Johnston v. Ellis, 49 Idaho 1, 285 P. 1015 (1930).

Distribution In Kind.

By express agreement, winding-up partners may agree to an in-kind division of assets. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

The decision of the trial court to distribute the partnership assets in kind rather than to liquidate them was consistent with the purposes of the Uniform Partnership Act. Kelly v. Silverwood Estates, 127 Idaho 624, 903 P.2d 1321 (1995).

Final Settlement of Partnership Indebtedness.

When one partner purchases the interest of the other, the transaction presumptively includes a final settlement of all partnership indebtedness existing between the partners. Thomas v. Schmelzer, 118 Idaho 353, 796 P.2d 1026 (Ct. App. 1990).

Liquidation of Assets.

Ordinarily, in any action to terminate a partnership, the trial court will order liquidation of the partnership assets by sale. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Money Judgment.

Under the circumstances, it was not improper for the trial court to enter a money judgment for one partner against the remaining partners where substantial partnership liabilities were still outstanding. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Mutual Discharge from Liability.

Where parties to contract dissolving partnership expressly agreed that final settlement set forth in contract was complete, and that they mutually discharged each other from liability arising from previous association as copartners, partner who agreed to pay all liabilities arising from leasehold of partnership could not recover from copartner one-half of rent accruing

after dissolution of partnership which was paid by him under covenant in lease; "liability" being a broad term of most comprehensive significance. Bratton v. Morris, 54 Idaho 743, 37 P.2d 1097 (1934).

Prior Accord and Satisfaction.

Where finding that partners made full and complete settlement and accounting of all their dealings in 1931 was sustained by the evidence, any indebtedness owing to partner, who allegedly paid purchase-price, freight, and cost of handling of seed potatoes purchased by partnership in 1928, was discharged and partner was not entitled in subsequent accounting proceeding to credit for such transactions. Bussell v. Barry, 61 Idaho 350, 102 P.2d 280 (1940).

Purpose.

A purpose of this section is to broaden the circumstances in which a partner is entitled to an accounting. Ramseyer v. Ramseyer, 98 Idaho 47, 558 P.2d 76 (1976).

The ultimate goal of an accounting is to ascertain the value of a plaintiff's interest in the partnership as of the date of dissolution and then to determine any profits attributable to the use of the plaintiff's right in the property of the dissolved partnership. Arnold v. Burgess, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987).

Although the right to an accounting may arise as prescribed in this section, an accounting is generally held to be an equitable proceeding, designed to comprehensively investigate partnership transactions and adjudicate the rights of the partners. Havelick v. Chobot, 123 Idaho 714, 851 P.2d 1010 (Ct. App. 1993).

Official Comment

Subsection (a) — This subsection is non-waivable as to creditors who are not partners. *See* Section 3-105(c)(17) (stating that the partnership agreement may not "restrict the rights under this [article] of a person other than a partner "). However, if a creditor is willing, a dissolved partnership may certainly make agreements with the creditor specifying the terms under which the partnership will "discharge its obligations" to the creditor. If under Section 3-306(a) one or more partners are also liable on a partnership

obligation, any agreement between the partnership and the creditor should take in account Section 3-703(d).

Subsection (b) — For the most part, this subsection states default rules. For example, partnership agreements often provide for different distribution rights upon liquidation than during operations. However, distributions under this subsection (or otherwise under the partnership agreement) are subject to Section 3-504 (charging orders). As to the extent the partnership agreement can be amended to affect the distribution rights of persons already transferees, see Section 3-107(b).

Subsection (c) — This section applies obligation by obligation, because a person — *qua* partner or person dissociated as a partner — is required to contribute to the partnership to satisfy a partnership obligation only if, when the obligation was incurred: (i) the person was a partner; and (ii) the partnership was not an LLP. *See* Section 3-306(b), (c). As for when a partnership obligation is incurred, see Section 3-306(b) and (c), comments.

The allocation of contribution obligations parallels the default rule stated in Section 3-401(a) (providing that, "except in the case of a limited liability partnership, [each partner] is chargeable with a share of the partnership losses in proportion to the partner's share of the profits"). The partnership agreement can change the allocation *inter se* partners and persons dissociated as partners but cannot prejudice the rights of non-partner creditors.

> EXAMPLE: The A-B Partnership (the "Partnership") owes Creditor $150, an obligation incurred when Partners A and B were the only partners, sharing distributions equally, and the Partnership was not an LLP. The Partnership has no funds to pay Creditor. Although Subsection (c)(1) would require Partners A and B each to contribute equally (*i.e*., $75), the A-B Partnership Agreement provides that Partner A has the entire contribution obligation and Partner B has none. As between Partners A and B, Partner A is obligated to contribute $150 and Partner B nothing. However, as to Creditor, Partner B still has a contribution obligation of $75

This formal distinction will have practical consequences only if A does not contribute the full $150. Also, Creditor may have problems establishing standing. *Cf* . the comment to Section 3-407.

Subsection (c)(2) and (3) — These provisions are analogous to buy-sell provisions that: (i) provide that an owner's effort to sell the ownership interest triggers an option to purchase allocated among all the other owners; (ii) make the option conditional on the entire interest being purchased; and (iii) provide for successive allocations to take up any previous allocations that were not unexercised.

Subsection (e) — If a partnership has been a limited liability partnership throughout the partnership's existence, this subsection is consistent with this article's approach to loss sharing. If a partnership has been a limited liability partnership during only part of the partnership's existence, the issue of loss sharing upon dissolution: (i) can be exceedingly complicated, varying radically depending on the circumstances; (ii) is therefore not amenable to a statutory "gap filler"; and (iii) thus should always be addressed in the partnership agreement.

However, in case the partnership agreement does not address the issue, this article must provide a default rule. See the comment to Section 3-105(b) ("To the extent the partnership agreement does not determine an inter se matter, this article determines the matter."). This subsection applies to fill the gap. This approach has the virtues of simplicity and certainty but in no way resembles what "typical" partners might agree if they were to consider the matter ab initio, especially if the partnership was never an LLP. *Cf*. Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. Miami L. Rev. 425, 448 (1987) ("[T]he various norms established by the Act, applicable in the absence of agreements to the contrary, represent the supposed understandings partners most likely reach if they choose to bargain on the various issues.").

§ 30-23-807. Known claims against dissolved limited liability partnership. — (a) Except as otherwise provided in subsection (d) of this section, a dissolved limited liability partnership may give notice of a known claim under subsection (b) of this section that has the effect provided in subsection (c) of this section.

(b) A dissolved limited liability partnership may in a record notify its known claimants of the dissolution. The notice must: (1) Specify the information required to be included in a claim;

(2) State that a claim must be in writing and provide a mailing address to which the claim is to be sent; (3) State the deadline for receipt of a claim that may not be less than one hundred twenty (120) days after the date the notice is received by the claimant; (4) State that the claim will be barred if not received by the deadline; and

(5) Unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner based on section 30-23-306, Idaho Code.

(c) A claim against a dissolved limited liability partnership is barred if the requirements of subsection (b) of this section are met and: (1) The claim is not received by the specified deadline; or

(2) If the claim is timely received but rejected by the limited liability partnership: (A) The partnership causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the partnership to enforce the claim not later than ninety (90) days after the claimant receives the notice; and (B) The claimant does not commence the required action not later than ninety (90) days after the claimant receives the notice.

(d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

History.

I.C., § 30-23-807, as added by 2015, ch. 243, § 30, p. 758.

Official Comment

Source — Added during the Harmonization Project, this section is derived almost verbatim from Model Business Corporation Act § 14.06.

Subsection (b)(5) — For additional information on when a claim against a partnership is barred, *see* Section 3-810, comment.

§ 30-23-808. Other claims against dissolved limited liability partnership. — (a) A dissolved limited liability partnership may publish notice of its dissolution and request persons having claims against the partnership to present them in accordance with the notice.

(b) A notice under subsection (a) of this section must:

(1) Be published at least once in a newspaper of general circulation in the county in this state in which the dissolved limited liability partnership's principal office is located or, if the principal office is not located in this state, in the county in which the office of the partnership's registered agent is or was last located;

(2) Describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent;

(3) State that a claim against the partnership is barred unless an action to enforce the claim is commenced not later than three (3) years after publication of the notice; and

(4) Unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner based on section 30-23-306, Idaho Code.

(c) If a dissolved limited liability partnership publishes a notice in accordance with subsection (b) of this section, the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership not later than three (3) years after the publication date of the notice:

(1) A claimant that did not receive notice in a record under section 30-23-807, Idaho Code;

(2) A claimant whose claim was timely sent to the partnership but not acted on; and

(3) A claimant whose claim is contingent at or based on an event occurring after the date of dissolution.

(d) A claim not barred under this section or section 30-23-807, Idaho Code, may be enforced:

(1) Against a dissolved limited liability partnership, to the extent of its undistributed assets;

(2) Except as otherwise provided in section 30-23-809, Idaho Code, if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person's proportionate share of the claim or of the partnership's assets distributed to the partner or transferee after dissolution, whichever is less, but a person's total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution; and

(3) Against any person liable on the claim under sections 30-23-306, 30-23-703 and 30-23-805, Idaho Code.

History.

I.C., § 30-23-808, as added by 2015, ch. 243, § 30, p. 758.

Official Comment

Source —Added during the Harmonization Project, this section is derived almost verbatim from Model Business Corporation Act § 14.07.

Subsection (b)(4) — For additional information on when a claim against a partnership is barred, see Section 3-810, comment.

Subsection (d)(2) — Liability under this paragraph extends to those who have received distributions under a charging order. See the comment to Section 3-504(a) (explaining that the beneficiary of a charging order is a transferee). Unlike Section 3-407(c) (recapture of improper distributions), this paragraph contains no "knowledge" element.

Subsection (d)(3) — The referenced sections address the vicarious liability of partners and persons dissociated as partners for obligations of a partnership that is not an LLP.

§ 30-23-809. Court proceedings. — (a) A dissolved limited liability partnership that has published a notice under section 30-23-808, Idaho Code, may file an application with the district court in the county where the partnership's principal office is located or, if the principal office is not located in this state, where the office of its registered agent is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are reasonably expected to arise after the date of dissolution based on facts known to the partnership and:

(1) At the time of the application; (A) Are contingent; or

(B) Have not been made known to the partnership; or (2) Are based on an event occurring after the date of dissolution.

(b) Security is not required for any claim that is or is reasonably anticipated to be barred under section 30-23-807, Idaho Code.

(c) Not later than ten (10) days after the filing of an application under subsection (a) of this section, the dissolved limited liability partnership shall give notice of the proceeding to each claimant holding a contingent claim known to the partnership.

(d) In any proceeding under this section, the court may appoint a guardian ad litem to represent all claimants whose identities are unknown. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, must be paid by the dissolved limited liability partnership.

(e) A dissolved limited liability partnership that provides security in the amount and form ordered by the court under subsection (a) of this section satisfies the partnership's obligations with respect to claims that are contingent, have not been made known to the partnership, or are based on an event occurring after the date of dissolution, and such claims may not be enforced against a partner or transferee on account of assets received in liquidation.

History.

I.C., § 30-23-809, as added by 2015, ch. 243, § 30, p. 758.

Official Comment

Source — Added during the Harmonization Project, this section is derived almost verbatim from Model Business Corporation Act § 14.08.

§ 30-23-810. Liability of partner and person dissociated as partner when claim against partnership barred. — If a claim against a dissolved partnership is barred under section 30-23-807, 30-23-808 or 30-23-809, Idaho Code, any corresponding claim under section 30-23-306, 30-23-703 or 30-23-805, Idaho Code, is also barred.

History.

I.C., § 30-23-810, as added by 2015, ch. 243, § 30, p. 758.

Official Comment

A partner's liability under Sections 3-306, 3-703 and 3-805 is vicarious liability — liability solely by status and solely for the "debts, obligations, and other liabilities of the partnership." To the extent a claim pertaining to the underlying debt, obligation, or other liability is barred, a claim pertaining to the corresponding vicarious liability should likewise be barred.

Part 9
Limited Liability Partnership

Idaho Code § 30-23-901

§ 30-23-901. Statement of qualification. — (a) A partnership may become a limited liability partnership pursuant to this section.

(b) The terms and conditions on which a partnership becomes a limited liability partnership must be approved by the affirmative vote or consent necessary to amend the partnership agreement except, in the case of a partnership agreement that expressly addresses obligations to contribute to the partnership, the affirmative vote or consent necessary to amend those provisions.

(c) After the approval required by subsection (b) of this section, a partnership may become a limited liability partnership by delivering to the secretary of state for filing a statement of qualification. The statement must contain:

(1) The name of the partnership;

(2) The street and mailing addresses of the partnership's principal office and, if different, the street address of an office in this state, if any;

(3) The information required by section 30-21-404(a), Idaho Code;

(4) A statement that the partnership elects to become a limited liability partnership; and

(5) If the partnership is a professional entity, a statement that the partnership is a professional limited liability partnership and the principal profession or professions for which the partnership's partners are duly licensed or otherwise legally authorized to render professional services.

(d) A partnership's status as a limited liability partnership remains effective, regardless of changes in the partnership, until it is canceled pursuant to subsection (f) of this section or administratively revoked pursuant to section 30-23-903, Idaho Code.

(e) The status of a partnership as a limited liability partnership and the protection against liability of its partners for the debts, obligations, or other liabilities of the partnership while it is a limited liability partnership is not affected by errors or later changes in the information required to be contained in the statement of qualification.

(f) A limited liability partnership may amend or cancel its statement of qualification by delivering to the secretary of state for filing a statement of amendment or cancellation. The statement must be approved by the affirmative vote or consent of all the partners and state the name of the limited liability partnership and in the case of:

(1) An amendment, state the text of the amendment; and

(2) A cancellation, state that the statement of qualification is canceled.

History.

I.C., § 30-23-901, as added by 2015, ch. 243, § 31, p. 758; am. 2020, ch. 82, § 29, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "section 30-23-903, Idaho Code" for "section 30-23-902, Idaho Code" at the end of subsection (d).

Official Comment

Subsection (a) — Every partnership governed by this article may become a limited liability partnership, and the necessary formalities are straightforward: approval of the decision by the partners and delivery to the filing office for filing of a simple statement of qualification. A partnership becomes a limited liability partnership when the filing office files the statement of qualification and the statement takes effect. For the consequences of LLP status, see Section 3-306(c), comment.

Subsection (b) — In the default mode, becoming a limited liability partnership requires the agreement of all partners, because in the default mode amending the partnership agreement requires the affirmative vote or consent of all partners, Section 3-401(k) (stating the voting/consent

requirement to amend the partnership agreement). The unanimous vote/consent default rule reflects the significance of the transformation *inter se* the partners. *See* the comment to Section 3-306(c) (Effect of LLP Status on Relations Inter Se the Partners).

In the event a partnership agreement provides different quanta of consent for different matters, this subsection chooses (as a default rule) "the affirmative vote or consent necessary to amend those provisions" of "partnership agreement that expressly addresses obligations to contribute to the partnership." This choice makes good sense, given the effect of LLP status on contribution obligations. *See* the comment to Section 3-306(c).

The requirements for filing documents with the filing office are in Part 2 of Article 1. *See also* section 1-104 (Delivery of Record).

Subsection (c) — Although a statement of qualification does not create a new entity, Section 3-201(b), the requirements stated here are comparable to the requirements for a certificate of formation for a limited liability company, ULLCA (2006) (Last Amended 2013), and a certificate of limited partnership, ULPA (2001) (Last Amended 2013). The liability shield-a privilege granted by state — justifies requiring an LLP to meet these requirements.

Subsection (c)(3) — The rules regarding registered agents are found in Part 4 of Article 1.

Subsection (d) — Under some early LLP statutes, an LLP's failure to file an annual renewal ended LLP status and terminated the shield. This subsection eschews that draconian result. However, an LLP's failure to file an annual/biennial report, Section 3-913, is grounds for administrative revocation. *See* Section 3-903(d); *see also* Section 3-306(c)(2) (stating that the liability shield continues despite dissolution).

Neither this subsection nor Section 3-306(c)(2) expressly addresses the effect of an LLP's termination on the liability shield. However, neither logic nor policy supports the retroactive destruction of the shield.

Subsection (f) — The unanimity requirement for amending a statement of qualification is a default rule. The unanimity requirement for cancelling a statement of qualification is mandatory. Section 3-105(c)(13). The difference reflects the very different consequences of amendment and

cancellation. Subsection (b) requires very little information in a statement of qualification and does not contemplate additional information. *Compare* Section 3-901(f), *with* Section 5-201(c) (authorizing a certificate of formation to include additional information) *and* Section 4-201(c) (same with respect to a certificate and limited partnership). Therefore, an amendment can do no substantial harm to any partner's interest. In contrast, cancelling a statement of qualification makes every partner vicariously liable for all partnership obligations. Compare Section 3-901(f), *with* Section 3-105(c)(14) (stating that the partnership agreement may not "vary the right of a partner to approve a merger, interest exchange, conversion, or domestication" the result of which is to impose vicarious liability on the person for the obligations of the resulting entity).

§ 30-23-902. Permitted names. — The name of a partnership that is not a limited liability partnership may not contain the phrase "Registered Limited Liability Partnership" or "Limited Liability Partnership" or the abbreviation "R.L.L.P.," "L.L.P.," "RLLP" or "LLP."

History.

I.C., § 30-23-902, as added by 2015, ch. 243, § 31, p. 758.

Official Comment

Supplements this Code's primary provisions on the names of entities, which are found in Sections 1-301 and 1-302.

§ 30-23-903. Administrative revocation of statement of qualification. — (a) The secretary of state may commence a proceeding under subsection (b) of this section to revoke the statement of qualification of a limited liability partnership administratively if the partnership does not:

(1) Deliver an annual report to the secretary of state by the date it is due;

(2) Have a registered agent in this state for sixty (60) consecutive days; or

(3) The secretary of state has credible information that the limited liability partnership has failed to notify the secretary of state within sixty (60) days after the occurrence that its registered agent has been changed or that its registered agent has resigned.

(b) If the secretary of state determines that one (1) or more grounds exist for administratively revoking a statement of qualification, the secretary of state shall serve the partnership pursuant to section 30-21-212, Idaho Code, with notice in a record of the secretary of state's determination.

(c) If a limited liability partnership, not later than sixty (60) days after service of the notice is effected under subsection (b) of this section, does not cure or demonstrate to the satisfaction of the secretary of state the nonexistence of each ground determined by the secretary of state, the secretary of state shall administratively revoke the statement of qualification by signing a statement of administrative revocation that recites the grounds for revocation and the effective date of the revocation. The secretary of state shall file the statement and serve a copy on the partnership pursuant to section 30-21-212, Idaho Code.

(d) An administrative revocation under subsection (c) of this section affects only a partnership's status as a limited liability partnership and is not an event causing dissolution of the partnership.

(e) The administrative revocation of a statement of qualification of a limited liability partnership does not terminate the authority of its registered agent.

History.

I.C., § 30-23-903, as added by 2015, ch. 243, § 31, p. 758.

Official Comment

Many failures to comply with statutory requirements that may give rise to administrative revocation occur because of oversight or inadvertence and are usually corrected promptly when brought to the LLP's attention. Subsections (b) and (c) therefore provide a mandatory notice by the filing office to each LLP whose statement of qualification is subject to administrative revocation and a sixty-day grace period following the notice before the statement of administrative revocation may be filed.

In most instances, the issue whether a statement of qualification is subject to administrative revocation will not be controverted. If an LLP's statement of qualification is administratively revoked, the statement is no longer in effect. However, the partnership may petition the filing office for reinstatement under Section 3-904 and, if reinstatement is denied, the company may appeal to the courts under Section 3-905.

As a practical matter, administrative revocation permits the filing office to clear the record of "dead wood" and free up names.

However, the consequences for the partners can be quite serious. The liability shield remains effective for debts, liabilities, and other obligations incurred before revocation but disappears as to those incurred subsequently. A reinstated statement of qualification has retroactive effect generally, but exceptions can exist with regard to partnership obligations incurred before reinstatement. *See* Section 3-904(d)(3). For a discussion of when a partnership obligation is incurred, see the comment to Section 3-304(c) (The Temporal Nexus — When Claim Incurred).

Subsection (a)(2) — A limited liability partnership is required to file an annual/biennial report under Section 1-213.

Subsection (d) — This rule follows from Section 3-201(b) ("A partnership is the same entity regardless of whether the partnership has a statement of qualification in effect under Section 3-901.").

§ 30-23-904. Reinstatement. — (a) A partnership whose statement of qualification has been revoked administratively under section 30-23-903, Idaho Code, may apply to the secretary of state for reinstatement of the statement of qualification not later than ten (10) years after the effective date of the revocation. The application must state:

(1) The name of the partnership at the time of the administrative revocation of its statement of qualification and, if needed, a different name that satisfies sections 30-21-301 and 30-21-302, Idaho Code;

(2) The address of the principal office of the partnership and the information required by section 30-21-404(a), Idaho Code;

(3) The effective date of administrative revocation of the partnership's statement of qualification; and

(4) That the grounds for revocation did not exist or have been cured.

(b) To have its statement of qualification reinstated, a partnership must pay all fees, taxes, interest and penalties that were due to the secretary of state at the time of the administrative revocation and all fees, taxes, interest and penalties that would have been due to the secretary of state while the partnership's statement of qualification was revoked administratively.

(c) If the secretary of state determines that an application under subsection (a) of this section contains the required information, is satisfied that the information is correct, and determines that all payments required to be made to the secretary of state by subsection (b) of this section have been made, the secretary of state shall:

(1) Cancel the statement of revocation and prepare a statement of reinstatement that states the secretary of state's determination and the effective date of reinstatement; and

(2) File the statement of reinstatement and serve a copy on the partnership.

(d) When reinstatement under this section is effective, the following rules apply:

(1) The reinstatement relates back to and takes effect as of the effective date of the administrative revocation;

(2) The partnership's status as a limited liability partnership continues as if the revocation had not occurred; and

(3) The rights of a person arising out of an act or omission in reliance on the revocation before the person knew or had notice of the reinstatement [are not affected].

History.

I.C., § 30-23-904, as added by 2015, ch. 243, § 31, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion at the end of paragraph (d)(3) was added by the compiler to supply language missing from the enacting legislation.

Official Comment

Subsection (a)(1) — This provision will apply if, before the statement of qualification is reinstated, another entity has taken the company's name. *See* Section 3-902(c)(2).

Subsection (d)(3) — This paragraph provides an exception to the retroactive effect provided by Paragraphs (1) and (2). The greatest risk resulting from the exception is a creditor's claim of having entered into a contract with the partnership, knowing of the revocation and relying on the vicarious liability of each partner. The exception could also preclude a reinstated LLP's use of its own name. *See* Section 3-902(c)(2) (indirectly permitting an LLP to use the name of another partnership whose statement of qualification has been administratively revoked). Comparable provisions exist in other uniform acts pertaining to entities. *E.g.*, Section 5-112(b)(1).

§ 30-23-905. Judicial review of denial of reinstatement. — (a) If the secretary of state denies a partnership's application for reinstatement following administrative revocation of the partnership's statement of qualification, the secretary of state shall serve the partnership with notice in a record that explains the reasons for the denial.

(b) Within thirty (30) days after service of a notice of denial of reinstatement under subsection (a) of this section, a partnership may appeal from the denial by petitioning the district court of Ada county to set aside the revocation. The petition must be served on the secretary of state and contain a copy of the secretary of state's notice of revocation, the company's application for reinstatement, and the secretary of state's notice of denial.

(c) The district court may, if grounds exist, order the secretary of state to reinstate a partnership or take other action the court considers appropriate.

History.

I.C., § 30-23-905, as added by 2015, ch. 243, § 31, p. 758.

Official Comment

Because the grounds for administrative revocation under Section 3-904 are limited and straightforward, it is unlikely there will be a dispute about whether a partnership has corrected the reasons for the administrative revocation of the partnership's statement of qualification. But in the event a partnership disagrees with a determination by the filing office to deny the partnership's application for reinstatement, this section gives the partnership a limited right to seek judicial review of the denial of reinstatement.

§ 30-23-906. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Reservation of name — section 30-21-303, Idaho Code.

(2) Registration of name — section 30-21-304, Idaho Code.

(3) Registered agent — section 30-21-404, Idaho Code.

(4) Change of registered agent or address for registered agent by limited liability partnership — section 30-21-407, Idaho Code.

(5) Resignation of registered agent — section 30-21-410, Idaho Code.

(6) Change of name or address by registered agent — sections 30-21-408 and 30-21-409, Idaho Code.

(7) Service of process, notice, or demand — section 30-21-412, Idaho Code.

(8) Annual report for secretary of state — section 30-21-213, Idaho Code.

History.

I.C., § 30-23-906, as added by 2015, ch. 243, § 31, p. 758.

Chapter 24
LIMITED PARTNERSHIPS

Part 1. General Provisions

Sec.

Part 2. Formation; Certificate of Limited Partnership and Other Filings

Part 6. Dissociation

Part 7. Transferable Interests and Rights of Transferees and Creditors

Part 8. Dissolution and Winding Up

Part 9. Actions By Partners

Part 1
General Provisions

Idaho Code § 30-24-101

§ 30-24-101. Short title. — This chapter may be cited as the Idaho Uniform Limited Partnership Act.

History.

I.C., § 30-24-101, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

This article replaces a state's current limited partnership statute, whether or not that statute is based on the Uniform Limited Partnership Act (1916), Revised Uniform Limited Partnership Act (1976/1985) or the Uniform Limited Partnership Act (2001). Section 4-112 contains transition provisions for the applicability of this article to limited partnerships formed before the effective date of the Code. *See* Section 1-708.

§ 30-24-102. Definitions. — (a) In this chapter:

(1) "Certificate of limited partnership" means the certificate required by section 30-24-201, Idaho Code. The term includes the certificate as amended or restated.

(2) "Contribution," except in the phrase "right of contribution," means property or a benefit described in section 30-24-501, Idaho Code, which is provided by a person to a limited partnership to become a partner or in the person's capacity as a partner.

(3) "Distribution" means a transfer of money or other property from a limited partnership to a person on account of a transferable interest or in the person's capacity as a partner. The term:

(A) Includes:

(i) A redemption or other purchase by a limited partnership of a transferable interest; and

(ii) A transfer to a partner in return for the partner's relinquishment of any right to participate as a partner in the management or conduct of the partnership's activities and affairs or to have access to records or other information concerning the partnership's activities and affairs; and

(B) Does not include amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program.

(4) "General partner" means a person that:

(A) Has become a general partner under section 30-24-401, Idaho Code, or was a general partner in a partnership when the partnership became subject to this chapter under section 30-24-112, Idaho Code; and

(B) Has not dissociated as a general partner under section 30-24-603, Idaho Code.

(5) “Limited liability limited partnership” means a limited partnership whose certificate of limited partnership states that the partnership is a limited liability limited partnership.

(6) “Limited partner” means a person that:

(A) Has become a limited partner under section 30-24-301, Idaho Code, or was a limited partner in a limited partnership when the partnership became subject to this chapter under section 30-24-112, Idaho Code; and

(B) Has not dissociated under section 30-24-601, Idaho Code.

(7) “Limited partnership” means an entity formed under this chapter or that becomes subject to this chapter under chapter 22, title 30, Idaho Code, or section 30-24-112, Idaho Code. The term includes a limited liability limited partnership.

(8) “Partner” means a limited partner or general partner.

(9) “Partnership agreement” means the agreement, whether or not referred to as a partnership agreement and whether oral, implied, in a record, or in any combination thereof, of all the partners of a limited partnership concerning the matters described in section 30-24-105(a), Idaho Code. The term includes the agreement as amended or restated.

(10) “Required information” means the information that a limited partnership is required to maintain under section 30-24-108, Idaho Code.

(11) “Transferable interest” means the right, as initially owned by a person in the person’s capacity as a partner, to receive distributions from a limited partnership, whether or not the person remains a partner or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

(12) “Transferee” means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner. The term includes a person that owns a transferable interest under section 30-24-602(a)(3) or 30-24-605(a)(4), Idaho Code.

(b) The following definitions outside this chapter apply to this chapter:

(1) “Debtor in bankruptcy” — section 30-21-102(7), Idaho Code.

(2) "Foreign" — section 30-21-102(15), Idaho Code.

(3) "Jurisdiction" — section 30-21-102(22), Idaho Code.

(4) "Jurisdiction of formation" — section 30-21-102(23), Idaho Code.

(5) "Person" — section 30-21-102(35), Idaho Code.

(6) "Principal office" — section 30-21-102(36), Idaho Code.

(7) "Property" — section 30-21-102(41), Idaho Code.

(8) "Record" — section 30-21-102(44), Idaho Code.

(9) "Registered agent" — section 30-21-102(45), Idaho Code.

(10) "Sign" — section 30-21-102(47), Idaho Code.

(11) "State" — section 30-21-102(48), Idaho Code.

(12) "Transfer" — section 30-21-102(50), Idaho Code.

History.

I.C., § 30-24-102, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

Subsection (a) — Subsection (a) contains definitions for terms used throughout this article.

Subsection (b) — Subsection (b) contains a list of definitions in Article 1 that are applicable to limited partnerships.

"Certificate of limited partnership" [(a)(1)] — Until the 1985 amendments to the Revised Uniform Limited Partnership Act (1976), the certificate of limited partnership contained significant information about the limited partnership and the relationship among the partners. Consistent with the 1985 amendments and ULPA (2001), under this article the certificate: (i) merely reflects the existence of a limited partnership (rather than being the locus for important governance rules); and (ii) is significantly different from articles of incorporation, which have a substantially greater power to affect *inter se* rules for the corporate entity and its owners. For the relationship between the certificate of limited partnership and the partnership agreement, see Section 4-107(d).

"Contribution" [(a)(2)] — This definition serves to distinguish capital contributions from other circumstances under which a partner or would-be partner might provide benefits to a limited partnership (*e.g.*, providing services to the partnership as an employee or independent contractor, leasing property to the partnership).

This definition also distinguishes "contributions" from capital raised from transferees who invest; to be a contribution, the property or benefit must be "provided by a person . . . to become a partner or in the person's capacity as a partner." This distinction is ubiquitous in the law of unincorporated business organizations. *See, e.g.*, N.Y. Ltd. Liab. Co. Law § 102(f) (McKinney 2013) ("Contribution' means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to render services that a member contributes to a limited liability company in his or her capacity as a member.").

In contrast, partnership agreements sometimes provide for contributions from transferees. In such circumstances, the default rules for liquidating distributions should be altered accordingly. *See* Section 4-810(b)(1) (referring to distributions to be made "to each person owning a transferable interest that reflects *contributions* made and not previously returned") (emphasis added).

"Distribution" [(a)(3)(A) — redemptions included] — This provision specifically refers to transactions between a limited partnership and one of its partners, which in the corporate context would be labeled a "redemption." This paragraph has subparts because ownership interests in a partnership are conceptually bifurcated into economic rights ("transferable interests") and governance and information rights.

Under Section 4-503(a), "[a]ny distribution made by a limited partnership before its dissolution and winding up must be shared among the partners on the basis of the value, as stated in the required information when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner. . . . ." Since a redemption is a distribution, absent authorization in the partnership agreement a limited partnership may not redeem the interest of one partner or transferee without redeeming (or at least offering to redeem) the interests of all other partners and transferees to a comparable extent.

The law of close corporations has flirted with a similar notion. *See, e.g.*, *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 598, 328 N.E.2d 505, 518 (1975) (stating, with regard to closely held corporations, "if the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price"); *Toner v. Baltimore Envelope Co.*, 304 Md. 256, 273, 498 A.2d 642, 650 (1985) (rejecting the "per se breach of duty" approach); *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 850, 353 N.E.2d 657, 663 (1976) (stating that "untempered application of the strict good faith standard enunciated in *Donahue* to . . . will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned").

A partnership agreement can override Section 4-503(a)'s proportional treatment requirement without specifically mentioning redemptions.

> EXAMPLE: A limited partnership agreement: (i) includes a list (the "protected list") of decisions or actions that may be taken only with the consent of all the general partners and 2/3 of the interests owned by the limited partners; and (ii) provides that all other decisions and acts may be taken as the general partners determine. The protected list does not include redemptions. The partnership agreement overrides Section 4-503(a)'s proportional treatment requirement.

[(a)(3)(B) — exclusion] — This exclusion affects the reach of: (i) Section 4-505's clawback provisions; and (ii) the charging order remedy under Section 4-703. The effect on the clawback provision reflects the law in several states, *see, e.g.*, Del. Code Ann. tit. 6 § 17-607(a) (2012) and V.A. Code § 153.210(b) (2012), and makes sense conceptually and as a matter of policy. *See In re Tri-River Trading, LLC*, 329 B.R. 252, 266 (B.A.P. 8th Cir. 2005), *aff'd*, 452 F.3d 756 (8th Cir. 2006) ("We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.").

Affecting the charging order remedy is novel. For further explanation, see Section 4-703(a), comment.

“General partner” [(a)(4)] — A partnership agreement may vary Section 4-401 and provide a process or mechanism for becoming a general partner that is different from or additional to the rules stated in that section. *See* Section 4-401(b)(1). For the purposes of this definition, a person who becomes a general partner pursuant to a provision of the partnership agreement “become[s] a general partner under Section 4-401.” After a person has been dissociated as a general partner, Section 4-603, the term “general partner” continues to apply to the person’s conduct while a general partner. *See* Section 4-605(b).

“Limited liability limited partnership” [(a)(5)] — Typically, a general partnership becomes a limited liability partnership when the filing office files a statement of qualification submitted by the partnership. In contrast, LLLP status results from a statement in a limited partnership’s certificate of limited partnership. Section 4-201(b)(5) requires a limited partnership’s certificate of limited partnership to state “whether the limited partnership is a limited liability limited partnership.”

“Limited partner” [(a)(6)] — This definition parallels the definition of “general partner” and the comment to Paragraph 7 applies here as well.

“Limited partnership” [(a)(7)] — This definition makes no reference to a limited partnership having partners upon formation, but Section 4-201(d) does.

“Partnership agreement” [(a)(9)] — This definition must be read in conjunction with Sections 4-105 through 4-107, which further describe the partnership agreement. In particular, although this definition refers to “the agreement . . . of all the partners,” the limited partnership itself is bound by and may enforce the agreement. Section 4-106(a).

A partnership agreement is a contract, and therefore all statutory language pertaining to the partnership agreement must be understood in the context of the law of contracts.

The definition in Paragraph 9 is very broad and recognizes a wide scope of authority for the partnership agreement: “the matters described in Section 4-105(a).” Those matters include not only all relations *inter se* the partners and the partnership but also “the activities and affairs of the partnership and the conduct of those activities and affairs.” Section 4-105(a)(2). Moreover,

the definition puts no limits on the form of the partnership agreement. To the contrary, the definition contains the phrase "whether oral, implied, in a record, or in any combination thereof."

Unless the partnership agreement itself provides otherwise:

• a partnership agreement may comprise a number of separate documents (or records), however denominated; and

• subject to Section 4-106(b) (deeming new partners to assent to the then-existing partnership agreement), a document, record, understanding, *etc*. can be part of the partnership agreement only with the assent of all persons then partners.

An agreement among less than all partners might well be enforceable among those partners as parties, but would not be part of the partnership agreement. However, under Section 4-105(a)(3), an amendment to a partnership agreement can be made with less than unanimous consent if the partnership agreement itself so provides.

An agreement to form a limited partnership is not itself a partnership agreement. The term "partnership agreement" presupposes "partners," and a person cannot be a partner in a partnership before the partnership exists. However, as soon as a limited partnership comes into existence, it perforce has a partnership agreement. For example, suppose: (i) two persons, Gamma and Lambda, orally and informally agree to join their activities through a limited partnership, in which Gamma will be the general partner and Lambda the limited partner; (ii) an appropriate certification of limited partnership is delivered to the filing office, which files the certificate; (iii) Gamma and Lambda become respectively the general and limited partner; and (iv) the limited partnership is thus formed under Section 4-201(d). A partnership agreement exists. In the words of Paragraph 9 "all the partners" have agreed who the partners are, that, as "all the partners" they will conduct a business, and that Gamma will be the managing partner and Lambda will be more or less passive. That agreement — no matter how informal or rudimentary —is an agreement "concerning the matters described in Section 4-105(a)." To the extent the agreement does not provide the *inter se* "rules of the game," the "default rules" of this article "fill in the gaps." Section 4-105(b).

This article states no rule as to whether the statute of frauds applies to partnership agreements. Case law suggests that the answer is yes:

> Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing [and signed by the party to be bound]; however, a contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside the Statute of Frauds

Abbott v. Hurst, 643 So.2d 589, 592 (Ala. 1994) (citations omitted). *See also Chase Pratt, LLC v. Aetna Life Ins. Co*., CV 960560740S, 1999 WL 229214 at *4 (Conn. Super. Ct. Mar. 26, 1999) (recognizing that the one-year provision applies to limited partnership agreements but holding the provision inapplicable to a stated "99-year term," because the agreement permitted dissolution at any time "earlier by mutual consent of the Partners") (quoting the partnership agreement).

Likewise, the land provision of the statute of frauds:

> applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.

Froiseth v. Nowlin, 156 Wash. 314, 316, 287 P. 55, 56 (Wash. 1930) (quoting 27 C.J.S. § 220). *See also E. Piedmont 120 Associates, L.P. v. Sheppard*, 209 Ga. App. 664, 665, 434 S.E.2d 101, 102 (Ga. Ct. App. 1993) (same, stating that "the fact that promises covered by the Statute of Frauds are made in the context of a partnership or joint venture agreement does not render the statute inapplicable"); *Filippi v. Filippi*, 818 A.2d 608, 618 (R.I. 2003) (applying the statute of frauds to an alleged oral agreement to transfer land owned by a limited partnership to one of its partners).

In contrast, the land provision does not apply to a partner's interest in a partnership, no matter how much the partnership owns or deals in real property. Interests in a partnership are personal property and reflect no direct interest in the entity's assets. See Sections 4-102(24) and 4-701.

Thus, the real property issues pertaining to a partnership ownership of land do not "flow through" to the partners and partnership interests. *See, e.g.*, *Wooten v. Marshall*, 153 F. Supp. 759, 763-764 (S.D.N.Y. 1957) (involving an "oral agreement for a joint venture concerning the purchase, exploitation and eventual disposition of this 160 acre tract" and stating "[t]he real property acquired and dealt with by the venturers takes on the character of personal property as between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]"). *See also Wade v. DeHart*, 26 Ohio N.P. 560 (Ohio Com. Pl. 1926), *aff'd sub nom., Wade v. De Hart*, 26 Ohio App. 177, 159 N.E. 838 (Ohio Ct. App. 1927) (same).

On the question of how far a written (or "in a record") partnership agreement can go to prevent oral or implied-in-fact terms, see Section 4-105(a)(3), comment. For the effect of a pre-formation agreement, see Section 4-106(c).

"Transferable interest" [(a)(11)] — Absent a contrary provision in the partnership agreement or the consent of the partners, a "transferable interest" is the only interest in a limited partnership which can be transferred. *See* Section 4-702.

This article defines "[t]ransferable interest" as an interest "initially owned by a person in the person's capacity as a partner," because this article does not contemplate a limited partnership directly creating interests that comprise only economic rights. *See* Sections 4-301 and 4-401 (addressing how a person becomes a limited and general partner) and 4-702 (addressing how a person becomes a transferee).

"Transferee" [(a)(12)] — This definition should be read in light of Sections 4-602(a)(3) and 4-605(a)(4), which subject to limited exceptions provide that "any transferable interest owned by [a general or limited partner] in the person's capacity as a [general or limited] partner immediately before dissociation is owned by the person solely as a transferee."

§ 30-24-103. Knowledge — Notice. — (a) A person knows a fact if the person:

(1) Has actual knowledge of it; or

(2) Is deemed to know it under law other than this chapter.

(b) A person has notice of a fact if the person:

(1) Has reason to know the fact from all the facts known to the person at the time in question; or

(2) Is deemed to have notice of the fact under subsection (c) or (d) of this section.

(c) A certificate of limited partnership on file in the office of the secretary of state is notice that the partnership is a limited partnership and the persons designated in the certificate as general partners are general partners. Except as otherwise provided in subsection (d) of this section, the certificate is not notice of any other fact.

(d) A person not a partner is deemed to have notice of:

(1) Another person's dissociation as a general partner ninety (90) days after an amendment to the certificate of limited partnership that states that the other person has dissociated becomes effective or ninety (90) days after a statement of dissociation pertaining to the other person becomes effective, whichever occurs first;

(2) A limited partnership's:

(A) Dissolution ninety (90) days after an amendment to the certificate of limited partnership stating that the limited partnership is dissolved becomes effective;

(B) Termination ninety (90) days after a statement of termination under section 30-24-802(b)(2)(F), Idaho Code, becomes effective; and

(C) Participation in a merger, interest exchange, conversion, or domestication ninety (90) days after articles of merger, interest

exchange, conversion, or domestication under chapter 22, title 30, Idaho Code, become effective.

(e) Subject to section 30-21-212, Idaho Code, a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to know the fact.

(f) A general partner's knowledge or notice of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership, except in the case of a fraud on the partnership committed by or with the consent of the general partner. A limited partner's knowledge or notice of a fact relating to the partnership is not effective as knowledge of or notice to the partnership.

History.

I.C., § 30-24-103, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

Three aspects of this section warrant particular note. First, this section is substantially slimmer than the corresponding provisions of previous uniform acts pertaining to business organizations: UPA (1997), ULLCA (1996), and ULPA (2001). Each of those acts borrowed heavily from the comparable provision of the Uniform Commercial Code. This article relies instead on generally applicable principles of agency law, see Section 1-702 (Supplemental Principles of Law), although Subsection (f) does provide a rule for attributing to a partnership knowledge or notice possessed by a general partner.

Second, the section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this article than in other circumstances; and (iv) are the subject of considerable attention in the Restatement (Third) of Agency) (2006).

Third, this article does not define "notice" to include "knowledge." Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for

the uninitiated. In ordinary usage, notice has a meaning separate from knowledge. This article follows ordinary usage and therefore contains some references to "knowledge or notice."

Subsection (a)(2) — In this context, the most important source of "law other than this [Code]" is the common law of agency.

Subsection (b)(1) — The "facts known to the person at the time in question" include facts the person is deemed to know under Subsection (a)(2).

Subsection (c) — As for the significance of constructive notice "that the partnership is a limited partnership," see *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1001 1003 (Colo. 1998) (interpreting a comparable provision of the Colorado LLC statute and holding the provision ineffective to change common law agency principles, including the rules relating to the liability of an agent that transacts business for an undisclosed principal).

As for constructive notice that "the persons designated in the certificate as general partners are general partners," Section 4-201(b)(4) requires the initial certificate of limited partnership to name each general partner, and Section 4-202(d) requires a limited partnership to promptly amend its certificate of limited partnership to reflect any change in the identity of its general partners. Nonetheless, it will be possible, albeit improper, for a person to be designated in the certificate of limited partnership as a general partner without having become a general partner as contemplated by Section 4-401. Likewise, it will be possible for a person to have become a general partner under Section 4-401 without being designated as a general partner in the certificate of limited partnership. According to the last clause of this subsection, the fact that a person is not listed in the certificate as a general partner is not notice that the person is not a general partner. For further discussion of this point, see the comment to Section 4-401.

If the partnership agreement and the public record are inconsistent, the partnership agreement prevails as to *inter se* matters and the record prevails as to third parties who have reasonably relied on it. Section 4-107(d). *See also* Sections 4-202(d) (requiring the limited partnership to amend its certificate of limited partnership to keep accurate the listing of general partners), 4-202(e) (requiring a general partner to take corrective action when the general partner knows that the certificate of limited partnership

contains false information), and 4-205 (imposing liability for false information in, *inter alia*, the certificate of limited partnership).

Subsection (d) — This subsection provides constructive notice of facts stated in specified filed public records. The subsection works in conjunction with other sections of this article to curtail the power to bind and personal liability of general partners and persons dissociated as general partners. *See* Sections 4-402, 4-606, 4-607, 4-804, and 4-805. The constructive notice begins ninety days after the effective date of the filed record. For the rules on delayed effective dates, see Section 1-203.

The 90-day delay applies only to the constructive notice and not to the event described in the filed record.

EXAMPLE: On March 15, X dissociates as a general partner from XYZ Limited Partnership by giving notice to XYZ. *See* Section 4-603(1). On March 20, XYZ amends its certificate of limited partnership to remove X's name from the list of general partners. See Section 4-202(d)(2).

X's dissociation is effective March 15. If on March 16 X purports to be a general partner of XYZ and under Section 4-606(a) binds XYZ to some obligation, X will be liable under Section 4-606(b) as a "person dissociated as a general partner."

On June 19 (90 days after March 20), the world has constructive notice of X's dissociation as a general partner. Beginning on that date, X will lack the power to bind XYZ. *See* Section 4-606(a)(2)(B) (providing that a person dissociated as a general partner can bind the limited partnership only if, *inter alia*, "at the time the other party enters into the transaction . . . the other party does not know or have notice of the dissociation").

Constructive notice under this subsection applies to partners and transferees as well as other persons.

Subsection (e) — If a person "notifies" another person of a fact, the other person has "reason to know" the fact and therefore has notice under Subsection (b)(1). However, a person can have "notice" of a fact without having been "notifie[d]" of the fact.

Section 1-212 pertains to delivery of records *by* the filing office.

Subsection (f) — This subsection states the rule for imputing a partner's knowledge or notice to the partnership. Under this subsection and Section 4-302, information possessed by a person that is only a limited partner is not attributable to the limited partnership. However, information possessed by a person that is both a general partner and a limited partner is attributable to the limited partnership. *See* Section 4-109 (Dual Capacity). For a discussion of agency law principles analogous to "fraud on the partnership," see Restatement (Third) of Agency § 5.04 cmt. b (2006).

§ 30-24-104. Governing law. — The law of this state governs:

(1) The internal affairs of a limited partnership; and (2) The liability of a partner as partner for the debts, obligations, or other liabilities of a limited partnership.

History.

I.C., § 30-24-104, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

Paragraph (1) — Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the partnership agreement, relations among the partners as partners, and relations between the limited partnership and its partners. *Compare* Section 4-104, with Restatement (Second) of Conflict of Laws § 302 cmt. a (1971) (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

"Internal affairs" do not encompass the power *vel non* of a person to bind a limited partnership. Restatement (Second) of Conflict of Laws § 292(2) (1971) ("The principal will be held bound by the agent's action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority."); *Id*. § 295(1) ("Whether a partnership is bound by action taken on its behalf by an agent in dealing with a third person is determined by the local law of the state selected by application of the rule of § 292."); Restatement (First) of Conflict of Laws § 345 cmt. c (1934) (Law Governing Effect of Act of Agent or Partner) ("If . . . the principal or partner sends the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only for authorized but for unauthorized conduct of the agent or partner in accordance with the law of that state."). *See also Farm & Ranch Services, Ltd. v. LT Farm & Ranch*, LLC, 779 F. Supp. 2d 949, 960 (S.D. Iowa 2011).

The partnership agreement cannot alter this section. *See* Section 4-105(c)(1). However, partnership agreement may lawfully incorporate by reference the provisions of another state's limited partnership statute. If done correctly, this incorporation makes the foreign statutory language part of the partnership agreement, and the incorporated terms (together with the rest of the partnership agreement) then govern the partners (and those claiming through the partners) to the extent not prohibited by this article. *See* Section 4-105. This approach: (i) does not switch the limited partnership's governing law to that of another state; (ii) instead takes the provisions of another state's law and incorporates them by reference into the contract among the partners; (iii) raises complex drafting issues — *e.g.*, how to address subsequent changes to the incorporated law (whether occurring by statutory amendment or court decision); and (iv) thus is rarely, if ever, a good idea.

Paragraph (2) — This paragraph obviously encompasses Sections 4-303 (the liability shield for limited partners) and 4-404(c) (the shield for general partners in a limited liability limited partnership), but does not encompass a claim that a partner is liable to a third party for: (i) having purported to bind a limited partnership to the third party; or (ii) having committed a tort against the third party while acting on a limited partnership's behalf or in the course of the partnership's business. That liability is not by status (*i.e.*, not partner as a partner) but rather results from function or conduct. *Cf.* Section 4-302(b) (stating that, although this article does not make a limited partner as limited partner the agent of a limited partnership, other law may make a limited partnership liable for the conduct of a limited partner).

"Internal affairs" and the "liability of a partner as a partner" are mentioned separately because it can be argued that the liability of partners to third parties is not an internal affair. *See, e.g.,* Restatement (Second) of Conflict of Laws, § 307 (1971) (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. *See, e.g., Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993) (holding that the corporation's "primary purpose is to insulate shareholders from legal liability" and therefore "the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away") (quoting

Soviet Pan Am Travel Effort v. Travel Comm., Inc., 756 F. Supp. 126, 131 (S.D.N.Y. 1991) (internal quotation marks omitted).

In any event, most (if not all) limited partnership statutes follow the rule stated in this paragraph. *See* ULPA (1975/1986) § 901 (stating that "the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners"); and ULPA (2001) § 901 (same, but as to all partners).

Moreover, "[t]he general rule [from the case law] is that a plaintiff's alter ego theory is governed by the law of the state in which the business at issue is organized." *Rual Trade Ltd. v. Viva Trade LLC*, 549 F. Supp. 2d 1067, 1077 (E.D. Wis. 2008). *See also, e.g., In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 787 (Bankr. W.D. La. 2013) (stating both conceptual and policy rationales for choosing the law of the state of formation); *In re Saba Enters.*, 421 B.R. 626, 648-51 (Bankr. S.D.N.Y. 2009) (examining the issue in detail and applying the state of formation rule).

§ 30-24-105. Partnership agreement — Scope — Function — Limitations. — (a) Except as otherwise provided in subsections (c) and (d) of this section, the partnership agreement governs:

(1) Relations among the partners as partners and between the partners and the limited partnership;

(2) The activities and affairs of the partnership and the conduct of those activities and affairs; and

(3) The means and conditions for amending the partnership agreement.

(b) To the extent the partnership agreement does not provide for a matter described in subsection (a) of this section, this chapter governs the matter.

(c) A partnership agreement may not:

(1) Vary the provisions of chapter 21, title 30, Idaho Code;

(2) Vary the law applicable under section 30-24-104, Idaho Code;

(3) Vary a limited partnership's capacity under section 30-24-111, Idaho Code, to sue and be sued in its own name;

(4) Vary any requirement, procedure, or other provision of this act pertaining to:

(A) Registered agents; or

(B) The secretary of state, including provisions pertaining to records authorized or required to be delivered to the secretary of state for filing under this act;

(5) Vary the provisions of section 30-21-210, Idaho Code;

(6) Vary the right of a general partner under section 30-24-406(b)(2), Idaho Code, to vote on or consent to an amendment to the certificate of limited partnership which deletes a statement that the limited partnership is a limited liability limited partnership;

(7) Alter or eliminate the duty of loyalty or the duty of care except as otherwise provided in subsection (d) of this section;

(8) Eliminate the contractual obligation of good faith and fair dealing under sections 30-24-305(a) and 30-24-409(d), Idaho Code, but the partnership agreement may prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured;

(9) Relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law;

(10) Vary the information required under section 30-24-108, Idaho Code, or unreasonably restrict the duties and rights under section 30-24-304 or 30-24-407, Idaho Code, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;

(11) Vary the power of a person to dissociate as a general partner under section 30-24-604(a), Idaho Code, except to require that the notice under section 30-24-603(1), Idaho Code, be in a record;

(12) Vary the causes of dissolution specified in section 30-24-801(a)(6), Idaho Code;

(13) Vary the requirement to wind up the partnership's activities and affairs as specified in section 30-24-802(a), (b)(1) and (d), Idaho Code;

(14) Unreasonably restrict the right of a partner to maintain an action under part 9 of this chapter;

(15) Vary the provisions of section 30-24-905, Idaho Code, but the partnership agreement may provide that the partnership may not have a special litigation committee;

(16) Vary the right of a partner to approve a merger, interest exchange, conversion, or domestication under section 30-22-203(a)(2), 30-22-303(a)(2), 30-22-403(a)(2) or 30-22-503(a)(2), Idaho Code;

(17) Vary any requirement, procedure, or other provision of this chapter pertaining to the secretary of state, including provisions pertaining to records authorized or required to be delivered to the secretary of state for filing under this chapter; or

(18) Except as otherwise provided in sections 30-24-106 and 30-24-107(b), Idaho Code, restrict the rights under this chapter of a person other than a partner.

(d) Subject to subsection (c)(8) of this section, without limiting other terms that may be included in a partnership agreement, the following rules apply:

(1) The partnership agreement may:

(A) Specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one (1) or more disinterested and independent persons after full disclosure of all material facts; and

(B) Alter the prohibition in section 30-24-405(a)(2), Idaho Code, so that the prohibition requires only that the company's [partnership's] total assets not be less than the sum of its total liabilities.

(2) If not manifestly unreasonable, the partnership agreement may:

(A) Alter or eliminate the aspects of the duty of loyalty stated in section 30-24-409(b), Idaho Code;

(B) Identify specific types or categories of activities that do not violate the duty of loyalty;

(C) Alter the duty of care, but may not authorize conduct involving bad faith, willful or intentional misconduct, or knowing violation of law; and

(D) Alter or eliminate any other fiduciary duty.

(e) The court shall decide as a matter of law whether a term of a partnership agreement is manifestly unreasonable under subsection (c)(7) or (d)(2) of this section. The court:

(1) Shall make its determination as of the time the challenged term became part of the partnership agreement and by considering only circumstances existing at that time; and

(2) May invalidate the term only if, in light of the purposes, activities, and affairs of the limited partnership, it is readily apparent that:

(A) The objective of the term is unreasonable; or

(B) The term is an unreasonable means to achieve the provision's objective.

History.

I.C., § 30-24-105, as added by 2015, ch. 243, § 33, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Compiler's Notes.

The bracketed insertion in paragraph (d)(1)(B) was added by the compiler to conform to the uniform act.

Official Comment

The Harmonization Project rewrote this section to conform, for the most part, to the corresponding section of ULLCA (2006) (Last Amended 2013).

Principal Provisions of the Article Concerning the Partnership Agreement

The partnership agreement is pivotal to a limited partnership, and Sections 4-105 through 4-107 are pivotal to this article. They must be read together, along with Section 4-102(a)(9) (defining the partnership agreement).

This Section performs five essential functions. Subsection (a) establishes the primacy of the partnership agreement in establishing relations *inter se* the limited partnership and its partners. Subsection (b) recognizes this article as comprising mostly default rules — *i.e.*, gap fillers for issues as to which the partnership agreement provides no rule. Subsection (c) lists the few mandatory provisions of the article. Subsection (d) lists some provisions frequently found in partnership agreements, authorizing some provisions unconditionally and other provisions so long as "not manifestly unreasonable." Subsection (e) delineates in detail both the meaning of "not manifestly unreasonable" and the information relevant to a determining a claim that a provision of a partnership agreement is manifestly unreasonable.

Section 4-106 details the effect of a partnership agreement on the limited partnership and on persons becoming partners. Section 4-107 concerns the effect of a partnership agreement on third parties.

Role and Inevitability of Partnership Agreement

"A limited partnership is a creature of both statute and contract." *Cantor Fitzgerald, L.P. v. Cantor*, CIV.A. 18101, 2001 WL 1456494 at *5 (Del. Ch. Nov. 5, 2001); *Gottsacker v. Monnier*, 281 Wis. 2d 361, 370, 697 N.W.2d 436, 440 (2005) (stating that "from the partnership form, the LLC borrows . . . internal governance by contract"), and Section 102(14) delineates a very broad scope for "partnership agreement." As a result, once a limited partnership comes into existence and has at least one general partner and one limited partner, a partnership agreement necessarily exists. See the comment to Section 4-102(a)(9). Accordingly, this article refers to "the partnership agreement" rather than "a partnership agreement." This phrasing should not, however, be read to require a limited partnership or its partners to take any formal action to adopt a partnership agreement.

Subject only to Subsections (c) and (d), the partnership agreement has plenary power to structure and regulate the relations of the partners *inter se* . Although the certificate of limited partnership is a limited partnership's foundational document, among the partners the partnership agreement controls.

The partnership agreement is the exclusive consensual process for modifying this article's various default rules pertaining to relationships it inter se the partners and between the partners and the limited partnership. Section 4-105(b). The partnership agreement also has power over "[t]he obligations of a limited partnership and its partners to a person in the person's capacity as a transferee or a person dissociated as a partner." Section 4-107(b). For the relationship between the partnership agreement and certificate of limited partnership, see Section 4-107(d).

The Partnership Agreement and the Fiduciary and Other Duties of the General Partner

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization's

owners can affect the fiduciary and other duties of those who manage the organization — in the case of a limited partnership, the general partner (or partners). As explained in detail in the comment to Subsection (d)(3), this article rejects the notion that a contract can completely transform an inherently fiduciary relationship into a merely arm's length association. Within that limitation, however, this section provides substantial power to the partnership agreement to reshape, limit, and eliminate fiduciary and other managerial duties.

Subsection (a) recognizes that the partnership agreement is the map to the parties' deal and that any claim by a partner of managerial misconduct must be assessed first under the relevant terms of the partnership agreement. Subsection (d) specifically validates arrangements commonly used to reshape managerial duties and limit the consequences of breaching those duties. Subsection (c) contains relevant limitations, but those limitations: (i) must be read together with Subsection (d); and (ii) do not preclude the partnership agreement fundamentally redesigning the duties applicable to the general partners. For the article's design of those duties, see Sections 4-304, 4-407, and 4-409.

Subsection (a) — This subsection describes the very broad scope of a limited partnership's partnership agreement, which includes all matters constituting "internal affairs."*Compare* Section 4-105(a), *with* Section 4-104(1) (using the phrase "internal affairs" in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in Subsection (c), including the broad restriction stated in Paragraph (c)(18) (concerning the rights of third parties under this article).

Subsection (a)(1) — This paragraph encompasses all the rights and duties of each partner, including rights and duties pertaining to transactions under Article 2.

Subsection (a)(3) — Under this provision, the partnership agreement can control both the quantum of consent required (*e.g.*, majority of partners) and the means by which the consent is manifested (*e.g.*, prohibiting modifications except when consented to in writing). *See also* the comment to Section 4-107(a).

Under subsection (b) if the partnership agreement does not address the issue, this article provides the rule. Section 4-407(b)(4)(C) (requiring the

affirmative vote or consent of all the partners) and 4-407(c)(3)(C) (same). Under Section 1-702 (Supplemental Principles of Law), the parol evidence rule will apply to a written partnership agreement when appropriate under contract law.

Subsection (b) — To the extent the partnership agreement does not determine an *inter se* matter, this article determines the matter. The partnership agreement may vary any provision of this article pertaining to *inter se* matters, except as provided in Subsections (c) and (d).

Sometimes — but not always — the comments to this article refer to a variable provision as a "default rule" and a non-waivable provision as "mandatory." These references are merely to draw attention to the default/mandatory distinction in particular contexts and have neither the intent nor the power to affect the default/mandatory status of provisions of this article whose comments lack a comparable reference.

Subsection (c) — This subsection lists provisions of this article whose respective effects cannot be varied or may be varied subject to a stated limitation. For historical reasons, this subsection uses the words "vary" and "alter" interchangeably. No difference in meaning is intended.

If a person claims that a term of the partnership agreement violates this subsection, as a matter of ordinary procedural law the burden of proof is on the person making the claim.

Subsection (c)(1) — Section 4-104 states that this article provides the law applicable to: (i) the internal affairs of a limited partnership formed under this article; and (ii) the liability of partners for obligations of the limited partnership. The organizers of a limited partnership make this choice of law by choosing to form a limited partnership under this act. Domestication to another jurisdiction will re-set the choice of law, *see* Sections 2-501 through 2-506, but the partnership agreement cannot. The partnership agreement may incorporate wholesale and by reference the provisions of another jurisdiction's limited partnership statute, but that approach raises complex drafting issues — *e.g.*, how to address future revisions to that statute — and in any event is subject to the strictures of Section 4-105(c) and (d). *See also* the comment to Section 4-104(1).

Subsection (c)(2) — Under this article, a limited partnership is emphatically an entity, and the partners lack the power to alter that characteristic.

Subsection (c)(3) — This prohibition is arguably implicit in Subsection (c)(18) (affecting rights of third parties under this article) but is stated expressly to avoid any doubt.

Subsection (c)(4) — This provision means that the partnership agreement cannot affect the right of an "aggrieved" person to seek the court's help when "a person required by this [Code] to sign a record or deliver a record to the filing office for filing under this [Code] does not do so." Section 1-210.

Subsection (c)(5) — Because deleting the specified statement exposes each general partner to unlimited liability for each debt, liability, or other obligation of the limited partnership accrued after the deletion: (i) Section 4-406(b)(2) gives each general partner veto power; and (ii) this subsection makes that power non-waivable.

Subsection (c)(6) — This limitation is less powerful than might first appear, because Subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care, including restricting and substantially eliminating those duties.

Subsection (c)(7) — Sections 4-305(a) and 4-409(d) refer to the "contractual obligation of good faith and fair dealing," which contract law implies in every contract. The partnership agreement cannot eliminate this obligation, neither in whole (*i.e.*, generally) nor in part (*i.e.*, as applicable to specified situations).

However, a partnership agreement may "prescribe the standards . . . by which the performance of the obligation is to be measured."

> EXAMPLE: The partnership agreement of a limited partnership gives the general partner the discretion to cause the limited partnership to enter into contracts with affiliates of the general partner (so-called "Conflict Transactions"). The agreement further provides: "When causing the Limited Partnership to enter into a Conflict Transaction, the general partner complies with Section 4-409(d) of [this article] if a disinterested person, knowledgeable in the subject matter, states in writing that the

terms and conditions of the Transaction are equivalent to the terms and conditions that would be agreed to by persons at arm's length in comparable circumstances." This provision "prescribe[s] the standards by which the performance of the [Section 4-409(d)] obligation is to be measured."

EXAMPLE: Same facts as the previous example, except that, during the performance of a Conflict Transaction, the general partner causes the limited partnership to waive material protections under the applicable contract. The standard stated in the previous example is inapposite to this conduct. Section 4-409(d) therefore applies to the conduct without any direct contractual delineation. (However, other terms of the agreement may be relevant to determining whether the conduct violates Section 4-409(d). See the comment to Section 4-409(d).

EXAMPLE: The partnership agreement of a limited partnership gives the general partner "sole discretion" to make various decisions. The agreement further provides: "Whenever this agreement requires or permits a general partner to make a decision that has the potential to benefit one class of partners to the detriment of another class, the general partner complies with Section 4-409(d) of [this article] if the general partner makes the decision with:

a. the honest belief that the decision:

i. serves the best interests of the Limited Partnership; or

ii. at least does not injure or otherwise disserve those interests; and

b. the reasonable belief that the decision breaches no partner's rights under this agreement."

This provision "prescribe[s] the standards by which the performance of the [Section 4-409(d)] obligation is to be measured." *Compare* Section 4-105(c)(7), *with Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) (considering such a situation in the context of the right to call preferred stock and deciding by a 3-2 vote that exercising the call did not breach the implied covenant of good faith and fair dealing).

A partnership agreement that seeks to prescribe standards for measuring the contractual obligation of good faith and fair dealing under Section 409(d) should expressly refer to the obligation. *See Gerber v. Enter. Prods.*

Hldgs., LLC, 67 A.3d 400, 418 (Del. 2013) (distinguishing between the implied contractual covenant and an express contractual obligation of "good faith" as stated in a limited partnership agreement).

For an explanation of the function and role of the covenant of good faith and fair dealing, see the comment to Section 4-409(d). For the rules delimiting the "not manifestly unreasonable" requirement, see Subsection (e).

Subsection (c)(8) — These restrictions are ubiquitous in the law of business entities and, in conjunction with other provisions of this section, control the otherwise very broad power of a partnership agreement to affect fiduciary and other duties. The restrictions are central to the raft of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985). Delaware led the response with Del. Code Ann. tit. 8, § 102(b)(7), and a number of LLC statutes have similar provisions. *E.g*. Ga. Code Ann. § 14-11-305(4)(A) (2011). For an extreme example, see Va. Code Ann. § 13.1-1025 (B) (2012). In this context, "conduct" includes both acts and omissions. Black's Law Dictionary (9th ed. 2009) (defining conduct as "[p]ersonal behavior, whether by action or inaction").

The term "bad faith" has multiple meanings, and the context determines which meaning applies. In the context of the duty of loyalty, "bad faith" includes conduct motivated by ill will or other intent purposely to harm another person. The concept also includes conduct from which a person derives an improper personal benefit. *See, e.g., Mroz v. Hoaloha Na Eha, Inc*., 410 F. Supp. 2d 919, 936-37 (D. Haw. 2005) (denying a motion to dismiss a claim that "the Majority Partners" were personally liable for the partnership's wrongful termination of the plaintiff; quoting the complaint as alleging that "the Majority Partners, individually and as a group, acted with malice and/or ill will, and or with an intent to serve their own personal interests and/or without an intent to serve company interests, and/or outside of the scope of their authority and/or without justification"); *BOGNC, LLC v. Cornelius NC Self-Storage LLC*, 10 CVS 19072, 2013 WL 1867065 at *9 (N.C. Super. [Business Court] May 1, 2013) (noting that "no . . . [exculpatory] provision may limit a manager's liability for acts known to be in conflict with the interests of the limited liability company, or for acts from which the manager derived an improper personal benefit") (citing

N.C. Gen. Stat. § 57C-3-32(b)); *Lasica v. Savers Grp. of Minnesota, LLC*, A12-0092, 2012 WL 3553246 at *2 (Minn. Ct. App. Aug. 20, 2012) (noting that an "individual seeking indemnification [under statute providing for indemnification)] must have acted in good faith and must not have received an improper personal benefit") (citing Minn. Stat. § 322B.69, subds. 2(a)(2), (3) (2010)).

In the context of the duty of care, the concept of bad faith comes primarily from corporate law and means an extreme breach of the duty — *i.e.*, "the failure to exercise *honest judgment* in the lawful and legitimate furtherance of corporate purposes." *Deblinger v. Sani-Pine Products Co., Inc.*, 107 A.D.3d 659, 661, 967 N.Y.S.2d 394 (2013) (quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994 (1979) (emphasis added) (internal quotation marks omitted).

Thus, when a plaintiff alleges bad faith as pertaining to the duty of care, "[t]he burden . . . is to show irrationality: a plaintiff must demonstrate that no reasonable business person could possibly authorize the action in good faith. Put positively, the decision must go so far beyond the bounds of reasonable business judgment that its only explanation is bad faith." *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (discussing then prevailing Delaware law) (citation omitted). *See also KDW Restructuring & Liquidation Servs. LLC v. Greenfield*, 874 F. Supp. 2d 213, 226 (S.D.N.Y. 2012) (referring to a lack of "a rationale corporate purpose" and "a disregard for the duty to examine all available information — *information that was readily at hand* ") (emphasis added).

With regard to both the duty of loyalty and the duty of care, "bad faith" is entirely distinct from the meaning of "good faith" in the contractual covenant of good faith and fair dealing. See the comment to Section 4-409(d).

Subsection (c)(8) pertains to indirect as well as direct efforts to "relieve or exonerate" and thus limits how far a partnership agreement can go in providing for indemnification. See Section 4-408(b) (stating a default rule for indemnification).

Although this paragraph does not expressly address contracts between a limited partnership and a general partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

EXAMPLE: A limited partnership enters into a management contract with its general partner, and the contract provides the general partner exoneration for liability to the limited partnership even for willful and intentional misconduct. Most likely, contract law will treat the provision as against public policy and therefore unenforceable. Restatement (Second) of Contracts) § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."). If not, a court should hold the provision unenforceable to avoid evisceration of Subsection (c)(8). (Or, the court could invoke the policy expressed in Subsection (c)(8) as grounds for holding the provision unenforceable under contract law.)

Subsection (c)(9) — Although phrased as a restriction, this provision grants substantial power to the partnership agreement

EXAMPLE: The partnership agreement of a limited partnership states "No limited partner may have access to information constituting a trade secret of the Partnership." This restriction is reasonable.

The information required under Section 4-108 is skeletal, and the partnership agreement can impose reasonable limitations on access to and use of other information.

The article also empowers the limited partnership "as a matter within the ordinary course of its activities and affairs [to] impose reasonable restrictions and conditions on access to and use of information" obtained under Section 4-304 or 4-407. *See* Sections 304(j) and 4-407(j), cmts.

In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored. Under this article, general and limited partners have sharply different roles. A restriction that is reasonable as to a limited partner is not necessarily reasonable as to a general partner. Restricting a limited partner's access to or use of the names and addresses of other limited partners is not per se unreasonable.

Subsection (c)(11) — A partnership agreement certainly may make a person's dissociation as a general partner a breach of contract, but

eliminating even the power to dissociate would contradict the essence of the limited partnership. General partners in a limited partnership are analogous to partners in a general partnership, and the relationship among general partners is at its core a *voluntary* association.

Moreover, general partners in a limited partnership provide services not only as fiduciaries but also pursuant to a contract. See Section 4-105, cmt. (Role and Inevitability of Partnership Agreement). Only in exceptional circumstances does a party to a contract lack the power to breach, and such circumstances do not exist as to general partners of a limited partnership. Indeed, courts will not enjoin a person to remain in an ongoing contractual relationship that involves trust and confidence. E. Allan Farnsworth, Contracts § 12.7 at 781 (3rd ed. 1999) ("A court will not grant specific performance of a contract to provide a service that is personal in nature. This refusal . . . is based [in part] of the undesirability of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken and the undesirability, in some instances, of imposing what might seem like involuntary servitude.") (footnote omitted).

For two reasons this article treats limited partners quite differently. First, to make possible this article a suitable vehicle for family limited partnerships, "[a] person does not have a right to dissociate as a limited partner before the completion of the winding up of the limited partnership." Section 4-601(a).

Second, the partnership agreement may eliminate a limited partner's power to dissociate, because limited partners do not resemble contract obligors. Limited partners *qua* limited partners provide no services to the limited partnership, and therefore the analysis stated in the second paragraph of this comment does not apply. Moreover, limited partners have no fiduciary duties, Section 4-305(b), and therefore the analysis stated in the first paragraph of this comment is inapposite as well.

Subsection (c)(12) — The partnership agreement may not change the stated grounds for judicial dissolution but may determine the forum in which a claim for dissolution under Section 4-801(a)(6) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and in partnership agreements in particular.

The approach of this paragraph differs from the law of Delaware. *See Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898 at *1 and n.2 (Del. Ch. Dec. 9, 2013) (stating that "the right to judicial dissolution is a default right which the parties may eschew by contract" but reserving the question of "[w]hether the parties may, by contract, divest this Court of its authority to order a dissolution in all circumstances, even where it appears manifest that equity so requires — leaving, for instance, irreconcilable members locked away together forever like some alternative entity version of Sartre's *Huis Clos* ").

Subsection (c)(13) — The cited provisions comprise the non-waivable aspects of winding up a dissolved limited partnership. The other provisions of Section 4-802 are default rules.

Subsection (c)(14) — Part 9 delineates a partner's rights to bring direct and derivative actions. It would be unreasonable to frustrate these rights but not unreasonable to channel their exercise. For example, the partnership agreement might select a forum, require pre-suit mediation, provide for arbitration of both direct and derivative claims, or override Section 4-902 and require "universal demand" in all derivative cases. Similarly, it is not unreasonable to provide for liquidated damages consonant with the law of contracts. In contrast, it would be unreasonable for a partnership agreement to both: (i) require a would-be derivative plaintiff to make demand regardless of futility; and (ii) bar taking the claim to court no matter how long the general partners ponder the demand.

Subsection (c)(15) — A partnership agreement may not alter this article's rules for a special litigation committee but may preclude entirely the use of such a committee

Subsection (c)(16) — Section 2-203(a)(1), 2-303(a)(1), 2-403(a)(1), and 2-503(a)(1) each requires the consent or the affirmative vote of all partners. The partnership agreement may modify these requirements. In contrast, under the sections stated in this subsection:

• each partner is protected from being merged, exchanged, converted, or domesticated "into" the status of a partner in a general partnership that is not a limited liability partnership (or a comparable "unshielded" position in some other organization) without the member having *directly* consented to either:

¢i the merger, interest exchange, conversion, or domestication; or

¢i a partnership agreement provision that permits such transactions to occur with less than unanimous consent of the partners; and

• merely consenting to a partnership agreement provision that permits amendment of the agreement with less than unanimous consent of the partners does not qualify as the requisite direct consent.

Subsection (c)(17) — Because these plans are the basic "deal documents" for each of the organic transactions contemplated in Article 2, the partnership agreement may not vary the contents of these plans.

Subsection (c)(18) — This limitation pertains only to "the rights under this [Code] of" third parties other than partners. Moreover, the limitation is subject to two substantial exceptions: Section 4-106 (pertaining to the partnership agreement's relationship to the limited partnership itself and to persons becoming partners) and Section 4-107(b) (pertaining to the partnership agreement's power over the rights of transferees).

Subsection (d) — The partnership agreement has plenipotentiary power over the matters described in Subsection (a), except as specifically limited by Subsections (c). However, for the convenience of practitioners and the courts, Paragraphs 1 and 2 list various terms often found in partnership agreements. No negative inference should be drawn about terms not listed; the listing is provided "without limiting other terms that may be included in a partnership agreement."

Paragraph 2 lists arrangements subject to the "not manifestly unreasonable standard." Subsection (e) delineates that standard. The same standard applies to terms of a partnership agreement which seek to "prescribe the standards . . . by which the performance of the [contractual] obligation [of good faith and fair dealing] is to be measured." Subsection (c)(7).

Subsection (d)(1)(A) — An arrangement *not* involving "one or more disinterested and independent persons" acting "after full disclosure of all material facts" would "alter . . . the aspects of the duty of loyalty stated in Section 4-409(b)" and would therefore be subject to the "not manifestly unreasonable standard" of Subsection (d)(2)(A).

For the meaning of "material" as applied to information, see the comment to Section 4-409(f).

Subsection (d)(1)(B) — Section 4-504(a)(2) prohibits distributions:

• *not merely* when, after the distribution, "the partnership's total assets would be less than the sum of its total liabilities,"

• *but also* when, after the distribution, the assets would less than the total liabilities "plus the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to those of persons receiving the distribution."

The second part of the solvency test pertains to preferential rights to distributions, is thus a matter *inter se* the partners and any transferees, and is therefore subject to change in the partnership agreement.

In contrast, the first part of the solvency test protects third parties — creditors of the limited partnership — and therefore cannot be changed by the partnership agreement. Section 4-105(c)(18). Likewise, the partnership agreement cannot change solvency test stated in Section 4-504(a)(1) (that "the partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's activities and affairs").

Section (d)(2) — This article rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of "freedom of contract" against the dangers that inescapably exist when some have power over the interests of others.

Nonetheless, a properly drafted partnership agreement may substantially alter and even eliminate fiduciary duties. Two important limitations exist. First, arrangements subject to this subsection may not be "manifestly unreasonable." *See* Subsection (e) (delineating this standard).

Second, the partnership agreement may not transform the relationship *inter se* the general partners to the limited partnership and limited partners into an entirely arm's length arrangement. For example, displacement of fiduciary duties is effective only to the extent that the displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence

of fiduciary duty. *See, e.g., Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, Civ. A. No. 5502-CS, 2011 WL 3505355 at *31 (Del. Ch. Aug. 8 2011) (stating that, even under a statute that "permits the waiver of fiduciary duties . . . such waivers must be set forth clearly"); *Kelly v. Blum*, Civ. A. No. 4516-VCP, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010) ("Having been granted great contractual freedom by the LLC Act, drafters of or parties to an LLC agreement should be expected to provide . . . clear and unambiguous provisions when they desire to expand, restrict or eliminate the operation of traditional fiduciary duties"). It would therefore be manifestly unreasonable for a partnership agreement to negate this rule.

Although Subsection (d)(2) does not expressly address contracts between a limited partnership and general partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

> EXAMPLE: A limited partnership enters into a management contract with its sole general partner, and the contract provides that the duties of loyalty stated in Section 4-409(b) are entirely eliminated. If the partnership agreement were to so provide, the provision would be subject to the "manifestly unreasonable standard." Section 4-105(d)(2)(A). Absent the authorization provided by Section 4-105(d)(2)(A), the management contract's attempt to waive fiduciary duties may be unenforceable as a matter of public policy and contract law. *See Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 57, 133 Cal. Rptr. 2d 218 (2003) (stating that "waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in private close corporations is against public policy and a contract provision in a buy-sell agreement purporting to effect such a waiver is void"). If not, a court should hold the provision unenforceable nonetheless so as to avoid eviscerating Subsection (d)(2).

Subsection (d)(2)(A) — Subject to the "not manifestly unreasonable" standard, this paragraph empowers the partnership agreement to eliminate *all* aspects of the duty of loyalty listed in Section 4-409(b). The obligation of good faith and fair dealing, Section 4-409(d), would remain. *See* Subsection (c)(6). As to any other, uncodified aspects of the duty of loyalty, see Subsection (d)(2)(D) (empowering the partnership agreement to "alter or eliminate any other fiduciary duty").

EXAMPLE: Joint Venture Limited Partnership ("JV") is a limited partnership, with two general partners, Kappa, Inc. ("Kappa") and Lambda, LLC ("Lambda"). The partnership agreement provides that:

• JV is managed by a "board" consisting of one person appointed by Kappa and one person appointed by Lambda;

• each appointee:

¢i owes fiduciary and any other duties exclusively to the general partner that made the appointment; and

¢i owes no duties to:

□• the other general partner;

□• the limited partners; and

□• the limited partnership itself.

The "not manifestly unreasonable" standard applies to these provisions under Subsection (d)(2)(A) and (D), and the provisions are not manifestly unreasonable. Note that the provisions do not affect the duties of Kappa and Lambda as general partners.

EXAMPLE: ABC Limited Partnership ("ABC") is a limited partnership with three general partners. ABC has two entirely separate lines of business, the Alpha business and the Beta business. Under ABC's partnership agreement:

• general Partner 1's responsibilities pertain exclusively to the Alpha business, while responsibility for:

¢i the Beta business is allocated exclusively to General Partner 2; and

¢i ABC's overall operations is allocated exclusively to General Partner 3.

• General Partner 2's responsibilities pertain exclusively to the Beta business, while responsibility for:

¢i the Alpha business is allocated exclusively to General Partner 1; and

¢i ABC's overall operations is allocated exclusively to General Partner 3.

• General Partner 1 has no fiduciary duties pertaining to the Beta business.

• General Partner 2 has no fiduciary duties pertaining to the Alpha business.

The "not manifestly unreasonable" standard applies to these provisions under Subsection (d)(2)(A) and (D), and the provisions are not manifestly unreasonable.

Subsection (d)(2)(B) — Under this paragraph, a partnership agreement might provide that an affiliate of a general partner will provide compensated services to the limited partnership at a price not exceeding market price, or that a general partner may pursue opportunities that otherwise would be partnership opportunities. Such arrangements are commonplace and permissible.

Subsection (d)(2)(C) — In this context, "conduct" includes both acts and omissions. Black's Law Dictionary (9th ed. 2009), conduct (defining conduct as "[p]ersonal behavior, whether by action or inaction"). Subject to the "not manifestly unreasonable" standard and the bedrock requirements stated here and in Subsection (c)(8), the partnership agreement can reduce the duty of care substantially. In particular, the partnership agreement can eliminate the aspects of the duty of care pertaining to gross negligence and recklessness.

This provision replicates in a particular context the general rule stated in Subsection (c)(8). For the meaning of "bad faith" in the context of the duty of care, see the comment to Subsection (c)(8).

Subsection (e) — The "not manifestly unreasonable" concept became part of uniform business entity statutes when UPA (1997) imported the concept from the Uniform Commercial Code. (In the current version of the Uniform Commercial Code, the concept appears in Section 1-302(b).)

This subsection provides rules for applying the concept, specifying:

• who decides the issue of "manifestly unreasonable"

□• "the court . . . as a matter of law," Subsection (e);

• the framework for determining the issue

□• determination to be made "in light of the purposes, activities, and affairs of the limited partnership," Subsection (e)(2);

• the temporal setting for determining the issue

□• "determination [to be made] as of the time the challenged term became part of the partnership agreement," Subsection (e)(1); and

• what information is admissible for determining the issue

□• "only circumstances existing" when "the challenged term became part of the partnership agreement," Subsection (e)(1).

The subsection also provides a very demanding standard for persons claiming that a term of a partnership agreement is "manifestly unreasonable." "The court . . . may invalidate the term only if, in light of the purposes, activities, and affairs of the limited partnership it is *readily apparent* that: (A) the objective of the term is unreasonable; or (B) the term is an unreasonable means to achieve the term's objective." Subsection (e)(2) (emphasis added).

Subsection (e) is fundamental to this article, because: (i) this article generally defers to the agreement among the partners; and (ii) Subsection (e) safeguards the partnership agreement in at least four ways:

• Determining manifest unreasonableness *inter se* partners of an organization is a different task than doing so in a commercial context, where concepts like "usages of trade" are available to inform the analysis. Each business organization must be understood in its own terms and context.

• If loosely applied, the concept of "manifestly unreasonable" would permit a court to rewrite the partners' agreement, which would destroy the balance this article seeks to establish between freedom of contract and fiduciary duty.

• Case law has not adequately delineated the concept. *See, e.g., In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) ("RUPA [UPA (1997)] does not define what is 'manifestly unreasonable' and the parties have not cited, nor can the court locate, a decision that defines the term. Absent case law or even a dictionary

definition, the court must rely on its common sense to recognize something as manifestly unreasonable.").

• In the context of statutes permitting stock transfer restrictions unless "manifestly unreasonable," courts have often ignored the word "manifestly." *See, e.g., Brandt v. Somerville*, 692 N.W.2d 144, 152 (N.D. 2005) (stating that "in close corporations, a majority of courts have sustained restrictions that are determined to be reasonable in light of the relevant circumstances"); *Roof Depot, Inc. v. Ohman*, 638 N.W.2d 782, 786 (Minn. Ct. App. 2002) (stating that "the restrictions [on share transfer] are not 'manifestly unreasonable' because they are reasonable means to ensure that the management and control of the business remains in the group of investors or with people well known to them"); *Castriota v. Castriota*, 268 N.J. Super. 417, 423-24, 633 A.2d 1024, 1027-28 (App. Div. 1993) ("We are obliged to apply the statute in a manner consonant with its essential purpose to permit reasonable restrictions upon alienation.").

Subsection (e)(1) — The significance of the phrase "as of the time the term as challenged became part of the partnership agreement" is best shown by example.

EXAMPLE: When a particular limited partnership comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the limited partnership's sole general partner. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the partnership's start-up. In order to induce the individual to accept the position of sole general partner, the other partners are willing to have the partnership agreement significantly limit the general partner's fiduciary duties. Several years later, when the limited partnership's operations have turned prosaic and the general partner's talents and background are not nearly so crucial, a limited partner challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under Subsection (e)(1) is when the limited partnership began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

EXAMPLE: As initially adopted, a partnership agreement identifies a category of decisions ordinarily subject to the duty of loyalty and

provides that "the general partner's sole, reasonable discretion" satisfies the duty. A year later, the agreement is amended to delete the word "reasonable." Later, a partner claims that, without the word "reasonable," the provision is manifestly unreasonable. The relevant time under Subsection (e)(1) is when the agreement was amended, not when the agreement was initially adopted.

Subsection (e)(2) — If a person claims that a term of the partnership agreement is manifestly unreasonable under Subsections (c)(7) or (d)(2), as a matter of ordinary procedural law the person making the claim has the burden of proof.

§ 30-24-106. Partnership agreement — Effect on limited partnership and person becoming partner — Preformation agreement. — (a) A limited partnership is bound by and may enforce the partnership agreement, whether or not the partnership has itself manifested assent to the agreement.

(b) A person that becomes a partner of a limited partnership is deemed to assent to the partnership agreement.

(c) Two (2) or more persons intending to become the initial partners of a limited partnership may make an agreement providing that upon the formation of the partnership the agreement will become the partnership agreement.

History.

I.C., § 30-24-106, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

Subsection (a) — This subsection resolves twin questions that have troubled some courts — namely, whether an unincorporated entity that has not signed its foundational agreement nonetheless is bound by and may enforce the agreement. The questions have been particularly troubling in the context of agreements to arbitrate. *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 3:13-CV-1655-K, 8 F. Supp. 3d 845, 2014 WL 1255844 at *5-6 (N.D. Tex. Mar. 27, 2014) (concluding that a limited liability partnership "is a party to the Partnership Agreement," even though the partnership itself never signed or otherwise assented to the agreement; enforcing arbitration provision to the benefit of the LLP). *Contra Trover v. 419 OCR, Inc.*, 397 Ill. App. 3d 403, 409, 921 N.E.2d 1249, 1255 (2010) (finding that "neither FODG [an LLC] nor the Golf Club [a related LLC] was a party to the operating agreements and that they are therefore not bound by the arbitration clauses therein").

Developments pertaining to the Virginia LLC Act further illustrate the difficulties. In *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 161-62, 654 S.E.2d 888, 891 (2008), the Virginia Supreme Court held that an LLC member's derivative claim was not subject to the

arbitration provision in the operating agreement, because: (i) the LLC was "the real party in interest;" (ii) the LLC had not signed the operating agreement; and (iii) requiring the claim to be arbitrated would "ignore[] the separate existence of Holdings [the LLC]." The Virginia legislature promptly disagreed and amended the LLC act to state: "A limited liability company is bound by its operating agreement whether or not the limited liability company executes the operating agreement." Va. Code Ann. § 13.1-1023.A.1 (2012). The legislature left open the question of a limited liability company's power to enforce an operating agreement that the company has not executed.

This subsection answers the twin questions, categorically and in the affirmative.

This subsection does not consider whether a limited partnership is an indispensable party to a suit concerning the partnership agreement. That is a question of procedural law, and the answer can determine whether federal diversity jurisdiction exists.

Subsection (b) — Given the possibility of oral and implied-in-fact terms in the partnership agreement, a person becoming a partner of an existing limited partnership should take precautions to ascertain fully the contents of the partnership agreement. *See* the comment to Section 4-105(a)(3).

Subsection (c) — A preformation agreement is not a partnership agreement. A partnership agreement is among "partners," and, under this article, the earliest a person can become a partner is upon the formation of the limited partnership. Section 4-401.

§ 30-24-107. Partnership agreement — Effect on third parties — Relationship to records effective on behalf of limited partnership. — (a) A partnership agreement may specify that its amendment requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) The obligations of a limited partnership and its partners to a person in the person's capacity as a transferee or person dissociated as a partner are governed by the partnership agreement. Subject only to a court order issued under section 30-24-703(b)(2), Idaho Code, to effectuate a charging order, an amendment to the partnership agreement made after a person becomes a transferee or is dissociated as a partner:

(1) Is effective with regard to any debt, obligation, or other liability of the partnership or its partners to the person in the person's capacity as a transferee or person dissociated as a partner; and

(2) Is not effective to the extent the amendment imposes a new debt, obligation, or other liability on the transferee or person dissociated as a partner.

(c) If a record delivered by a limited partnership to the secretary of state for filing becomes effective and contains a provision that would be ineffective under section 30-24-105(c) or (d)(2), Idaho Code, if contained in the partnership agreement, the provision is ineffective in the record.

(d) Subject to subsection (c) of this section, if a record delivered by a limited partnership to the secretary of state for filing becomes effective and conflicts with a provision of the partnership agreement:

(1) The agreement prevails as to partners, persons dissociated as partners, and transferees; and

(2) The record prevails as to other persons to the extent they reasonably rely on the record.

History.

I.C., § 30-24-107, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

Subsection (a) — This subsection, derived from Del. Code Ann. tit. 6, § 18-302(e), permits the partnership agreement to: (i) accord a non-partner veto rights over amendments to the agreement; and (ii) establish other preconditions for amendments. An amendment made in derogation of a veto right or precondition is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-partner managers.

EXAMPLE: A non-partner manager enters into a management contract with a limited partnership, and that agreement provides in part that the limited partnership may remove the manager without cause only with the consent of partners holding 2/3 of the profits interests. The partnership agreement contains a parallel provision (the "partnership agreement's quantum provision"), but the non-partner manager is not a party to the partnership agreement. Later, the partners amend the partnership agreement's quantum provision to reduce the quantum to a simple majority of profits interests and thereafter purport to remove the manager without cause. Although the limited partnership has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the limited partnership has the *power* under Section 4-105(a)(2) to effect the removal — unless the partnership agreement provides the manager a veto right over changes in the partnership agreement's quantum provision.

This subsection does not refer to partner veto rights because, unless otherwise provided in the partnership agreement, the consent of each partner is necessary to effect an amendment. *See* Section 4-406(b)(1). Because "[a] partnership agreement may specify that its amendment requires . . . the satisfaction of a condition," a partnership agreement can require that any amendment be made through a writing or a record signed by each partner. *See also* Section 4-105(a)(3) (empowering the partnership agreement to determine "the means and conditions for amending the partnership agreement").

Subsection (b) — The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry on their activities as they see fit

(or have agreed) and the rights of transferees of the organization's economic interests. Such transferees can include the heirs of business founders as well as former owners who are "locked in" as transferees of their own interests. See Section 4-602(a)(3) and 4-605(a)(4).

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can "freeze the deal" as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

The scant case law in this area clearly favors the remaining partners over former partners and other transferees. *See, e.g., Bauer v. Blomfield Co./Holden Joint Venture*, 849 P.2d 1365, 1367 n.2 (Alaska 1993) (holding that a mere assignee "was not entitled to complain about a decision made with the consent of all the partners" and stating "[w]e are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest"); *Bynum v. Frisby*, 73 Nev. 145, 149-50, 311 P.2d 972, 975 (1957) ("[A]n assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners nor require them to resort to dissolution in order to prevent such a relationship from arising. The stranger remains a stranger entitled only to share in the partnership's worth and to demand an accounting upon dissolution.") (applying UPA (1914) § 27, pertaining to rights of an assignee). *See generally* Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 Suffolk L. Rev. 587 (2009).

This subsection follows *Bauer* and other cases by expressly subjecting transferees (including a person dissociated as a partner) to partnership agreement amendments made after the transfer or dissociation, except amendments that increase obligations on transferees. For example, an amendment might extend the duration of a limited partnership but may not institute a new capital call obligation on transferees.

The question of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation awaits development in the case law. An unreported LLC case suggests the answer might be yes, but the decision rests primarily on the wording of the LLC's operating agreement. In *Kohannim v. Katoli*,

08-11-00155-CV, 2013 WL 3943078 at *10-11 (Tex. App. July 24, 2013), the court: (i) noted an LLC's "Regulations provide[] for the distribution of 'available cash' to members quarterly provided that the available cash is not needed for a reasonable working capital reserve"; (ii) noted that "Jacob [the defendant member] paid himself $100,000 for management services that were not performed and failed to make any profit distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-spouse of Mike, who became Mike's transferee as part of their divorce proceeding] even though more than $250,000 in undistributed profit had accumulated in the company's accounts since the mortgage on the property had been paid off in February 2007"; and (iii) concluded that "more than a scintilla of evidence supports the trial court's finding that Jacob failed to make profit distributions to Parvaneh." In essence, the court upheld a finding that Jacob had breached (or caused the LLC to breach) a contractual obligation to make distributions. But the court went further: "We also agree with the trial court's conclusion that the established facts demonstrated Jacob engaged in wrongful conduct and exhibited a lack of fair dealing in the company's affairs to the prejudice of Parvaneh." *Id*. at *11.

For the very limited rights of transferees, see Section 4-702.

Subsection (b)(1) — This provision is inapposite when "a partner or transferee becomes entitled to receive a distribution." Section 4-503(d). In that circumstance:

• "the partner or transferee has the status of . . . a creditor of the limited partnership with respect to the distribution," *Id*. ; and

• the relevant obligation is not owed to "a person in the person's capacity as a transferee or person dissociated as a partner," Subsection (b), but rather to the person in the person's capacity as a creditor.

Subsection (c) — This provision precludes using the certificate of limited partnership to make an end run around the strictures of Section 4-105(c) and (d)(2).

Subsection (d) — It will be possible, albeit improvident, for a limited partnership agreement to be inconsistent with the certificate of limited partnership or other public filings pertaining to the partnership. For those

circumstances, this subsection provides rules for determining which source of information prevails:

• For partners, persons dissociated as partners, and transferees, the partnership agreement is paramount.

• Third parties may invoke the public record upon a showing of reasonable reliance, which presupposes actual knowledge — *i.e.*, deemed knowledge under Section 4-103(d) does not suffice.

The mere fact that a term is present in a publicly-filed record and not in the partnership agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not expressly cover a situation in which: (i) one of the specified filed records contains information in addition to, but not inconsistent with, the partnership agreement; and (ii) a person, other than a partner or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation. Moreover, to argue that the partnership agreement prevails over the filed record is to argue that the additional term does conflict with the partnership agreement, at least in effect.

Section 4-105(a)(3) might also be relevant to the subject matter of this subsection. Absent a contrary provision in the partnership agreement, language in a certificate of limited partnership or other record delivered to the filing office for filing on behalf of the limited partnership might be evidence of the partners' agreement and thereby constitute or at least imply a term of the partnership agreement.

This subsection does not apply to records delivered to the filing office for filing on behalf of a person other than a limited partnership.

§ 30-24-108. Required information. — A limited partnership shall maintain at its principal office the following information:

(a) A current list showing the full name and last known street and mailing address of each partner, separately identifying the general partners, in alphabetical order, and the limited partners, in alphabetical order;

(b) A copy of the initial certificate of limited partnership and all amendments to and restatements of the certificate, together with signed copies of any powers of attorney under which any certificate, amendment, or restatement has been signed;

(c) A copy of any filed articles of merger, interest exchange, conversion, or domestication;

(d) A copy of the partnership's federal, state, and local income tax returns and reports, if any, for the three (3) most recent years;

(e) A copy of any partnership agreement made in a record and any amendment made in a record to any partnership agreement;

(f) A copy of any financial statement of the partnership for the three (3) most recent years;

(g) A copy of the three (3) most recent annual reports delivered by the partnership to the secretary of state pursuant to section 30-21-213, Idaho Code;

(h) A copy of any record made by the partnership during the past three (3) years of any consent given by or vote taken of any partner pursuant to this act or the partnership agreement; and

(i) Unless contained in a partnership agreement made in a record, a record stating:

(1) A description and statement of the agreed value of contributions other than money made and agreed to be made by each partner;

(2) The times at which, or events on the happening of which, any additional contributions agreed to be made by each partner are to be made;

(3) For any person that is both a general partner and a limited partner, a specification of what transferable interest the person owns in each capacity; and

(4) Any events upon the happening of which the partnership is to be dissolved and its activities and affairs wound up.

History.

I.C., § 30-24-108, as added by 2015, ch. 243, § 33, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

A required information section first appeared in ULPA (1976) § 105, although the notion of information rights traces back to the original uniform limited partnership act, ULPA (1916) § 10.

The partnership agreement cannot vary this section. However, subject to Section 4-105(c)(9), the agreement can vary Sections 4-304 and 4-407, which govern access to and use of the information required by this section.

Paragraph (e) — This requirement applies to both superseded and current agreements and amendments. An agreement or amendment is "made in a record" to the extent the agreement is integrated into a record and consented to in that memorialized form. It is possible for a partnership agreement to be made in part in a record and in part otherwise. *See* the comment to Section 4-102(9). An oral agreement that is subsequently inscribed in a record (but not consented to as such) was not "made in a record" and is not covered by this paragraph. However, if the limited partnership happens to have such a record, Section 4-304(b) might and Section 4-407(a)(2) will provide a right of access.

Paragraph (h) — This paragraph does not require a limited partnership to make a record of consents given and votes taken. However, if the limited partnership has made such a record, this paragraph requires that the limited partnership maintain the record for three years. The requirement applies to any record made by the limited partnership, not just to records made

contemporaneously with the giving of consent or voting. The three-year period runs from when the record was made and not from when the consent was given or vote taken.

Paragraph (i) — Information is "contained in a partnership agreement made in a record" only to the extent that the information is integrated into a record and, in that memorialized form, has been consented to as part of the partnership agreement.

This paragraph is not a statute of frauds provision. For example, failure to comply with Paragraph (9)(A) or (B) does not render unenforceable an oral promise to make a contribution. Likewise, failure to comply with Paragraph (9)(D) does not invalidate an oral term of the partnership specifying "events upon the happening of which the limited partnership is to be dissolved and its activities wound up." *See also* Section 4-801(a).

Conversely, the mere fact that a limited partnership maintains a record in purported compliance with Paragraph (9)(A) or (B) does not prove that a person has actually promised to make a contribution. Likewise, the mere fact that a limited partnership maintains a record in purported compliance with Paragraph (9)(D) does not prove that the partnership agreement actually includes the specified events as causes of dissolution.

Consistent with the partnership agreement's plenary power to structure and regulate the relations of the partners *inter se*, a partnership agreement can impose "made in a record" requirements which render unenforceable oral promises to make contributions or oral understandings as to "events upon the happening of which the limited partnership is to be dissolved."

Paragraph (i)(1) and (2) — Often a partnership agreement will state in record form the value of contributions made and promised to be made. If not, these provisions require that the value be stated in a record maintained as part of the limited partnership's required information. This article does not authorize the limited partnership or the general partners to set the value of a contribution without the concurrence of the person who has made or promised the contribution, although the partnership agreement itself can grant that authority.

Paragraph (i)(3) — The information required by this provision is essential for determining what happens to the transferable interests of a

person that is both a general partner and a limited partner and that dissociates in one of those capacities but not the other. *See* Sections 4-602(a)(3) and 4-605(a)(5).

§ 30-24-109. Dual capacity. — A person may be both a general partner and a limited partner. A person that is both a general and limited partner has the rights, powers, duties, and obligations provided by this chapter and the partnership agreement in each of those capacities. When the person acts as a general partner, the person is subject to the obligations, duties, and restrictions under this chapter and the partnership agreement for general partners. When the person acts as a limited partner, the person is subject to the obligations, duties, and restrictions under this chapter and the partnership agreement for limited partners.

History.

I.C., § 30-24-109, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

It may be to the advantage of a general partner to own some of its interests as a limited partner, especially interests connected to voting rights. *See* Section 4-305(b) (providing that, except for the implied contractual covenant of good faith and fair dealing, “a limited partner does not have any duty to the limited partnership or to any other partner solely by reason of acting as a limited partner”).

§ 30-24-110. Nature, purpose and duration of limited partnership. — (a) A limited partnership is an entity distinct from its partners. A limited partnership is the same entity regardless of whether its certificate states that the limited partnership is a limited liability limited partnership.

(b) A limited partnership may have any lawful purpose.

(c) A limited partnership has perpetual duration.

History.

I.C., § 30-24-110, as added by 2015, ch. 243, § 33, p. 758.

Official Comment Subsection (a) — The "separate entity" characteristic is fundamental to a limited partnership and is inextricably connected to both the liability shield, Sections 4-303 and 4-404(b), and the inability of creditors of a partner or transferee to reach the assets of the limited partnership, absent a "reverse pierce" or a claim of fraudulent transfer. *See, e.g., C.F. Trust, Inc. v. First Flight, L.P.*, 580 S.E.2d 806, 810 (Va. 2003) ("hold[ing] that Virginia does recognize the concept of outsider reverse piercing and that this concept can be applied to a Virginia limited partnership"); *In re Flanagan*, 373 B.R. 216, 223, n.6 (Bankr. D. Conn. 2007) (stating that "[r]everse piercing claims have been recognized as viable causes of action in Connecticut" and "[t]he fact that [an entity] is a limited partnership does not alter the analysis"); *Egle v. Egle*, 817 So. 2d 136, 140 (La. Ct. App. 2002) (allowing plaintiff to proceed with claims that transfers made by her ex-spouse inter alia to an LLC were sham transactions).

Acquiring or relinquishing an LLLP shield changes only the rules governing a general partner's liability for subsequently incurred obligations of the limited partnership. The underlying entity is unaffected.

Subsection (b) — Although some limited partnership statutes continue to require a business purpose, this article follows the current trend and takes a more expansive approach. The phrase "any lawful purpose, regardless of whether for profit" encompasses even charitable activities, but this article does not include any comprehensive protections pertaining to charitable

assets and purposes. Section 2-104(b) does contain a "nondiversion" provision, but the provision applies only to the organic transactions contemplated by Article 2. Comprehensive protections must be (and typically are) found in other law, although sometimes that "other law" appears within a state's non-profit corporation statute. *See, e.g.*, Minn. Stat. § 317A.811 (2012) (providing restrictions on charitable organizations that seek to "dissolve, merge, or consolidate, or to transfer all or substantially all of their assets" but imposing those restrictions only on "corporations," which are elsewhere defined as corporations incorporated under the non-profit corporation act).

Subsection (c) — The word "perpetual" is a misnomer, albeit one commonplace in limited partnership and limited liability company statutes. In this context, "perpetual" means merely that this article: (i) does not require a definite term; and (ii) creates no immediate nexus between the dissociation of a partner and the dissolution of the entity.

Moreover, the public record pertaining to a limited partnership will not necessarily reveal whether the limited partnership actually has a perpetual duration or has in fact dissolved, because: (i) this article, like all limited partnership statutes, provides several consent-based methods to dissolve a limited partnership; and (ii) none of those methods involve a public filing. For example, dissolution and winding up of a limited partnership may result from a term specified in the partnership agreement, an event specified in the partnership agreement, or the affirmative vote or consent of all partners. See Sections 4-801 (events causing dissolution) and 4-802 (winding up required upon dissolution). A partnership agreement is not a publicly-filed document, and a partner vote to dissolve a limited partnership is not a public event. A dissolved limited partnership may deliver to the filing office for filing an amendment to the certificate of limited partnership stating that the partnership is dissolved, Section 4-802(b)(2)(A), and later a statement of termination, Section 4-802(b)(2)(F), or both, but the filing of such statements is permissive rather than mandatory. *Id.*

Likewise, the public record will not reveal when (or even whether) a limited partnership has come into existence. *See* Section 4-201(d) (providing that the formation of a limited partnership requires both that the certificate of limited partnership become effective and that at least two

separate persons become partners, with at least one being a general partner and one being a limited partner).

§ 30-24-111. Powers. — A limited partnership has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs.

History.

I.C., § 30-24-111, as added by 2015, ch. 243, § 33, p. 758.

Official Comment

Continuing the approach initiated in ULPA (2001) § 105, this article omits as unnecessary any detailed list of specific powers.

The partnership agreement cannot vary a limited partnership's capacity to sue and be sued. Section 4-105(c)(2). A limited partnership's standing to enforce the partnership agreement is a separate matter, which is covered by Section 4-106(a) (stating, as a default rule, that the limited partnership "may enforce the partnership agreement").

§ 30-24-112. Application to existing relationships. — (a) Before July 1, 2017, this chapter governs only:

(1) A limited partnership formed on or after July 1, 2015; and

(2) Except as otherwise provided in subsections (c) and (d) of this section, a limited partnership formed before July 1, 2015, which elects, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be subject to this chapter.

(b) Except as otherwise provided in subsections (c) and (d) of this section, on and after July 1, 2017, this chapter governs all limited partnerships.

(c) With respect to a limited partnership formed before July 1, 2006, the following rules apply except as the partners otherwise elect in the manner provided in the partnership agreement or by law for amending the partnership agreement:

(1) Section 30-24-110(c), Idaho Code, does not apply and the limited partnership has whatever duration it had under the law applicable immediately before July 1, 2006.

(2) The limited partnership is not required to amend its certificate of limited partnership to comply with section 30-24-201(b)(5), Idaho Code.

(3) Sections 30-24-601 and 30-24-602, Idaho Code, do not apply and a limited partner has the same right and power to dissociate from the limited partnership, with the same consequences, as existed immediately before July 1, 2006.

(4) Section 30-24-603(4), Idaho Code, does not apply.

(5) Section 30-24-603(5), Idaho Code, does not apply and a court has the same power to expel a general partner as the court had immediately before July 1, 2006.

(6) Section 30-24-801(a)(3) and (4), Idaho Code, does not apply and the connection between a person's dissociation as a general partner and the

dissolution of the limited partnership is the same as existed immediately before July 1, 2006.

(d) With respect to a limited partnership that elects pursuant to subsection (a)(2) of this section to be subject to this chapter, after the election takes effect the provisions of this chapter relating to the liability of the limited partnership's general partners to third parties apply:

(1) Before July 1, 2017, to:

(A) A third party that had not done business with the limited partnership in the year before the election took effect; and

(B) A third party that had done business with the limited partnership in the year before the election took effect only if the third party knows or has been notified of the election; and

(2) On and after July 1, 2017, to all third parties, but those provisions remain inapplicable to any obligation incurred while those provisions were inapplicable under paragraph (1)(B) of this subsection.

History.

I.C., § 30-24-112, as added by 2015, ch. 243, § 33, p. 758.

§ 30-24-113. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Supplemental principles of law — section 30-21-702, Idaho Code.

(2) Permitted names — sections 30-21-301 and 30-21-302, Idaho Code.

(3) Reservation of name — section 30-21-303, Idaho Code.

(4) Registration of name — section 30-21-304, Idaho Code.

(5) Registered agent — sections 30-21-402 and 30-21-404, Idaho Code.

(6) Change of registered agent or address for registered agent by limited partnership — section 30-21-407, Idaho Code.

(7) Resignation of registered agent — section 30-21-410, Idaho Code.

(8) Change of name or address by registered agent — sections 30-21-408 and 30-21-409, Idaho Code.

(9) Service of process, notice or demand — section 30-21-412, Idaho Code.

(10) Delivery of record — section 30-21-104, Idaho Code.

(11) Reservation of power to amend or repeal — section 30-21-701, Idaho Code.

History.

I.C., § 30-24-113, as added by 2015, ch. 243, § 33, p. 758.

Part 2
Formation; Certificate of Limited Partnership and Other Filings

Idaho Code § 30-24-201

§ 30-24-201. Formation of limited partnership — Certificate of limited partnership. — (a) To form a limited partnership, a person must deliver a certificate of limited partnership to the secretary of state for filing.

(b) A certificate of limited partnership must state:

(1) The name of the limited partnership, which must comply with sections 30-21-301 and 30-21-302(b), Idaho Code;

(2) The street and mailing addresses of the partnership's principal office;

(3) The information required by section 30-21-404(a), Idaho Code;

(4) The name and the street and mailing addresses of each general partner;

(5) Whether the limited partnership is a limited liability limited partnership; and

(6) If the partnership is a professional entity, a statement that the partnership is a professional limited partnership or professional limited liability limited partnership and the principal profession or professions for which the partnership's partners are duly licensed or otherwise legally authorized to render professional services.

(c) A certificate of limited partnership may contain statements as to matters other than those required by subsection (b) of this section, but may not vary or otherwise affect the provisions specified in section 30-24-105(c) and (d), Idaho Code, in a manner inconsistent with that section. The secretary of state shall not accept partnership agreements for filing.

(d) A limited partnership is formed when:

(1) The certificate of limited partnership becomes effective;

(2) At least two (2) persons have become partners;

(3) At least one (1) person has become a general partner; and

(4) At least one (1) person has become a limited partner.

History.

I.C., § 30-24-201, as added by 2015, ch. 243, § 34, p. 758.

Official Comment

For a limited partnership to be formed (*i.e.*, to come into existence), four conditions must be met: (i) a certificate of limited partnership must become effective; (ii) at least two persons must become partners; (iii) at least one person must become a general partner; and (iv) at least one person must become a limited partner.

By definition, the earliest a person can become a limited partner is when the certificate of limited partnership takes effect. *See* Section 4-102(a)(6) (defining "limited partner" as a person that "has become a limited partner under Section 4-301"). However, a certificate of limited partnership can take effect long before any person becomes a limited partner, and this article does not require any public filing to indicate that a person has become a limited partner. Therefore, the public record will not reflect when (and even whether) a limited partnership has come into existence.

Subsection (a) — The requirements for filing documents with the filing office are in Part 2 of Article 1.

Subsection (b) — Consistent with the modern trend, this Code requires only the most "bare bones" of disclosure.

Subsection (b)(3) — The rules regarding registered agents are found in Part 4 of Article 1. *See* Section 1-104 (Delivery of Record).

Subsection (b)(4) — The requirement to identify all general partners dates back to 1916. ULPA (1916) § 2. When a person dissociates as a general partner or a person becomes a new general partner, the certificate must be amended. *See* Section 4-202(d). However, a person can become a general partner for many purposes without being listed as such on the certificate. *See* the comment to Section 4-401.

Section (b)(5) — This article permits a limited partnership to be a limited liability limited partnership ("LLLP"), and this provision requires the certificate of limited partnership to state whether the limited partnership is an LLLP. The requirement is intended to force the organizers of a limited partnership to decide whether the limited partnership is to be an LLLP.

Subject to Sections 4-406(b)(2) and 4-105(c)(5), a limited partnership may amend its certificate of limited partnership to add or delete a statement that the limited partnership is a limited liability limited partnership. An amendment deleting such a statement must be accompanied by an amendment stating that the limited partnership is *not* a limited liability limited partnership. Section 4-201(b)(5) does not permit a certificate of limited partnership to be silent on this point, except for pre-existing partnerships that become subject to this article under Section 4-112. *See* Section 4-112(c)(2).

Subsection (c) — This provision permits the certificate of limited partnership to contain information beyond that required in Subsection (b). A limited partnership should have good reason, however, before choosing to include additional information. Such information: (i) is available to the public (including competitors); (ii) increases the chances of a conflict between the certificate of limited partnership and the partnership agreement, *see* Section 4-107(d); (iii) permits the argument that the additional information is part of the partnership agreement, *see* the comment to Section 4-102(9), (stating that "[t]he partnership agreement may comprise a number of separate documents (or records), however denominated, unless the partnership agreement itself provides otherwise"); and (iv) can be confusing to the extent the information appears to delineate the power of persons to act for the limited partnership. In any event, placing additional information in the certificate of limited partnership does not enable a limited partnership to "end run" the provisions of Section 4-105(c) and (d) (limiting the power of the partnership agreement to vary specified provisions of this Code.

§ 30-24-202. Amendment or restatement of certificate of limited partnership. — (a) A certificate of limited partnership may be amended or restated at any time.

(b) To amend its certificate of limited partnership, a limited partnership must deliver to the secretary of state for filing an amendment stating:

(1) The name of the partnership;

(2) The date of filing of its initial certificate; and

(3) The text of the amendment.

(c) To restate its certificate of limited partnership, a limited partnership must deliver to the secretary of state for filing a restatement designated as such in its heading.

(d) A limited partnership shall promptly deliver to the secretary of state for filing an amendment to a certificate of limited partnership to reflect:

(1) The admission of a new general partner;

(2) The dissociation of a person as a general partner; or

(3) The appointment of a person to wind up the limited partnership's activities and affairs under section 30-24-802(c) or (d), Idaho Code.

(e) If a general partner knows that any information in a filed certificate of limited partnership was inaccurate when the certificate was filed or has become inaccurate due to changed circumstances, the general partner shall promptly:

(1) Cause the certificate to be amended; or

(2) If appropriate, deliver to the secretary of state for filing a statement of change under section 30-21-407, Idaho Code, or a statement of correction under section 30-21-205, Idaho Code.

History.

I.C., § 30-24-202, as added by 2015, ch. 243, § 34, p. 758.

Official Comment

Like other provisions of the Code requiring records to be delivered to the filing officer for filing, this section is not subject to change by the partnership agreement. *See* Section 4-105(c)(3). Except for Subsection (d), this section is essentially mechanical.

Subsection (d) — This subsection lists changes in circumstances which require an amendment to the certificate. Neither a statement of change, Section 1-407, nor the annual/biennial report, Section 1-212, suffice to report the addition or deletion of a general partner or the appointment of a person to wind up a limited partnership that has no general partner.

Acquiring or relinquishing LLLP status also requires an amendment to the certificate. *See* Sections 4-105(c)(5), 4-201(b)(5), 4-406(b)(2).

This subsection states an obligation of the limited partnership. However, so long as the limited partnership has at least one general partner, the general partner or partners are responsible for managing the limited partnership's activities. Section 4-406(a). That management responsibility includes maintaining accuracy in the limited partnership's public record. Moreover, Subsection (e) imposes direct responsibility on any general partner that knows that the filed certificate of limited partnership contains false information.

Subsection (e) — This subsection imposes an obligation directly on the general partners rather than on the limited partnership. A general partner's failure to meet the obligation can expose the general partner to liability to third parties under Section 4-204 and might constitute a breach of the general partner's duties under Section 4-409(c). In addition, an aggrieved person may seek a remedy under Sections 1-210 (Signing and Filing Pursuant to Judicial Order) and 1-211 (Liability for Inaccurate Information in Filed Record).

§ 30-24-203. Signing of records to be delivered for filing to secretary of state. — (a) A record delivered to the secretary of state for filing pursuant to this act must be signed as follows:

(1) An initial certificate of limited partnership must be signed by all general partners listed in the certificate.

(2) An amendment to the certificate of limited partnership adding or deleting a statement that the limited partnership is a limited liability limited partnership must be signed by all general partners listed in the certificate.

(3) An amendment to the certificate of limited partnership designating as general partner a person admitted under section 30-24-801(a)(3)(B), Idaho Code, following the dissociation of a limited partnership's last general partner must be signed by that person.

(4) An amendment to the certificate of limited partnership required by section 30-24-802(c), Idaho Code, following the appointment of a person to wind up the dissolved limited partnership's activities and affairs must be signed by that person.

(5) Any other amendment to the certificate of limited partnership must be signed by:

(A) At least one (1) general partner listed in the certificate;

(B) Each other person designated in the amendment as a new general partner; and

(C) Each person that the amendment indicates has dissociated as a general partner, unless:

(i) The person is deceased or a guardian or general conservator has been appointed for the person and the amendment so states; or

(ii) The person has previously delivered to the secretary of state for filing a statement of dissociation.

(6) A restated certificate of limited partnership must be signed by at least one (1) general partner listed in the certificate, and, to the extent the

restated certificate effects a change under any other paragraph of this subsection, the certificate must be signed in a manner that satisfies that paragraph.

(7) A statement of termination must be signed by all general partners listed in the certificate of limited partnership or, if the certificate of a dissolved limited partnership lists no general partners, by the person appointed pursuant to section 30-24-802(c) or (d), Idaho Code, to wind up the dissolved limited partnership's activities and affairs.

(8) Any other record delivered by a limited partnership to the secretary of state for filing must be signed by at least one (1) general partner listed in the certificate of limited partnership.

(9) A statement by a person pursuant to section 30-24-605(a)(3), Idaho Code, stating that the person has dissociated as a general partner must be signed by that person.

(10) A statement of negation by a person pursuant to section 30-24-306, Idaho Code, must be signed by that person.

(11) Any other record delivered on behalf of any person to the secretary of state for filing must be signed by that person.

(b) A record delivered for filing under this chapter may be signed by an agent. Whenever this chapter requires a particular individual to sign a record and the individual is deceased or incompetent, the record may be signed by a legal representative of the individual.

(c) A person who signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.

History.

I.C., § 30-24-203, as added by 2015, ch. 243, § 34, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Section 1-102(47) defines "sign" broadly, including "an electronic symbol, sound, or process."

§ 30-24-204. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Signing and filing pursuant to judicial order — section 30-21-210, Idaho Code.

(2) Liability for inaccurate information in filed record — section 30-21-211, Idaho Code.

(3) Filing requirements — section 30-21-201, Idaho Code.

(4) Effective date and time — section 30-21-203, Idaho Code.

(5) Withdrawal of filed record before effectiveness — section 30-21-204, Idaho Code.

(6) Correcting filed record — section 30-21-205, Idaho Code.

(7) Duty of secretary of state to file; review of refusal to file; delivery of record by secretary of state — sections 30-21-206 and 30-21-212, Idaho Code.

(8) Certificate of good standing or registration — section 30-21-208, Idaho Code.

(9) Annual report for secretary of state — section 30-21-213, Idaho Code.

History.

I.C., § 30-24-204, as added by 2015, ch. 243, § 34, p. 758; am. 2020, ch. 82, § 30, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "30-21-212, Idaho Code" for "30-21-211, Idaho Code" at the end of subsection (7).

Part 3
Limited Partners

Idaho Code § 30-24-301

§ 30-24-301. Becoming limited partner. — (a) Upon formation of a limited partnership, a person becomes a limited partner as agreed among the persons that are to be the initial partners.

(b) After formation, a person becomes a limited partner: (1) As provided in the partnership agreement;

(2) As the result of a transaction effective under chapter 22, title 30, Idaho Code; (3) With the affirmative vote or consent of all the partners; or (4) As provided in section 30-24-801(a)(4) or (5), Idaho Code.

(c) A person may become a limited partner without:

(1) Acquiring a transferable interest; or

(2) Making or being obligated to make a contribution to the limited partnership.

History.

I.C., § 30-24-301, as added by 2015, ch. 243, § 35, p. 758.

Official Comment

Subsection (b)(3) — A limited partnership being in part a creature of contract, consent is determined on an objective basis (*i.e.*, contract law's "reasonable person" standard). Depending on the terms of a limited partnership agreement, the partners' manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the partnership agreement might reduce the quantum of consent necessary or shift the consent exclusively to the general partners.

Given that a limited partnership is a voluntary association, a person cannot become a partner of a limited partnership without manifesting consent to do so. That consent also is judged objectively.

Under Section 4-106(b), "[a] person that becomes a partner is deemed to assent to the partnership agreement," and the agreement binds the partner regardless of whether the partner has actually indicated assent in any way.

Subsection (d) — To accommodate business practices and also because a limited partnership need not have a business purpose, this subsection permits so-called "non-economic partners."

§ 30-24-302. No agency power of limited partner as limited partner. — (1) A limited partner is not an agent of a limited partnership solely by reason of being a limited partner.

(2) A person's status as a limited partner does not prevent or restrict law other than this chapter from imposing liability on a limited partnership because of the person's conduct.

History.

I.C., § 30-24-302, as added by 2015, ch. 243, § 35, p. 758.

Official Comment

Subsection (a) — In this respect a limited partner is analogous to a shareholder in a corporation; in each case, status as owner provides neither the right to manage nor a reasonable appearance of that right. The phrase "solely by reason of being a limited partner" conforms to Subsection (b).

Subsection (b) — The phrase "as a limited partner" indicates that: (i) this section does not disable a general partner that also owns a limited partner interest; (ii) the partnership agreement may as a matter of contract allocate managerial rights to one or more limited partners; and (iii) a separate agreement can empower and entitle a person that is a limited partner to act for the limited partnership in another capacity, *e.g.*, as an agent. *See* the comment to Section 4-305.

The fact that a limited partner *qua* limited partner has no power to bind the limited partnership means that, subject to Section 4-109 (Dual Capacity), information possessed by a limited partner is not attributed to the limited partnership. *See* Section 4-103(f).

This Code specifies various circumstances in which limited partners have consent rights, including:

- admission of a limited partner, Section 4-301(b)(3)
- admission of a general partner, Section 4-401(b)(3)
- amendment of the partnership agreement, Section 4-406(b)(1)

- the decision to amend the certificate of limited partnership so as to obtain or relinquish LLLP status, Section 4-406(b)(2)
- the disposition of all or substantially all of the limited partnership's property, outside the usual and regular course of its activities and affairs, Section 4-406(b)(3)
- the compromise of a partner's obligation to make a contribution or return an improper distribution, Section 4-502(c)
- expulsion of a limited partner by consent of the other partners, Section 4-601(b)(4)
- expulsion of a general partner by consent of the other partners, Section 4-603(4)
- causing dissolution by consent, Section 4-801(a)(2)
- causing dissolution by consent following the dissociation of a general partner, when at least one general partner remains, Section 4-801(a)(3)(A)
- avoiding dissolution and appointing a successor general partner, following the dissociation of the sole general partner, Section 4-801(a)(3)(B)(i)
- appointing a person to wind up the limited partnership when there is no general partner, Section 4-802(c)
- rescinding dissolution, Section 4-803(b)(1)
- approving, amending or abandoning a plan of:
    - merger, Sections 2-203 and 2-204;
    - interest exchange, Sections 2-303 and 2-304;
    - conversion, Sections 2-403 and 2-404; and
    - domestication, Sections 2-503 and 2-504.

§ 30-24-303. No liability as limited partner for limited partnership obligations. — (a) A debt, obligation, or other liability of a limited partnership is not the debt, obligation, or other liability of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited partnership solely by reason of being or acting as a limited partner, even if the limited partner participates in the management and control of the limited partnership. This subsection applies regardless of the dissolution of the partnership.

(b) The failure of a limited partnership to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a limited partner for a debt, obligation, or other liability of the partnership.

History.

I.C., § 30-24-303, as added by 2015, ch. 243, § 35, p. 758.

Official Comment

Elimination of the " Control Rule"

ULPA (2001) eliminated the so-called "control rule," which had impaired the liability protection accorded limited partners and had become an anachronism in a world with LLPs, LLCs and, most importantly, LLLPs.

The "control rule" first appeared in a uniform act in 1916, although the concept is much older. Section 7 of the original Uniform Limited Partnership Act provided that "a limited partner shall not become liable as a general partner [*i.e.*, for the obligations of the limited partnership] unless . . . he takes part in the control of the business."

ULPA (1976) "carrie[d] over the basic test from former Section 7," but recognized "the difficulty of determining when the control line has been overstepped." ULPA (1976) § 303, comment. Accordingly, ULPA (1976) tried to buttress the limited partner's shield by: (i) providing a safe harbor for a lengthy list of activities deemed not to constitute participating in

control, Section 303(b); and (ii) limiting a limited partner's "control rule" liability "only to persons who transact business with the limited partnership with actual knowledge of [the limited partner's] participation in control," Section 303(a). However, these protections were complicated by a countervailing rule which made a limited partner generally liable for the limited partnership's obligations "if the limited partner's participation in the control of the business is . . . substantially the same as the exercise of the powers of a general partner." Section 303(a).

The 1985 amendments to ULPA (1976) further buttressed the limited partner's shield, removing the "substantially the same" rule, expanding the list of safe harbor activities and limiting "control rule" liability "only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner." ULPA (1976/1985) § 303(a).

ULPA (2001) took the logical next step, bringing limited partners into parity with corporate shareholders, LLC members, and LLP partners.

Subsection (a) — This subsection provides a corporate-like liability shield for limited partners, protecting them against the debts, obligations and other liabilities of the limited partnership — *i.e.*, against vicarious liability for the obligations of the entity. Because a dissolved limited partnership is nonetheless an entity formed under this article, dissolution has no effect on the liability shield.

For further comments on the nature of the shield, see Section 4-404(c), comment.

Subsection (b) — For an explanation of this subsection, see Section 4-404(d), comment.

§ 30-24-304. Rights to information of limited partner and person dissociated as limited partner. — (a) On ten (10) days' demand, made in a record received by the limited partnership, a limited partner may inspect and copy required information during regular business hours in the limited partnership's principal office. The limited partner need not have any particular purpose for seeking the information.

(b) During regular business hours and at a reasonable location specified by the limited partnership, a limited partner may inspect and copy information regarding the activities, affairs, financial condition, and other circumstances of the limited partnership as is just and reasonable if:

(1) The limited partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner;

(2) The limited partner makes a demand in a record received by the limited partnership, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(3) The information sought is directly connected to the limited partner's purpose.

(c) Not later than ten (10) days after receiving a demand pursuant to subsection (b) of this section, the limited partnership shall inform in a record the limited partner that made the demand of:

(1) What information the partnership will provide in response to the demand and when and where the partnership will provide the information; and

(2) The partnership's reasons for declining, if the partnership declines to provide any demanded information.

(d) Whenever this act or a partnership agreement provides for a limited partner to vote on or give or withhold consent to a matter, before the vote is cast or consent is given or withheld, the limited partnership shall, without demand, provide the limited partner with all information that is known to the partnership and is material to the limited partner's decision.

(e) Subject to subsection (j) of this section, on ten (10) days' demand made in a record received by a limited partnership, a person dissociated as a limited partner may have access to information to which the person was entitled while a limited partner if:

(1) The information pertains to the period during which the person was a limited partner;

(2) The person seeks the information in good faith; and

(3) The person satisfies the requirements imposed on a limited partner by subsection (b) of this section.

(f) A limited partnership shall respond to a demand made pursuant to subsection (e) of this section in the manner provided in subsection (c) of this section.

(g) A limited partnership may charge a person that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

(h) A limited partner or person dissociated as a limited partner may exercise the rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the partnership agreement or under subsection (j) of this section applies both to the agent or legal representative and to the limited partner or person dissociated as a limited partner.

(i) Subject to section 30-24-704, Idaho Code, the rights under this section do not extend to a person as transferee.

(j) In addition to any restriction or condition stated in its partnership agreement, a limited partnership, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

History.

I.C., § 30-24-304, as added by 2015, ch. 243, § 35, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

This section balances two countervailing concerns relating to information: the need of limited partners and former limited partners for access versus the limited partnership's need to protect confidential business data and other intellectual property. The balance must be understood in the context of fiduciary duties. The general partners are obliged through their duties of care and loyalty to protect information whose confidentiality is important to the limited partnership or otherwise inappropriate for dissemination. *See* Section 4-409 (general standards of general partner conduct). A limited partner, in contrast, "does not have any [fiduciary] duty to the limited partnership or to any other partner solely by reason of acting as a limited partner." Section 4-305(b).

Like predecessor law, this article divides limited partner access rights into two categories: required information and other information. However, this article builds on predecessor law by:

• expanding slightly the category of required information and stating explicitly that a limited partner may have access to that information without having to show cause;

• specifying a procedure for limited partners to follow when demanding access to other information;

• specifying how a limited partnership must respond to such a demand and setting a time limit for the response;

• retaining predecessor law's "just and reasonable" standard for determining a limited partner's right to other information, while recognizing that, to be "just and reasonable," a limited partner's demand for other information must meet minimum standards of relatedness and particularity;

• expressly requiring the limited partnership to volunteer known, material information when seeking or obtaining consent from limited partners;

• codifying (while limiting) the power of the partnership agreement to vary limited partner access rights;

• permitting the limited partnership to establish other reasonable limits on access; and

• providing access rights for former limited partners.

Although the rights and duties stated in this section are extensive, they are not necessarily all-inclusive. This article's statement of fiduciary duties is not exhaustive. *See* the comment to Section 4-409(a) and some cases characterize owners' information rights as reflecting a fiduciary duty of those with management power. *E.g., Fate v. Owens*, 130 N.M. 503, 511, 27 P.3d 990, 998 (2001) (stating that "[a] partner, as a fiduciary, is required to fully disclose material facts and information relating to partnership affairs to the other partners," including limited partners); *Konover Dev. Corp. v. Zeller*, 228 Conn. 206, 218-19, 635 A.2d 798, 804-05 (1994) (stating that "the general partner of a limited partnership has the fiduciary duty of rendering true accounts and full information about anything which affects the partnership") (quoting *Williams v. Bartlett*, 189 Conn. 471, 482 n. 8, 457 A.2d 290 (1983) (internal quotations omitted). Also, the rights stated in this section are in addition to whatever discovery rights a party has in a civil suit.

In contrast, the rights of transferees are limited to those stated in this section and Subsection 4-702(c); general partners do not owe fiduciary duties to transferees.

The rights stated in this section are personal to limited partners and transferees, and are enforceable through a direct action. *See* the comment to Section 4-901(b).

Subsection (a) — The phrase "required information" is a defined term. *See* Sections 4-102(a)(10) and 4-108. This subsection's broad right of access is subject not only to reasonable limitations in the partnership agreement, Section 4-105(c)(9), but also to the power of the limited partnership to impose reasonable limitations on use, Subsection (j). Unless the partnership agreement provides otherwise, general partners have the authority to use that power. *See* Section 4-406(a).

Subsection (b) — The language describing the information to be provided comes essentially verbatim from ULPA (1976/1985) § 305 (2)(i) and (iii). The procedural requirements derive from the Model Business Corporation Act § 16.02(c). This subsection does not itself impose a requirement of good faith because Section 4-305(a) contains a generally applicable obligation of good faith and fair dealing for limited partners. *But see* Subsection (e)(2) (establishing a duty of good faith applicable to a former limited partner).

Subsection (d) — The duty stated in this subsection is at the core of the duties owed by a limited partnership and its general partners to the limited partners, and imposes an affirmative duty to volunteer information. The obligation is limited to information which is both material and known by the limited partnership.

"Knowledge" is viewed subjectively — *i.e.*, actual knowledge. Section 4-103(a)(1). A limited partnership will "know" what its general partners know. Under Section 4-103(f), "[a] general partner's knowledge . . . of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership." As to others acting or reasonably appearing to act on behalf of the limited partnership, common law agency rules will apply. Restatement (Third) of Agency § 5.03 (2006) (Imputation of Notice of Fact to Principal).

In contrast, materiality is viewed objectively. Thus, this subsection applies to known, material information, even if the limited partnership does not know that the information is material.

If a violation of this subsection causes harm to a limited partner, the limited partnership is answerable in damages. In appropriate circumstances, a violation might cause a court to enjoin or even rescind an action of a limited partnership, especially when the violation has interfered with an approval or veto mechanism involving limited partner consent. *E.g., Blue Chip Emerald LLC v. Allied Partners Inc*., 299 A.D.2d 278, 279-280 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that "[a]bsent such full disclosure, the transaction is voidable"), abrogated on other grounds by *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 952 N.E.2d 995 (N.Y. 2011). In addition, a limited partnership's violation of

this paragraph could give rise to a claim for damages against a general partner who, through the breach of a duty stated in Section 4-409, causes or suffers the limited partnership to violate this paragraph. *See Anthony v. Padmar, Inc.*, 465 S.E.2d 745, 755 (S.C. Ct. App. 1995) (finding general partners made a defective disclosure prior to a vote and were therefore liable for resulting pecuniary damages to limited partners).

Subsection (e) — Codifying the information rights of former partners began with UPA (1997) § 403(b). Access is limited and subject to conditions.

> EXAMPLE: A person dissociated as a limited partner seeks access to information pertaining to the period during which the person was a limited partner and to which the person would have access while a limited partner. The person makes a bald demand, merely stating a desire to review the information at the limited partnership's principal office. In particular, the demand does not describe "with reasonable particularity the information sought and the purpose for seeking the information." *See* Subsection (b)(2). The limited partnership is not obliged to allow access. The person must first comply with Subsection (e), which incorporates by reference the requirements of Subsection (b).

See also Subsection (i) (pertaining to information rights of the legal representative of a deceased limited partner).

Subsection (e)(2) — A duty of good faith is needed here because a person claiming access under this subsection is no longer a limited partner and is no longer subject to Section 4-305(a). See Section 4-602(a)(2) (dissociation as a limited partner terminates duty of good faith as to subsequent events). *But see id.*, comment (noting that the common law implied covenant will continue to be relevant if the partnership agreement provides continuing rights and obligations for a person dissociated as a limited partner).

As for the meaning of "good faith" in this context, see the comment to Section 4-407(e)(2).

Subsection (h) — Some old cases involved conflicts over whether a shareholder could exercise inspection rights through another person. *White v. Coeur D'Alene Big Creek Mining Co.*, 55 P.2d 720, 723 (Idaho 1936)

(stating that "[t]he refusal to permit respondent [shareholder] to appoint his own attorney or agent to make the examination [of the corporation's books] was in effect a denial of his right" of inspection); *State v. Monida & Yellowstone Stage Co*., 124 N.W. 971, 972 (Minn. 1910) (upholding a trial court's mandamus order, "which shall provide that [the shareholder complainant], or such attorney or agent as he may select, . . . shall be allowed to inspect the books, records, and papers of the defendant [corporation]"). In light of that history, for the avoidance of doubt, this subsection expressly authorizes taking action through an agent. No negative inference should be drawn about using agents to take other action under this article.

Subsection (i) — This section provides no information rights to a person as transferee. Transferee status brings only the very limited information rights stated in Section 4-702(c). However, a transferee that is a person dissociated as a limited partner has rights in the latter capacity under Subsection (e).

Subsection (j) — This subsection permits the limited partnership - as distinguished from the partnership agreement - to impose access and use limitations. *See* Section 4-105(c)(9) (providing that the partnership agreement may impose reasonable restrictions). Under Section 4-406(a), it will be the general partners that decide whether the limited partnership will impose access and use restrictions.

The limited partnership bears the burden of proving the reasonableness of any restriction imposed under this subsection. In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem the restriction seeks to avoid and the purpose for which information is sought, the restriction is reasonably tailored. Restricting use of the names and addresses of limited partners is not *per se* unreasonable.

§ 30-24-305. Limited duties of limited partners. — (a) A limited partner shall discharge any duties to the partnership and the other partners under the partnership agreement and exercise any rights under this act or the partnership agreement consistently with the contractual obligation of good faith and fair dealing.

(b) Except as otherwise provided in subsection (a) of this section, a limited partner does not have any duty to the limited partnership or to any other partner solely by reason of acting as a limited partner.

(c) If a limited partner enters into a transaction with a limited partnership, the limited partner's rights and obligations arising from the transaction are the same as those of a person that is not a partner.

History.

I.C., § 30-24-305, as added by 2015, ch. 243, § 35, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment Subsection (a) —Fiduciary duty typically attaches to a person whose status or role creates significant power for that person over the interests of another person. Under this article, limited partners have very limited power of any sort in the regular activities of the limited partnership and no power whatsoever justifying the imposition of fiduciary duties either to the limited partnership or fellow partners. *See, e.g., Lichtyger v. Franchard Corp.*, 223 N.E.2d 869, 873 (N.Y. 1966) ("the limited partner is in a position analogous to that of a corporate shareholder, an investor who likewise has limited liability and no voice in the operation of an enterprise") (internal quotation omitted).

It is possible for a partnership agreement to allocate significant managerial authority and power to a limited partner, but in that case the power exists not as a matter of status or role but rather as a matter of contract. *E.g., DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund*

of Chicago, 75 A.3d 101, 111 (Del. 2013) (pertaining to a limited partnership agreement that allowed the limited partners to remove the general partner). The proper limit on such contract-based power is the contract itself (including the implied obligation of good faith and fair dealing), not fiduciary duty, unless the partnership agreement itself: (i) expressly imposes a fiduciary duty; or (ii) creates a role for a limited partner which, as a matter of other law, gives rise to a fiduciary duty. For example, if the partnership agreement makes a limited partner an agent for the limited partnership as to particular matters, the law of agency will impose fiduciary duties on the limited partner with respect to the limited partner's role as agent.

This subsection refers to the "contractual obligation of good faith and fair dealing" to emphasize that the obligation is not an invitation to re-write agreements among the partners. At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights — *i.e.*, duties and rights "under this [Code]." However, for the most part those duties and rights apply to relationships *inter se* the partners and the limited partnership and function only to the extent not displaced by the partnership agreement. Those statutory default rules are thus intended to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.

For a detailed discussion of the implied contractual obligation of good faith and fair dealing, see the comment to Section 4-409(d). As to the power of the partnership agreement to affect the obligation, see Section 4-105(c)(7) (prohibiting elimination but allowing the agreement to "prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured").

§ 30-24-306. Liability for inaccurate information in filed record. — (a) Except as otherwise provided in subsection (b) of this section, a person that makes an investment in a business enterprise and erroneously but in good faith believes that the person has become a limited partner in the enterprise is not liable for the enterprise's obligations by reason of making the investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, the person:

(1) Causes an appropriate certificate of limited partnership, amendment, or statement of correction to be signed and delivered to the secretary of state for filing; or (2) Withdraws from future participation as an owner in the enterprise by signing and delivering to the secretary of state for filing a statement of negation under this section.

(b) A person that makes an investment described in subsection (a) of this section is liable to the same extent as a general partner to any third party that enters into a transaction with the enterprise, believing in good faith that the person is a general partner, before the secretary of state files a statement of negation, certificate of limited partnership, amendment, or statement of correction to show that the person is not a general partner.

(c) If a person makes a diligent effort in good faith to comply with subsection (a)(1) of this section and is unable to cause the appropriate certificate of limited partnership, amendment, or statement of correction to be signed and delivered to the secretary of state for filing, the person has the right to withdraw from the enterprise pursuant to subsection (a)(2) of this section even if the withdrawal would otherwise breach an agreement with others that are or have agreed to become co-owners of the enterprise.

History.

I.C., § 30-24-306, as added by 2015, ch. 243, § 35, p. 758.

Official Comment

This section deals with the somewhat rare situation in which a person intending in good faith to be a limited partner invests in an enterprise, but: •

the enterprise is not a limited partnership (*i.e.*, no certificate of limited partnership has become effective); or • the certificate of limited partnership has become effective but lists the person as a general partner.

Subsection (a) — In this subsection, "good faith" does not refer to the implied contractual covenant under Section 4-409(d). By hypothesis, a person invoking this section is not a partner under this article. In this context, "good faith" is properly understood as referring to the notion of "clean heart, [even if] empty head." Thus, the good faith standard here is entirely subjective, pertaining to the person's actual state of mind regardless of whether that statement of mind is objectively reasonable.

Subsection (a)(2) — The requirement that a person "withdraw[] from future participation as an owner in the enterprise" means, in part, that the person refrain from taking any further profit from the enterprise. However, the person is not required to return previously obtained profits or forfeit the investment.

Part 4
General Partners

Idaho Code § 30-24-401

§ 30-24-401. Becoming general partner. — (a) Upon formation of a limited partnership, a person becomes a general partner as agreed among the persons that are to be the initial partners.

(b) After formation of a limited partnership, a person becomes a general partner:

(1) As provided in the partnership agreement;

(2) As the result of a transaction effective under chapter 22, title 30, Idaho Code;

(3) With the affirmative vote or consent of all the partners: or

(4) Under section 30-24-801(a)(3)(B), Idaho Code, following the dissociation of a limited partnership's last general partner.

(c) A person may become a general partner without:

[(1)](a) Acquiring a transferable interest; or

[(2)](b) Making or being obligated to make a contribution to the partnership.

History.

I.C., § 30-24-401, as added by 2015, ch. 243, § 36, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions at the beginning of the designated paragraphs in subsection (c) were added by the compiler to conform to the standard statutory designation scheme.

Official Comment

A person's status as a general partner is not dependent on the person being so designated in the certificate of limited partnership. If a person does become a general partner under this section without being so designated:

• the limited partnership is obligated to promptly and appropriately amend the certificate of limited partnership, Section 4-202(d)(1);

• each general partner that knows of the discrepancy is personally obligated to cause the certificate to be promptly and appropriately amended, Section 4-202(e)(1), and is subject to liability for failing to do so, Section 4-205(a)(2);

• the "non-designated" general partner has no right to sign records which are to be filed on behalf of the limited partnership under this article, Section 4-203(a), except the right to sign an amendment to the certificate of limited partnership in the capacity of a person newly designated as a general partner, *see* Section 4-203(a)(5)(B);

• the "non-designated" general partner has nonetheless:

  • the powers of a general partner to bind the limited partnership under Sections 4-402 and 4-403; and

  • the rights and duties of a general partner viz-a-viz the limited partnership and the other partners.

A limited partnership's liability under Section 4-402 does not depend on the "act of a general partner" being the act of a general partner designated in the certificate of limited partnership. Moreover, the notice provided by Section 4-103(c) does not undercut any appearance of authority. Section 4-402 refers only to notice under Section 4-103(d) and, in any event, according to the second sentence of Section 4-103(c), the fact that a person is not listed as in the certificate as a general partner is not notice that the person is not a general partner.

EXAMPLE: By consent of the partners of XYZ Limited Partnership, Partner G is admitted as a general partner. However, XYZ's certificate of limited partnership is not amended accordingly. Later, Partner G — acting without actual authority — purports to bind XYZ to a transaction with Third Party. Third Party does not review the filed certificate of limited partnership before entering into the transaction. XYZ will be bound under Section 4-402, assuming that Partner G's action is "for

apparently carrying on in the ordinary course the partnership's activities and affairs or activities and affairs of the kind carried on by the partnership."

EXAMPLE: Same facts, except that Third Party does review the certificate of limited partnership before entering into the transaction. The result might still be the same. The omission of a person's name from the certificate's list of general partners is not notice that the person is not a general partner. Therefore, Third Party's review of the certificate does not mean that Third Party knew, had received a notification or had notice that Partner G lacked authority. At most, XYZ could argue that, because Third Party knew that Partner G was not listed in the certificate, a transaction entered into by Partner G could not reasonably appear to Third Party to be for apparently carrying on the limited partnership's activities in the ordinary course. For a discussion of the reasonableness requirement, see the comment to Section 4-402(a).

Subsection (b)(3) — A limited partnership being in part a creature of contract, consent is determined on an objective basis (*i.e.*, contract law's "reasonable person" standard). Depending on the terms of the partnership agreement, the partners' manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the partnership agreement might reduce the quantum of consent necessary or shift the consent right to the general partners.

A limited partnership being a voluntary association, a person cannot become a partner without manifesting consent to do so. That consent also is judged objectively.

Under Section 4-106(b), "[a] person that becomes a partner is deemed to assent to the partnership agreement," and the agreement binds the partner regardless of whether the partner has actually indicated assent in any way.

Subsection (c)(1) — To accommodate business practices and also because a limited partnership need not have a business purpose, this provision permits so-called "non-economic partners."

§ 30-24-402. No agency power of general partner as limited partner. — (a) Each general partner is an agent of the limited partnership for the purposes of its activities and affairs. An act of a general partner, including the signing of a record in the partnership's name, for apparently carrying on in the ordinary course the partnership's activities and affairs or activities and affairs of the kind carried on by the partnership binds the partnership, unless the general partner did not have authority to act for the partnership in the particular matter and the person with which the general partner was dealing knew or had notice that the general partner lacked authority.

(b) An act of a general partner that is not apparently for carrying on in the ordinary course the limited partnership's activities and affairs or activities and affairs of the kind carried on by the partnership binds the partnership only if the act was actually authorized by all the other partners.

History.

I.C., § 30-24-402, as added by 2015, ch. 243, § 36, p. 758.

Official Comment Derivation — ULPA (2001) derived this section from UPA (1997) § 301(1), which was derived from UPA (1914) § 9. For further information on the derivation, see the comment to Section 3-301.

At common law, a general partner was considered a general agent of the partnership. Joseph Story, Commentaries on the Law of Partnership § 101 at 153 (2nd ed. 1850); Restatement (Second) of Agency § 14A cmt. a (1958), and the mere status of a general partner "clothes" a person with apparent authority to carry on the partnership business. *Stockwell v. U.S.*, 80 U.S. 531, 567 (1871); *Lincoln Nat. Bank v. Schoen*, 56 Mo. App. 160, 1894 WL 1879 (1894); *Kansallis Finance Ltd. v. Fern*, 659 N.E.2d 731, 733, 740 (Mass. 1996). In 1914, the Uniform Partnership Act codified this principle, UPA (1914) § 9 (Partner Agent of Partnership as to Partnership Business), and "statutory apparent authority" has been part of uniform partnerships acts ever since. *See* UPA (1997) § 301 (Partner Agent of Partnership; ULPA (2001) § 402 (General Partner Agent of Limited Partnership).

This section's principal purpose is to delineate a general partner's statutory apparent authority. The partnership agreement and Section 4-406 govern the rights of the partners among themselves, including the right to restrict a general partner's actual authority.

Subsection (a) — This subsection reflects the basic common law principles, as first codified in UPA (1914) § 9(1) and later in UPA (1997) § 301(1). In effect, the subsection characterizes a general partner as a general managerial agent of the limited partnership. Such agents have both actual and apparent authority, and this section delineates the apparent authority. For a discussion of the scope of actual authority, see the comment to Section 406(a).

The agency law origins of statutory apparent authority have informed courts' application of UPA (1914) § 9(1), and that case law is equally applicable under this article. For example, although the statutory language does not appear to require that the appearance of authority be reasonable, the case law does so routinely. *See, e.g., In re Fox Hill Office Invs., Ltd.*, 101 B.R. 1007, 1019 (Bankr. W.D. Mo. 1989) (stating a third-party lender in possession of a copy of a limited partnership's partnership agreement was on notice of the general partner's lack of authority and therefore should have inquired as to the partner's authority), *aff'd*, 926 F.2d 752 (8th Cir. 1991); *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 789 (N.C. 1987) (stating that "in order to hold the [partnership] liable, [a third party] must show that in the exercise of reasonable care under the circumstances, it was justified in believing that the principal had conferred . . . authority to [act] on behalf of the partnership"); *First Interstate Bank of Oregon, N.A. v. Bergendahl*, 723 P.2d 1005, 1010 (Or. Ct. App. 1986) (stating that bank in possession of management agreement was on notice of general partner's restricted authority and could not rely on a theory of apparent authority).

Likewise, per the law of apparent authority, a general partner can bind a partnership under this section even if the partner intends to take and does take the resulting benefits for the partner's own benefit. *See Wolfe v. Harms*, 413 S.W.2d 204, 216 (Mo. 1967) (stating that partnership is liable for partner's acts "even if the predominant motive of the partner was to benefit himself or third persons"); *Rouse v. Pollard*, 18 A.2d 5, 7 (N.J. Eq. 1941) ("All the partners are responsible for the act of one of their number as agent, even though he acts for some secret purpose of his own, and not

really for the benefit of the [partnership].”), *aff’d*, 21 A.2d 801 (N.J. Eq. 1941); *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 788 (N.C. 1987) (stating that the mere fact that the partner’s act was for personal gain was not enough to justify summary judgment for the partnership on the subject of the partnership’s liability for the act).

The fact that a person is not listed in the certificate of limited partnership as a general partner is not notice that the person is not a partner and is not notice that the person lacks authority to act for the limited partnership. *See* Section 4-103(c) and the comment to Section 4-401. In contrast, several filings under Section 4-103(d) may provide notice “to the world” that a person lacks authority to bind a limited partnership.

EXAMPLE: For the past ten years, Partner X has been a general partner of XYZ Limited Partnership and has regularly conducted the limited partnership’s business with Third Party. However, 100 days ago the limited partnership expelled Partner X as a general partner and the next day delivered for filing an amendment to XYZ’s certificate of limited partnership which stated that Partner X was no longer a general partner. On that same day, the filing officer filed the amendment.

Today Partner X approaches Third Party, purports still be to a general partner of XYZ and purports to enter into a transaction with Third Party on XYZ’s behalf. Third Party is unaware that Partner X has been expelled and has no reason to doubt Partner X’s bona fides. Nonetheless, XYZ is not liable on the transaction. Under Section 4-103(d)(1), Third Party has notice that Partner X is dissociated and perforce has notice that Partner X is not a general partner authorized to bind XYZ because Third Party is deemed to have notice ninety days after the amendment became effective.

The reference to “signing of a record in the partnership’s name” encompasses records that purport to convey title to realty.

Subsection (b) — Under this provision, a general partner that lacks both actual and statutory apparent authority entirely lacks the power to bind the entity. *Accord* Restatement (Third) of Agency, ch. 2, Introductory Note (2006) (stating that “this Restatement . . . does not use the concept of inherent agency power”). *But see* the comment to Section 4-403 (explaining that, under that section, a general partner may bind a limited partnership by

unauthorized and wrongful conduct as to which the apparent authority *vel non* is irrelevant).

Agency law determines whether a general partner has actual authority in any particular situation. *See* Restatement (Third) of Agency § 3.01 (2006) (Creation of Actual Authority). For delineation of a general partner's actual authority when this article's default management rules remain in effect, *see* the comment to Section 4-406(a) and (b). However, the partnership agreement will typically be the primary source of a general partner's actual authority.

This subsection does not affect a limited partnership's power to ratify a general partner's unauthorized act. *See* Restatement (Third) of Agency, Chapter 4 ((2006) Ratification) and Section 1-702 (Supplemental Principles of Law).

§ 30-24-403. Limited partnership liable for general partner's actionable conduct. — (a) A limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of activities and affairs of the partnership or with the actual or apparent authority of the partnership.

(b) If, in the course of a limited partnership's activities and affairs or while acting with actual or apparent authority of the partnership, a general partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the partnership is liable for the loss.

History.

I.C., § 30-24-403, as added by 2015, ch. 243, § 36, p. 758.

Official Comment Subsection (a) — This provision is derived from UPA (1914) § 13 (Partnership Bound by Partner's Wrongful Act) as modernized by UPA (1997) § 305(a) (Partnership Liable for Partner's Actionable Conduct) and for the most part parallels the agency law doctrine of *respondeat superior. See* Restatement (Second) of Agency § 14A cmt. a (1958) ("When one of the partners is in active management of the business or is otherwise regularly employed in the business, he is a servant of the partnership."). The liability is vicarious and without regard to the fault of those managing the partnership. For more information on the historical development of this section, see the comment to Section 3-305(a).

To successfully invoke this provision, a plaintiff must show: (i) "a wrongful act or omission, or other actionable conduct" by a general partner; (ii) that caused "loss or injury"; and (iii) that at the relevant moment, the general partner was acting with actual authority, apparent authority (if relevant), or within "the ordinary course of activities and affairs of the partnership." Extrapolating from agency law, apparent authority is relevant only when the appearance of authority augments the impact of the wrongful act. *See* Restatement (Third) of Agency, § 7.08 (2006) ("A principal is

subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.”).

An act or omission may be “in the ordinary course of activities and affairs of the partnership” even though the act is wrongful. Any other interpretation would vitiate the “ordinary course” element. “The proper question . . . is not whether the specific wrongful act is ‘ordinary course’ . . ., but rather whether that type of act, if done rightfully, would be.” Daniel S. Kleinberger, Agency, Partnership and LLCS: Examples and Explanations § 10.5.1 at 350 (4th ed., Wolters Kluwer, 2012) (emphasis omitted).

However, in *Jackson v. Jackson*, 20 N.C. App. 406, 408, 201 S.E.2d 722, 724 (N.C. App. 1974), the North Carolina Court of Appeals stated that, while “[a]dvising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, ... taking such action maliciously and without probable cause is quite a different matter.” The court held that “[i]n view of [ethics] rules, which clearly forbid any attempt by a lawyer to prosecute a person without cause, it cannot be held that malicious prosecution is within the ordinary course of business of a law partnership.” *Id* . It is difficult to identify a reasonable limit to this approach. Presumably, at least, a partner’s “plain vanilla” malpractice is within a law firm’s ordinary course of business despite the ethical rules requiring lawyers to act zealously and competently.

In any event, Subsection (a) refers to “the ordinary course of activities and affairs of the *partnership* ” (emphasis added); thus the proper question is whether the conduct is in the ordinary course for the partnership and not whether the particular general partner ordinarily plays a role in that part of the partnership’s business. *See In Moren ex. rel. Moren v. JAX Rest.*, 679 N.W.2d 165, 167-168 (Minn. Ct. App. 2004) (stating, as part of its analysis under UPA (1997) § 305, that “[i]t is undisputed that one of the cooks scheduled to work that evening [at the partnership’s restaurant] did not come in, and that [one] partner asked [another partner] to help in the kitchen . . . [and] that [the other partner] was making pizzas for the partnership when” her negligence injured the plaintiff); *Vanacore v. Kennedy*, 86 F. Supp. 2d 42, 51 (D. Conn. 1998), *aff’d sub nom., Vanacore v. Space Realty, Inc.*, 208 F.3d 204 (2d Cir. 2000) (stating that “Kennedy [a

partner] committed his misdeeds, which led directly to plaintiff's injuries, within the ordinary course of the business of E & K [the partnership]"); *Sheridan v. Desmond*, 697 A.2d 1162, 1166 (Conn. App. Ct. 1997) (stating that to be considered "in ordinary course of the business," a partner's action must be "the kind of thing a . . . partner would do") (emphasis added).

Subsection (b) — This provision is derived from UPA (1914) § 14 (Partnership Bound by Partner's Breach of Trust) and UPA (1997) § 305(b) (Partnership Liable for Partner's Actionable Conduct). It is not necessary that the general partner "receiv[ing] or caus[ing] the partnership to receive money or property" do so wrongfully. Culpability is necessary at the second phase - *i.e.*, when "the money or property is misapplied by a general partner."

§ 30-24-404. [General partner's liability.] Rights to information of general partner and person dissociated as limited partner. — (a) Except as otherwise provided in subsections (b) and (c) of this section, all general partners are liable jointly and severally for all debts, obligations, and other liabilities of the limited partnership unless otherwise agreed by the claimant or provided by law.

(b) A person that becomes a general partner is not personally liable for a debt, obligation, or other liability of the limited partnership incurred before the person became a general partner.

(c) A debt, obligation, or other liability of a limited partnership incurred while the partnership is a limited liability limited partnership is solely the debt, obligation, or other liability of the limited liability limited partnership. A general partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability limited partnership solely by reason of being or acting as a general partner. This subsection applies: (1) Despite anything inconsistent in the partnership agreement that existed immediately before the vote or consent required to become a limited liability limited partnership under section 30-24-406(b)(2), Idaho Code; and (2) Regardless of the dissolution of the partnership.

(d) The failure of a limited liability limited partnership to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a general partner for a debt, obligation, or other liability of the partnership.

(e) An amendment of a certificate of limited partnership that deletes a statement that the limited partnership is a limited liability limited partnership does not affect the limitation in this section on the liability of a general partner for a debt, obligation, or other liability of the limited partnership incurred before the amendment became effective.

History.

I.C., § 30-24-404, as added by 2015, ch. 243, § 36, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion at the beginning of the section heading was added by the compiler to correct the enacting legislation and to conform to the uniform act.

Official Comment

Derivation — ULPA (2001) derived this section from UPA (1997) § 306, which was also the source for ULLCA (2006) § 304. The Harmonization Project brought the two partnership acts and the limited liability company act into accord to the extent the three acts overlap.

Subsection (a) — Until the advent of limited liability partnerships and limited liability limited partnerships, one hallmark of general partner status was strict, vicarious liability for the debts, obligations, and other liabilities of the partnership. This subsection states a modern version of that venerable rule. The Harmonization Project made no substantive changes to this subsection.

Subsection (b) — UPA (1997) continued the approach of UPA (1914) §§ 17 and 41(7) to the vicarious liability of an incoming partner, but used a simpler and clearer formulation. ULPA (2001) followed UPA (1997), and the Harmonization Project made no substantive changes to this subsection.

With regard to when a limited partnership incurs a debt, obligation, or other liability, the case law is scant and concerns contractual and similar obligations. The leading case is *Conklin Farm v. Leibowitz*, 140 N.J. 417, 658 A.2d 1257 (1995), which holds that: (i) obligations on a loan, whether for interest or principal, are incurred when the loan is made, not when each particular payment is due; and (ii) obligations for lease payments are incurred when each rental payment is due, not when the lease is made.

Conklin concerned a partnership loan obligation that was: (i) entered into before a particular partner joined the partnership; but (ii) for the most part, was payable afterwards. The court held that "interest is part of the contractual debt, and the obligation to pay interest on a loan arises, if at all, at the time that the parties execute the note or other debt instrument."

Conklin, 140 N.J. at 423, 425, 658 A.2d at 1261 (emphasis in original). The court indicated that the same analysis applies to the obligation to repay principal. 140 N.J. at 429, 658 A.2d at 1263 (stating that "the decisive issue before this court . . . [is that] [p]ayment of interest, like repayment of advances, is an obligation that arises at the time the debt instrument is executed").

Conklin discussed the lease issue in response to the creditor's argument that "just as a rent obligation arises for current use of property, an interest obligation arises for current use of principal." *Conklin*, 140 N.J. at 425, 658 A.2d at 1261. Rejecting that argument, the court: (i) noted "the *common-law* obligation to pay rent based on current tenancy [which]. . . arises with each period of tenancy, and . . . arises even in the absence of a lease"; (ii) described "the common-law obligation to pay rent [as] entirely independent of the contractual obligation under the lease"; and (iii) held that, for purposes of partnership law, the rule for "incurring" a lease obligation rests on the common law duty in tenancy and not on the lease as a contract. *Conklin*, 140 N.J. at 426, 658 A.2d at 1262 (citing *Ellingson v. Walsh, O'Connor & Barneson*, 15 Cal. 2d 673, 104 P.2d 507, 508 (1940)). *Conklin* involved a general partnership but, in this context, that difference is immaterial.

As to when a partnership incurs a tort liability, the answer might be found by analogy to statute of limitation rules, another area of law concerned with when claims arise. "Although the courts have not been consistent . . . the interpretation of [when] a . . . statute [of limitations begins to run] as applied to torts has been such that the statute does not usually begin to run until the tort is complete. . .. A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff." Restatement (Second) of Torts § 899 cmt c. (1979); *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1078, 195 Cal. Rptr. 576 (Ct. App. 1983). By analogy, a limited partnership would incur liability for a tort when the harm occurs. *See, e.g., Jones v. Cox*, 828 P.2d 218, 224 (Colo. 1992) ("A cause of action has commonly been understood to 'accrue' when a suit may be maintained thereon.") (quoting Black's Law Dictionary 19 (5th ed. 1979)); *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1078, 195 Cal. Rptr. 576 (Ct. App. 1983).

However, a policy argument exists to the contrary. Vicarious liability for a limited partnership's torts should be confined to persons who are general partners when the wrongful conduct occurs. It is the conduct, not the consequences, that is wrongful; therefore, the occurrence of the wrongful conduct should determine which set of general partners are liable for the conduct's consequences.

For further discussion of the "incurred" issue, see Subsection (c), comment (The Temporal Nexus — When Claim Incurred).

Subsection (c) — This subsection provides a corporate/LLC-like liability shield for general partners, protecting them from (and only from) the debts, obligations and liabilities of the limited partnership — *i.e.*, against a partner's alleged vicarious liability for the obligations of the entity.

Shield Applicable Regardless of the Identity of the Plaintiff What makes the shield relevant is the nature of the claim. If the complaint seeks to hold a partner vicariously liability for the LLLP's obligations, the shield applies. If not, not. Thus, there is no distinction among a claim arising from an LLLP's debt to a commercial creditor, a partner's claim that the LLLP has failed to return a contribution as required by the partnership agreement, and a claim by a former partner that the LLLP has failed to follow through on a buy-out agreement. *See Rappaport v. Gelfand*, 197 Cal. App. 4th 1213, 1230-1232, 129 Cal. Rptr. 3d 670, 682-84 (Cal.App. 2 Dist. 2011) (involving a claim by a former partner). *Accord Ederer v. Gursky*, 9 N.Y.3d 514, 526, 881 N.E.2d 204, 212-213 (N.Y. 2007) (Smith, J., dissenting).

Shield Inapposite for Claims Arising from a Partner's Own Conduct Because the partner liability at issue is solely vicarious, the LLLP shield is irrelevant to claims seeking to hold a partner directly liable on account of the partner's own conduct. Case law on this issue comes from the analogous context of limited liability companies, and in that context a few judges have failed to understand this point. *See* the comment to Section 5-304(a). (Shield Inapposite for Claims Arising from a Member's or Manager's Own Conduct). However, the overwhelming weight of case law is contrary, as are the actual words of shield provisions (immunizing only for obligations of the entity and making no reference to direct obligations of an owner or manager) and public policy (which recoils from the idea of immunizing a

person's misconduct solely because the person acts on behalf of an organization).

EXAMPLE: A general partner personally guarantees a debt of a limited liability limited partnership. Subsection (c) is irrelevant to the general partner's liability as guarantor.

EXAMPLE: A general partner purports to bind a limited liability limited partnership while lacking any agency law power to do so. The LLLP is not bound, but the partner is liable for having breached the "warranty of authority" (an agency law doctrine). Subsection (c) does not apply. The liability is not *for* a debt, obligation, or other liability of the LLLP, but is rather the partner's own, direct liability. Indeed, the liability exists because the LLLP is *not* indebted, obligated or liable. Restatement (Third) of Agency § 6.10 (2006).

EXAMPLE: A general partner of a limited liability limited partnership defames a third party in circumstances that render the LLLP vicariously liable under Section 4-403(a). Under Subsection (c), the third party cannot hold the partner accountable for the *partnership's* liability, but that protection is immaterial. The partner is the tortfeasor and in that role is directly liable to the third party.

EXAMPLE: An LLLP provides professional services, and one of its general partners commits malpractice. The liability shield is irrelevant to the partner's direct liability in tort. However, if the partner's malpractice liability is attributed to the partnership under Section 4-403(a), the liability shield will protect the other general partners against a claim that they must make good on the LLLP's liability. The same analysis applies if the plaintiff also successfully claims that another general partner was negligent in supervising the first partner.

Subsection (c) pertains only to claims based on the LLLP's liability and is irrelevant to claims by a limited liability limited partnership or a partner against a general partner and vice versa. *See* Sections 4-409 (pertaining to management duties) and 4-901 (pertaining to direct claims by a partner).

Shield Inapposite to Role Liability Claims Provisions of regulatory law may impose liability on a general partner of an LLLP due to a role the general partner plays in the limited partnership. *See, e.g., Food Team Intern., Ltd. v.*

Unilink, LLC, 872 F. Supp. 2d 405, 424 (E.D. Pa. 2012) (holding several individuals "subject to secondary individual liability under PACA [Perishable Agricultural Commodities Act]" because their roles within a limited liability company enabled them to control the relevant assets) (citing *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 172 (3d Cir. 2010)). Subsection (c) does not affect this "role liability."

The Temporal Nexus — When Claim Incurred The LLLP shield functions only with respect to obligations incurred while the partnership is a limited liability limited partnership. The shield does not protect general partners from vicarious liability for partnership obligations incurred before a partnership becomes an LLLP or after the partnership ends its LLLP status. Sections 4-201(b)(5) and 4-406(b)(2).

For a preliminary discussion of when a partnership obligation is incurred, see Subsection (b), comment. It could well be argued that "incurred" under Subsection (c) has the same meaning as "incurred" under Subsection (b). *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34, 126 S.Ct. 514, 523 (2005) (referring to 'the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning'); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash. 2d 305, 313, 884 P.2d 920, 925 (1994) (stating that '[w]hen the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning').

However, the argument should yield if the subsections' different contexts raise different issues of policy. 1A Sutherland Statutes and Statutory Construction § 45:12 (7th ed.) (stating that 'departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question'). *See, e.g., S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) ("[W]e have held that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. We have not applied this rule without exception, however, and have sometimes held that an action does not accrue until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury.") (citations omitted).

The case law concerning contractual obligations (incurred when the contract is made) applies appropriately in the context of the LLLP shield. However, the lease case law is problematic. If an obligation is incurred each time rent is due, Subsection (c) is a trap for the unwary landlord.

> EXAMPLE: Ordinary limited partnership enters into a lease with a commercial landlord. Knowing that each general partner is automatically liable for the partnership's debt, the landlord does not obtain personal guarantees. Subsequently, the partnership becomes an LLLP. If future rent payments are incurred when due, and not as of when the lease was made, the landlord loses a very important part of the bargain.

Thus, for the purposes of Subsection (c), lease obligations should be treated as contractual obligations, incurred when the contract is made.

A similar issue exists with regard to tort liability. Courts must look to when the conduct causing the injury takes place and not to when actual injury occurs. Otherwise, a limited partnership could: (i) engage in wrongful conduct that does not cause immediate injury; (ii) come to realize that the conduct has occurred; (iii) subsequently amend its certificate of limited partnership to become a limited liability limited partnership; and (iv) thereby eliminate the vicarious liability of its general partners for all harm subsequently arising from the misconduct. *Cf. Savini v. Univ. of Hawaii*, 113 Haw. 459, 465, 153 P.3d 1144, 1150 (2007) (addressing the question of when a statute of limitations begins to run for bodily injury, when another statute precludes bringing a claim until the amount of damages has reach a specified threshold).

In general, courts should determine the "incurred" question under Subsection (c) so that the LLLP shield protects the general partners of an LLLP to the same extent that the corporate and LLC shields protect corporate shareholders and LLC members. From that perspective, LLLP status obtained after a limited partnership commits a wrongful act should provide no greater protection for the general partners than the protection a sole proprietor obtains by forming an LLC after committing a wrongful act — *i.e.*, none. *See, e.g., Foxchase, LLP v. Cliatt*, 562 S.E. 2d 221, 224 (Ga. Ct. App. 2002) (holding that a partnership's liability shield did not protect partners from claims of property damage caused by the construction of a

golf course, where the jury could have found that the "damage . . . occurred when they, not the partnership, owned the course").

Subsection (c)(2) — *The Shield and Dissolution*. The rule stated here is inherent in the nature of partnership dissolution. "[D]issolution does not end a limited partnership's existence but rather changes the purpose of that existence." Comment to Section 4-801. "A dissolved limited partnership shall wind up its business and . . . continues after dissolution . . . for the purpose of winding up." Section 4-802(a). Put another way: dissolution and winding up are part of the life cycle of a limited liability limited partnership — sometimes the most complicated part. There is no logical reason to remove the shield during the last part of a LLLP's partnership's life cycle.

This subsection makes this point expressly, because it is possible to misinterpret some outlying LLP cases as holding to the contrary. *See, e.g., Carolina Cas. Ins. Co. v. L.M. Ross Law Grp., LLP*, 151 Cal. Rptr. 3d 628, 635 (2012) (affirming the trial court's decision to hold an LLP's named partner liable for a judgment against his limited ability partnership; noting that "[c]entral to the decision to amend the judgment to add Ross [the named partner] as a judgment debtor . . . is the trial court's finding that Ross Law Group dissolved"; recognizing, however, that, before the partnership incurred the liability, Ross had signed and filed with the California Secretary of State a form stating that the law firm had "cease[d] to be a registered limited liability partnership and is hereby filing this notice with the California Secretary of State that [it] is no longer a registered limited partnership") (quotation marks omitted).

The Shield and Termination . This subsection does not expressly provide that, when a limited liability limited partnership's existence terminates, the liability shield remains in place as to any debt, obligation, or other liability of the partnership incurred before the termination. However, the point follows ineluctably from this subsection, which adopts an "occurrence" rather than a "claims made" basis for determining whether the shield applies. See the comment to Subsection (c) (The Temporal Nexus — When Claim Incurred).

Moreover, any other result would: (i) create huge holes in the shield; (ii) put the law of unincorporated businesses at odds with the law of corporations; (iii) render surplus this act's distribution recapture provision,

Section 4-407; (iv) render meaningless the exception to the notice requirement as stated in Sections 4-806(b)(5) and 4-807(b)(4); and (v) render nonsensical the otherwise logical extension of the equitable trust fund theory to limited liability limited partnerships. *Cf. Velasquez v. Franz*, 589 A.2d 143, 146 (N.J. 1991) (explaining that "the trust-fund doctrine. . . renders shareholders who receive distributed assets of the corporation liable as 'trustees' for claims of the corporation's creditors").

Subsection (d) — This subsection was added during the Harmonization Project and pertains to the equitable doctrine of "piercing the veil" — *i.e.*, conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of "piercing the corporate veil" is well-established, and courts should apply the doctrine to limited liability limited partnership for the same reasons that courts have regularly (and sometimes almost reflexively) applied the doctrine to limited liability companies. *Cf. Axtmann v. Chillemi*, 2007 ND 179, 740 N.W.2d 838, 847 (stating that "the shield of a limited liability partnership may be pierced under 'the case law that states the conditions and circumstances under which the corporate veil or limited liability shield of a corporation may be pierced under North Dakota law. . . .'") (quoting N.D.C.C. § 45-22-09(1)).

However, LLLP piercing involves one important distinction from the corporate realm. While under corporate law "disregard of corporate formalities" is a key piercing factor, that factor is inapposite in the law of unincorporated organizations. Corporate formalities reflect statutory mandates. LLLP formalities derive for the most part from the agreement among the partners. From a policy perspective, disregarding formalities adopted by agreement differs substantially from disregarding formalities imposed by law.

Moreover, because the terms of a partnership agreement may be "implied," Section 4-102(a)(9), an LLLP's ongoing disregard of formalities may well constitute an amendment to the partnership agreement. If so, disregard equals amendment, and the concept of "disregard of formalities" makes no sense.

In contrast, this subsection is inapposite to another key piercing factor — disregard of the separateness between entity and owner. *Cf. Vanderford Co. v. Knudson*, 165 P.3d 261, 271 (Idaho 2007) (noting that managing member

and "his accountant testified that the LLC's checking account was so confusing that the accountant could not be sure whose money was in the account at what times"); *Utzler v. Braca*, 972 A.2d 743 (Conn. App. 2009) (holding that veil piercing was appropriate under alter-ego theory when owner deposited LLC funds into a commingled bank account from which he made withdrawals for personal needs and unrelated projects).

EXAMPLE: The sole general partner of a limited liability limited partnership uses a car titled in the partnership's name for personal purposes and writes checks on the partnership's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not Subsection (b) formalities.

This subsection addresses claims to "impos[e] liability on a general partner for a debt, obligation, or other liability of the partnership" — *i.e.*, for what is sometimes termed a "direct pierce." Whether the same approach should apply to claims for a "reverse pierce" is a question for the courts. *See Comm'r of Envtl. Prot. v. State Five Indus. Park, Inc.*, 304 Conn. 128, 140, 37 A.3d 724, 732-33 (2012) (stating that "[a]lthough some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because the two share the same equitable goals, others wisely have recognized important differences between them").

This subsection has no relevance to a partner's claim that the disregard of agreed-upon formalities is a breach of the limited partnership agreement.

Subsection (e) — The rule stated here is implicit in Subsection (c) but is stated expressly for the avoidance of doubt.

§ 30-24-405. Actions by and against partnership and partners. — (a) To the extent not inconsistent with section 30-24-404, Idaho Code, a general partner may be joined in an action against the limited partnership or named in a separate action.

(b) A judgment against a limited partnership is not by itself a judgment against a general partner. A judgment against a limited partnership may not be satisfied from a general partner's assets unless there is also a judgment against the general partner.

(c) A judgment creditor of a general partner may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the limited partnership, unless the partner is personally liable for the claim under section 30-24-404, Idaho Code, and: (1) A judgment based on the same claim has been obtained against the limited partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part; (2) The partnership is a debtor in bankruptcy; (3) The general partner has agreed that the creditor need not exhaust partnership assets; (4) A court grants permission to the judgment creditor to levy execution against the assets of a general partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or (5) Liability is imposed on the general partner by law or contract independent of the existence of the partnership.

History.

I.C., § 30-24-405, as added by 2015, ch. 243, § 36, p. 758.

Official Comment

Subsection (a) — If a debt, obligation, or other liability is incurred against a limited liability limited partnership, joining a general partner would be improper. Likewise, if a debt, obligation, or other liability against an ordinary limited partnership is incurred before a person becomes a

general partner, it would be improper to join that person. As for when a claim is incurred, see the comments to Section 4-404(b) and (c).

The reference to "not inconsistent with Section 4-404" is the procedural analog to the substantive protections of Section 4-404(b) (incoming general partner not liable for pre-existing limited partnership obligations) and (c) (general partner not liable for partnership obligations incurred by an LLLP). When a general partner has personally guaranteed a limited partnership obligation, naming that general partner in a suit against the limited partnership is "not inconsistent with Section 4-404." *See* the comment to Section 4-404. (Shield Inapposite for Claims Arising from a Partner's Conduct). *Cf. Bank of Boston Connecticut v. Schlesinger*, 220 Conn. 152, 157-58, 595 A.2d 872, 875 (1991) (upholding pre-judgment attachment of a partner's assets, where the partner had personally guaranteed the partnership's obligations).

Subsection (b) — Reflecting the entity construct, Section 4-110(a), this subsection provides that a judgment against the limited partnership: (i) is not, standing alone, a judgment against the general partners; and (ii) cannot be satisfied from a general partner's personal assets absent a judgment against the general partner.

This article leaves to the law of judgments to determine the collateral effects to be accorded a prior judgment for or against the limited partnership in a subsequent action against a general partner individually. See Restatement (Second) of Judgments § 60 (1982) and cmts. *E.g., Detrio v. U.S.*, 264 F.2d 658 (5th Cir. 1959); Brunsoman v. Seltz, 414 N.W.2d 547 (Minn. App. 1987) (Lansing, J.). *Contra Evanston Ins. Co. v. Dillard Dep't Stores, Inc.*, 602 F.3d 610, 618 (5th Cir. 2010) (disregarding *sub silentio* the separateness of partner and partnership, overlooking therefore the issue of collateral estoppel, discussing with approval a bankruptcy case in which "the trustee sought to enforce the partnership judgment against [partners] simply by virtue of their status as partner"; and quoting with approval that case's holding that "[o]nce the liability of the partnership became fixed, the only issue remaining was whether the Defendants are partners of [the partnership]") (quoting *In re Jones*, 161 B.R. 180, 183-184 (Bankr. N.D. Tex. 1993)) (second brackets in original).

This subsection and Subsection (c) combine to create a trap for the unwary. For statute of limitations purposes, a creditor's claim against the general partners accrues simultaneously with the claim against the limited partnership. If a creditor chooses not to sue the general partners in its suit against the limited partnership, the statute of limitations may run before the creditor commences suit against the general partners. *Am. Star Energy & Minerals Corp. v. Stowers*, 405 S.W.3d 905, 907 (Tex. App. 2013) (holding that the partnership creditor "was obligated to sue the partners of S & J . . . within the same limitations period it had to sue S & J, the partnership" and that "[b]ecause, [the creditor] did not, the trial court correctly held that limitations ran"); *Sunseri v. Proctor*, 487 F. Supp. 2d 905, 908 (E.D. Mich. 2007), *aff'd*, 286 F. App'x 930 (6th Cir. 2008) ("While the plaintiff may use collateral estoppel to prevent the partner from relitigating the issue of liability, the plaintiff must still bring suit within the applicable limitations period for the underlying wrong.").

Subsection (c) — Subject to the five listed exceptions, this subsection prevents a general partner's assets from being the first recourse for a judgment creditor of the limited partnership, even if the partner is liable for the judgment debt under Section 404.

Although this subsection is silent with respect to pre-judgment remedies, as a matter of policy the subsection should guide courts as they apply the law of pre-judgment remedies. *Compare Sec. Pac. Nat. Bank v. Matek*, 175 Cal. App. 3d 1071, 1077, 223 Cal. Rptr. 288 (Ct. App. 1985) (granting a pre-judgment remedy against a partner because there is "no distinction between those sued individually as partners and those sued as sole proprietors"), *with Bank of Boston Connecticut v. Schlesinger*, 220 Conn. 152, 157-58, 595 A.2d 872, 875 (1991) (upholding pre-judgment attachment of a partner's assets, because the partner had personally guaranteed the partnership's obligations).

§ 30-24-406. Management rights of general partner. — (a) Each general partner has equal rights in the management and conduct of the limited partnership's activities and affairs. Except as otherwise provided in this chapter, any matter relating to the activities and affairs of the partnership is decided exclusively by the general partner or, if there is more than one (1) general partner, by a majority of the general partners.

(b) The affirmative vote or consent of all the partners is required to:

(1) Amend the partnership agreement;

(2) Amend the certificate of limited partnership to add or delete a statement that the limited partnership is a limited liability limited partnership; and

(3) Sell, lease, exchange, or otherwise dispose of all, or substantially all, of the limited partnership's property, with or without the goodwill, other than in the usual and regular course of the limited partnership's activities and affairs.

(c) A limited partnership shall reimburse a general partner for an advance to the partnership beyond the amount of capital the general partner agreed to contribute.

(d) A payment or advance made by a general partner that gives rise to an obligation of the limited partnership under subsection (c) of this section or section 30-24-408(a), Idaho Code, constitutes a loan to the limited partnership that accrues interest from the date of the payment or advance.

(e) A general partner is not entitled to remuneration for services performed for the partnership.

History.

I.C., § 30-24-406, as added by 2015, ch. 243, § 36, p. 758.

Official Comment

Subsection (a) — This article assumes that, more often than not, people utilizing the article will want: (i) strong centralized management, strongly

entrenched; and (ii) passive investors with little control over the entity. Section 4-302 essentially excludes limited partners from the ordinary management of a limited partnership's activities and affairs, unless the partnership agreement provides otherwise.

This subsection states affirmatively the general partners' commanding role. Only the partnership agreement and the express provisions of this article can limit that role.

The authority granted by this subsection includes the authority to delegate. Delegation does not relieve the delegating general partner or partners of their duties under Section 4-409. However, the fact of delegation is a fact relevant to any breach of duty analysis.

EXAMPLE: A sole general partner personally handles all important paperwork for a limited partnership. The general partner neglects to renew the fire insurance coverage on a building owned by the limited partnership, despite having received and read a warning notice from the insurance company. The building subsequently burns to the ground and is a total loss. The general partner might be liable for breach of the duty of care under Section 4-409(c) (gross negligence).

EXAMPLE: A sole general partner delegates responsibility for insurance renewals to the limited partnership's office manager, and that manager neglects to renew the fire insurance coverage on the building. Even assuming that the office manager has been grossly negligent, the general partner is not necessarily liable under Section 4-409(c). The office manager's gross negligence is not automatically attributed to the general partner. Under Section 4-409(c), the question is whether the general partner was grossly negligent (or worse) in selecting the office manager, delegating insurance renewal matters to the office manager, and supervising the office manager after the delegation.

The partnership agreement may also provide for delegation and, subject to Section 4-105(c)(6)-(8) and (d)(2), may modify a general partner's duties under Section 4-409.

For limited partnerships that have more than one general partner, this article provides that in most circumstances a "matter relating to the activities and affairs of the partnership is decided . . . by a majority of the

general partners." However, unlike corporate statutes, this article does not provide a rule for the quantum of participation necessary to constitute "a majority." *Cf., e.g.*, Minn. Stat. § 302A.237 (2014) (providing rules for determining the votes need to constitute "an act of the board"). If a limited partnership has more than one general partner, the partnership agreement should consider what "a majority" means in the event a general partner position is vacant. Note also that for some decisions this article requires the affirmative vote or consent of all partners. *See* the comment to Section 4-406(b).

Subsection (b) — Other provisions of this article also contain default rules providing for unanimous consent. *E.g.*, Sections 4-301(b)(3) (for a person to become a limited partner after formation of the limited partnership), 4-401(b)(3) (same as to becoming a general partner), and 4-502(3) (for compromising a person's obligation to make a contribution). In addition, the transactions authorized under Article 2 each have a default unanimous consent requirement.

Subsections (a) and (b) — These subsections have important implications for a partner's actual authority to act on behalf of the partnership. The actual authority of a general partner is a question of agency law, *see* Restatement (Third) of Agency § 3.01 (2006) (Creation of Actual Authority), and depends fundamentally on the contents of the partnership agreement. If, however, the partnership agreement is silent on the issue, this subsection helps delineate that actual authority. Acting individually, a general partner:

□• has no actual authority to commit the limited partnership to any matter for which this act require requires the affirmative vote or consent of all partners;

□• has the actual authority to commit the limited partnership to usual and customary matters, unless the general partner has reason to know that: (i) other general partners might disagree; or (ii) for some other reason consultation with fellow general partners is appropriate; and

□• has no actual authority to take unusual or non-customary actions that will have a substantial effect on the limited partnership.

The first point follows self-evidently from the language of this article. Where this article requires unanimity of all partners, no general partner could reasonably believe to the contrary (unless the partnership agreement provided otherwise).

The second point follows because:

☐• Subsection (a) serves as the gap-filler manifestation from the limited partnership to its general partners and does <u>not</u> require partners to act <u>only</u> in concert or after consultation. To the contrary, subject to the partnership agreement, this subsection expressly provides that "[e]ach general partner has equal rights in the management and conduct of the limited partnership's activities and affairs."

☐• It would be impractical to require collective action on even the smallest of decisions.

☐• However, to the extent a general partner has reason to know of a possible difference of opinion among the general partners, this subsection requires a decision by "a majority of the general partners."

A third point is a matter of common sense. The more serious the matter, the less likely it is that a general partner has actual authority to act unilaterally. *Cf.* Restatement (Third) of Agency § 3.03, cmt. c (2006) (noting the unreasonableness of believing, without more facts, that an individual has "an unusual degree of unilateral authority over a matter fraught with enduring consequences for the institution" and stating that "[t]he gravity of the matter from the standpoint of the organization is relevant to whether a third party could reasonably believe that the manager has authority to proceed unilaterally").

Subsection (e) — In a limited partnership, winding up is one of the tasks for which the limited partners depend on the general partner. There is no reason for this article to single out this particular task as giving rise to compensation.

§ 30-24-407. Rights to information of general partner and person dissociated as general partner. — (a) A general partner may inspect and copy required information during regular business hours in the limited partnership's principal office, without having any particular purpose for seeking the information.

(b) On reasonable notice, a general partner may inspect and copy during regular business hours, at a reasonable location specified by the limited partnership, any record maintained by the partnership regarding the partnership's activities, affairs, financial condition, and other circumstances, to the extent the information is material to the general partner's rights and duties under the partnership agreement or this act.

(c) A limited partnership shall furnish to each general partner:

(1) Without demand, any information concerning the partnership's activities, affairs, financial condition, and other circumstances that the partnership knows and is material to the proper exercise of the general partner's rights and duties under the partnership agreement or this act, except to the extent the partnership can establish that it reasonably believes the general partner already knows the information; and

(2) On demand, any other information concerning the partnership's activities, affairs, financial condition, and other circumstances, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(d) The duty to furnish information under subsection (c) of this section also applies to each general partner to the extent the general partner knows any of the information described in subsection (b) of this section.

(e) Subject to subsection (j) of this section, on ten (10) days' demand made in a record received by a limited partnership, a person dissociated as a general partner may have access to the information and records described in subsections (a) and (b) of this section at the locations specified in those subsections if:

(1) The information or record pertains to the period during which the person was a general partner;

(2) The person seeks the information or record in good faith; and

(3) The person satisfies the requirements imposed on a limited partner by section 30-24-304(b), Idaho Code.

(f) A limited partnership shall respond to a demand made pursuant to subsection (e) of this section in the manner provided in section 30-24-304(c), Idaho Code.

(g) A limited partnership may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(h) A general partner or person dissociated as a general partner may exercise the rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the partnership agreement or under subsection (j) of this section applies both to the agent or legal representative and to the general partner or person dissociated as a general partner.

(i) The rights under this section do not extend to a person as transferee, but if:

(1) A general partner dies, section 30-24-704, Idaho Code, applies; and

(2) An individual dissociates as a general partner under section 30-24-603(6)(B) or (C), Idaho Code, the legal representative of the individual may exercise the rights under subsection (d) of this section of a person dissociated as a general partner.

(j) In addition to any restriction or condition stated in its partnership agreement, a limited partnership, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

History.

I.C., § 30-24-407, as added by 2015, ch. 243, § 36, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Subsection (a) — The phrase "required information" is a defined term. See Sections 4-102(a)(10) and 4-108. This subsection's broad right of access is subject both to reasonable limitations in the partnership agreement, Section 4-105(c)(9), and also the power of the limited partnership to impose reasonable limitations on use, Subsection (j). However, limiting a general partner's access to this information or any other information would be quite unusual.

Subsection (b) — This subsection states the rule pertaining to information memorialized in "any record maintained by the partnership." Except in unusual circumstances (*e.g.*, a back-up general partner with no ongoing responsibilities), all of the information encompassed by this provision will be "material to the general partner's rights and duties under the partnership agreement or this [Code]." For further discussion of the meaning of "material" as applied to information, see the comment to Section 4-409(f).

Subsection (c) — Because a limited partnership is an entity, this subsection imposes a duty on the partnership, not the partners. However, the general partners are typically responsible for seeing that the limited partnership fulfills this obligation. For the limited partnership, breaching this obligation is a matter of strict liability (analogous to breaching a contract). In contrast, Section 4-409 provides the standard for evaluating a general partner's conduct in this context. Subsection (d) establishes a separate duty for the general partners.

A general partner's right to information under this subsection is personal to the general partner and enforceable under Section 4-901(a). These rights are in addition to whatever discovery rights a party has in a civil suit.

Subsection (c)(1) — This provision imposes an affirmative duty to volunteer information. However, given the assumption that each general partner will be active in management, the obligation ceases "to the extent

the partnership can establish that it reasonably believes the general partner already knows the information."

In any event, the obligation is limited to information which is both material and known by the limited partnership. "Knowledge" is viewed subjectively — *i.e.*, actual knowledge. Section 4-103(a)(1). Materiality is viewed objectively. Thus, the duty applies to known, material information, even if the limited partnership does not know that the information is material.

A limited partnership will "know" what its general partners know. Under Section 4-103(f), "[a] general partner's knowledge . . . of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership." As to others acting or reasonably appearing to act on behalf of the limited partnership, common law agency rules will apply. Restatement (Third) of Agency § 5.03 (2006) (Imputation of Notice of Fact to Principal).

Typically a general partner's duties are continuous, and therefore a general partner's right to information is not just transaction-specific. Ongoing managerial responsibilities require ongoing information — both periodically and *ad hoc* when a situation warrants.

For the meaning of "material" as applied to information, see the comment to Section 4-409(f).

Subsection (c)(2) — Other law determines which party has the burden of proof as to the stated exception.

Subsection (d) — This subsection imposes a duty directly on each general partner. The duty is both narrower and more demanding than the duty placed on general partners as the typically responsible parties under Subsection (c). The duty is narrower because the relevant information is confined to "the information [pertaining to records] described in subsection (b)," rather than the wide scope of "any information" delineated by Subsection (c). The duty is more demanding because it applies directly to the general partners, is therefore in the nature of a contractual obligation, and its breach is a matter of strict liability. For example, it is no defense for a general partner under this section to assert that, although the partner failed

to furnish required information, the failure did not amount to gross negligence under Section 4-409(c).

EXAMPLE: A limited partnership has two general partners: each of which is regularly engaged in conducting the limited partnership's activities; both of which are aware of and have regular access to all significant limited partnership records; and neither of which has special responsibility for or knowledge of any particular aspect of those activities or the relevant partnership records. Most likely, neither general partner is obliged to draw the other general partner's attention to information apparent in the limited partnership's records.

EXAMPLE: Although a limited partnership has three general partners, one is the managing partner with day-to-day responsibility for running the limited partnership's activities. The other two meet periodically with the managing general partner, and together with that partner function in a manner analogous to a corporate board of directors. Most likely, the managing general partner has a duty to draw the attention of the other general partners to important information, even if that information would be apparent from a review of the limited partnership's records.

As with Subsection (c), a general partner's right to information under this subsection is personal to the general partner and enforceable under Section 4-901(a). These rights are in addition to whatever discovery rights a party has in a civil suit.

Subsection (e) — Codifying the information rights of former owners began with RUPA (1997) § 403(b). Access is limited and subject to conditions, most of which are drawn from Section 4-304 (pertaining to the information rights of limited partners). *See also* Subsection (i) (providing information rights to the legal representative of a deceased general partner); Section 4-704 (providing additional information rights to the legal representative of the deceased partner).

Subsection (e)(1) — A person dissociated as a general partner has information rights in that capacity only as to the period during which the person was a general partner. To the extent that further information is accessible under Section 4-704(2) (providing access to the legal representative of a deceased partner's estate), that access is limited both in

purpose (“for purposes of settling the estate”) and in scope (“the rights of a current limited partner under Section 4-304”).

Subsection (e)(2) — A duty of good faith is needed here, because a person claiming access under this subsection is no longer a general partner and no longer subject to a general partner’s duties and obligations under Section 4-409. Section 4-605(a)(2) (dissociation as a partner terminates duty of good faith as to subsequent events). *But see id*., comment (noting that the common law implied covenant will continue to be relevant if the partnership agreement provides continuing rights and obligations for a person dissociated as a general partner).

In the context of Subsection (e)(2), “good faith” is properly understood to mean an honest belief that the request is made for a proper purpose. *Associated Indem. Corp. v. CAT Contracting, Inc*., 964 S.W.2d 276, 285 (Tex. 1998) (holding that “‘good faith’ in the surety agreement before us refers to conduct which is honest in fact, free of improper motive or willful ignorance of the facts at hand”); Andrews v. Bible, 812 S.W.2d 284, 288 (Tenn. 1991) (describing “subjective good faith” as “[a] pure heart but an empty head”) (quoting *Whittington v. Ohio River Co*., 115 F.R.D. 201, 209 (E.D.Ky.1987)). Willful ignorance includes being an ostrich. “While ‘honesty’ may require no more than a pure heart, it is questionable that a pure heart can co-exist with closed eyes. It is not honest to close one’s eyes so as to maintain an empty head.” *J.R. Hale Contracting Co. v. United New Mexico Bank at Albuquerque*, 799 P.2d 581, 591 (NM 1990). See also UPA (1914) § (3)(1) (“A person has ‘knowledge’ of a fact within the meaning of this article not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.”).

Subsection (e)(3) — Applying the limited partner standard Section 4-304(b) to a person dissociated as a general partner makes sense, because the person has no further management role. Theoretically, an even stricter standard might apply, because limited partners have at least some governance role. However, this article already has several different standards applicable to information rights. See Sections 4-304(b) (limited partner), Section 4-304(e) (person dissociated as a limited partner), 4-407(b), (c)(2) (general partner), 4-407(e) (person dissociated as a general

partner). This article applies Section 4-304(b) to a person dissociated as a general partner to avoid having to create another standard.

Subsection (h) — Some old cases involved conflicts over whether a shareholder could exercise inspection rights through another person. *White v. Coeur D'Alene Big Creek Mining Co*., 55 P.2d 720, 723 (Idaho 1936) (stating that "[t]he refusal to permit respondent [shareholder] to appoint his own attorney or agent to make the examination [of the corporation's books] was in effect a denial of his right" of inspection); *State v. Monida & Yellowstone Stage Co*., 124 N.W. 971, 972 (Minn. 1910) (upholding a trial court's mandamus order, "which shall provide that [the shareholder complainant], or such attorney or agent as he may select, . . . shall be allowed to inspect the books, records, and papers of the defendant [corporation]"). In light of that history, for the avoidance of doubt, this subsection expressly authorizes taking action through an agent. No negative inference should be drawn about using agents to take other action under this article.

Subsection (i) — This section provides no information rights to a person as transferee. Transferee status brings only the very limited information rights stated in Section 4-702(c). However, a transferee that is a person dissociated as a limited partner has rights in the latter capacity under Subsection (e).

Subsection (j) — This subsection provides fallback protection for gaps in the partnership agreement. For example, the general partners may protect trade secrets from disclosure and prohibit various misuses of confidential information even if the partnership agreement omits to do so.

Strictly speaking, the reference to "ordinary course" is unnecessary. See Section 4-406(a) (providing generally that "any matter relating to the activities and affairs of the partnership is decided exclusively" by the general partners). The phrase is included merely for the avoidance of doubt.

The limited partnership bears the burden of proving the reasonableness of any restriction imposed under this subsection. In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored.

The burden of persuasion under this subsection contrasts with the burden of persuasion under Section 4-105(c)(9) (prohibiting unreasonable limitations on the information rights provided by this section). Under that paragraph, as a matter of ordinary procedural law the burden is on the person making the claim.

§ 30-24-408. Reimbursement — Indemnification — Advancement — Insurance. — (a) A limited partnership shall reimburse a general partner for any payment made by the general partner in the course of the general partner's activities on behalf of the partnership, if the general partner complied with sections 30-24-406, 30-24-409 and 30-24-504, Idaho Code, in making the payment.

(b) A limited partnership shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a general partner, if the claim, demand, debt, obligation, or other liability does not arise from the person's breach of section 30-24-406, 30-24-409 or 30-24-504, Idaho Code.

(c) In the ordinary course of its activities and affairs, a limited partnership may advance reasonable expenses, including attorney's fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a general partner, if the person promises to repay the partnership if the person ultimately is determined not to be entitled to be indemnified under subsection (b) of this section.

(d) A limited partnership may purchase and maintain insurance on behalf of a general partner against liability asserted against or incurred by the general partner in that capacity or arising from that status even if, under section 30-24-105(c)(8), Idaho Code, the partnership agreement could not eliminate or limit the person's liability to the partnership for the conduct giving rise to the liability.

History.

I.C., § 30-24-408, as added by 2015, ch. 243, § 36, p. 758.

Official Comment

Subsections (a) and (b) — These subsections apply only to general partners. A limited partnership's obligation, if any, to reimburse or indemnify others (*e.g.*, employees, independent contractors, other agents) is

a question for other law, including the law of agency, contract and restitution. The fact a person has dissociated as a partner does not affect any obligations incurred by the partnership under these subsections for conduct occurring before the dissociation.

To the extent a partnership agreement modifies or displaces the default rules stated in Sections 4-406 and 4-409, the agreement should also address these subsections. For example, if the partnership agreement establishes a duty of ordinary care (modifying Section 4-409(c)), the agreement should specify which level of care is necessary to satisfy Subsections (a) and (b). It is not necessary that the levels of care be the same, only that the partnership agreement make the situation clear and thereby avoid difficult issues of interpretation.

Subsection (a) — The reimbursement obligation stated here is a default rule and roughly parallels a rule of agency law. Restatement (Third) of Agency § 8.14(2)(a) (2006) (stating that "[a] principal has a duty to indemnify an agent . . . when the agent makes a payment (i) within the scope of the agent's actual authority, or (ii) that is beneficial to the principal, unless the agent acts officiously in making the payment").

Subsection (b) — This subsection provides for indemnification but only as a default rule. Subject only to Section 4-105(c)(8), the partnership agreement can relax these preconditions substantially. The agreement can also impose stricter preconditions.

The rule's eligibility requirements correspond to the default rules on management duties, which is appropriate because otherwise the statutory default rule on indemnification could undercut or even vitiate the statutory default rules on duty.

Although referring broadly to any "person," this subsection is actually limited to present and former general partners. The indemnification obligation applies to only to a "debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a general partner." Thus, by its terms this subsection does not apply to a person in the capacity of an officer, manager, CEO, *etc*.

Of course, the partnership agreement may mandate indemnification to officers, managers, employees, and other persons providing services to or

acting for the limited partnership. Within the limitations stated in Section 4-105(c)(8), a limited partnership agreement may obligate a limited partnership to indemnify a person even when the person has breached a managerial duty or the partnership agreement itself.

Subsection (c) — This subsection authorizes but does not require a limited partnership to provide advances to cover expenses. *Cf. Majkowski v. American Imaging Mgmt. Servs.*, LLC, 913 A.2d 572, 589 (Del. Ch. 2006) ("Because rights to indemnification and advancement differ in important ways, our courts have refused to recognize claims for advancement not granted in specific language clearly suggesting such rights."). The phrase "hold harmless" likewise does not encompass advances. *Id* . The authorization applies only to those persons eligible for indemnification under Subsection (b), but the partnership agreement certainly can authorize a broader scope and even make advances obligatory.

The reference to "ordinary course" pertains to Section 4-406(a) (stating that "any matter relating to the activities and affairs of the partnership is decided exclusively by the general partner or, if there is more than one general partner, by a majority of the general partners.")

Subsection (d) — This subsection's language is very broad and authorizes a limited partnership to purchase insurance to cover, *e.g.*, a general partner's intentional misconduct. It is unlikely that such insurance would be available. This authorization comes from this article, not the partnership agreement, and therefore is not subject to restrictions stated in Section 4-105(c)(8) (precluding the partnership agreement from "reliev[ing] or exonerat[ing] a person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law").

§ 30-24-409. Standards of conduct for general partners. — (a) A general partner owes to the limited partnership and, subject to section 30-24-901, Idaho Code, the other partners the duties of loyalty and care stated in subsections (b) and (c) of this section.

(b) The fiduciary duty of loyalty of a general partner includes the duties: (1) To account to the limited partnership and hold as trustee for it any property, profit or benefit derived by the general partner: (A) In the conduct or winding up of the partnership's activities and affairs; (B) A use by the general partner of the partnership's property; or (C) From the appropriation of a partnership opportunity; (2) To refrain from dealing with the partnership in the conduct or winding up of the partnership's activities and affairs as or on behalf of a person having an interest adverse to the partnership; and (3) To refrain from competing with the partnership in the conduct or winding up of the partnership's activities and affairs.

(c) The duty of care of a general partner in the conduct or winding up of the limited partnership's activities and affairs is to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.

(d) A general partner shall discharge the duties and obligations under this act or under the partnership agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(e) A general partner does not violate a duty or obligation under this chapter or under the partnership agreement solely because the general partner's conduct furthers the general partner's own interest.

(f) All the partners of a limited partnership may authorize or ratify, after full disclosure of all material facts, a specific act or transaction by a general partner that otherwise would violate the duty of loyalty.

(g) It is a defense to a claim under subsection (b)(2) of this section and any comparable claim in equity or at common law that the transaction was fair to the limited partnership.

(h) If, as permitted by subsection (f) of this section or the partnership agreement, a general partner enters into a transaction with the limited

partnership that otherwise would be prohibited by subsection (b)(2) of this section, the general partner's rights and obligations arising from the transaction are the same as those of a person that is not a general partner.

History.

I.C., § 30-24-409, as added by 2015, ch. 243, § 36, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

ULPA (2001) derived this section from UPA (1997) § 404. The 2011 and 2013 Harmonization amendments made one major substantive change; they "un-cabined" fiduciary duty. UPA (1997) § 404 had deviated substantially from UPA (1914) by purporting to codify all fiduciary duties owed by partners. This approach had a number of problems. Most notably, the exhaustive list of fiduciary duties left no room for the fiduciary duty owed by partners to each other — *i.e.*, "the punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Although UPA (1997) § 404(b) purported to state "[a] partner's duty of loyalty to the partnership *and the other partners*" (emphasis added), the three listed duties each protected the partnership and not the partners.

The 2011 and 2013 Harmonization amendments "un-cabined" fiduciary duty in both partnership acts, thereby harmonizing them to ULLCA (2006). As harmonized, this section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the contractual obligation of good faith and fair dealing. The duties stated in this section are subject to the limited partnership agreement, but Section 4-105(c) and (d) contain important limitations on the power of the partnership agreement to affect fiduciary and other duties and the obligation of good faith and fair dealing.

For the effect of dissociation on a person's duties under this section, see Sections 4-602(a)(2) (limited partners) and 4-605(a)(2) (general partners).

Subsection (a) — This subsection recognizes two core managerial duties but, unlike UPA (1997) and ULPA (2001), does not purport to be exhaustive. For example, many cases characterize a manager's duty to disclose as a fiduciary duty. *E.g., Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1023 (Del. Ch. 2010) (stating that "in the limited partnership context, absent contractual modification, a general partner owes fiduciary duties that include a duty of full disclosure") (quotation marks and citation omitted); *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1298 (5th Cir. 1993) ("Under Alaska law, a general partner stands in a fiduciary relationship with the limited partnership and thereby owes 'a fiduciary duty . . . to disclose information concerning partnership affairs.'") (quoting *Parker v. Northern Mixing Co.*, 756 P.2d 881, 894 (Alaska 1988)).

Subsection (b) — This subsection states three core aspects of the fiduciary duty of loyalty: (i) not "usurping" partnership opportunities or otherwise wrongly benefiting from the limited partnership's operations or property; (ii) avoiding conflict of interests in dealing with the limited partnership (whether directly or on behalf of another); and (iii) refraining from competing with the limited partnership. Essentially the same duties exist in agency law and under the law of all types of business organizations.

The duties apply beginning with "the conduct of the partnership's activities and affairs," which by definition cannot exist before the partnership does; thus the stated duties do not apply to pre-formation activities.

The duties stated in this subsection comprise a default rule. Under Section 4-105(d)(3)(A): "If not manifestly unreasonable, the partnership agreement may . . . alter or eliminate the aspects of the duty of loyalty stated in Section 4-409(b)."

Subsection (b)(1) — The phrase "hold as trustee" dates back to UPA (1914) § 21 and reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the governing instrument and other sources of information. *Cf.* Section 8-506 ("A trustee [of a statutory trust] . . . is not liable to the trust or to a beneficial owner for breach of any duty, *including a fiduciary duty*, to the extent the breach

results from reasonable reliance on: (1) a term of the governing instrument; (2) a record of the statutory trust; or (3) an opinion, report, or statement of another person that the person to which the opinion, report, or statement is made or delivered reasonably believes is within the other person's professional or expert competence and is made or delivered to the trustee.") (emphasis added).

Subsection (b)(1)(A) — This provision is consistent with a basic principle of agency law — namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. Restatement (Third) of Agency § 8.06, cmt. c. (2006). Typically, however, the limited partnership agreement legitimizes particular benefits — *e.g.*, a management fee paid to a general partner in addition to that partner's share of distributions. Also, an agreed allocation of distributions takes those benefits outside the reach of this provision.

Subsection (b)(1)(B) — For the expansive meaning of "property," see Section 1-102(41). The term includes confidential information.

Subsection (b)(1)(C) — This article does not specify what constitutes "a partnership opportunity," but ample case law exists. *See, e.g., In re Monetary Grp.*, 159 B.R. 964 (M.D. Fla. 1990) (discussing the usurpation of a limited partnership opportunity), *aff'd in part, rev'd in part*, 2 F.3d 1098 (11th Cir. 1993); *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 223 N.E.2d 869, 873 (1966) ("There is no basis or warrant for distinguishing the fiduciary relationship of corporate director and shareholder from that of general partner and limited partner.") In the context of winding up, the scope of partnership opportunities inevitably narrows.

In most, if not all, situations, usurping a partnership opportunity also breaches the duty not to compete, Paragraph (b)(3), but not *vice versa*.

Subsection (b)(2) — In this context, the phrase "adverse interest" is a term of art, meaning "to be on the other side of the table" in some dealing with the limited partnership. Absent informed consent by the limited partnership, this duty is breached by the mere existence of the conflict of interest; the limited partnership need not prove that the outcome of the dealing was adverse to the partnership. *But see* Subsection (g) (permitting the defense of fairness).

Subsection (b)(3) — Although competition is often thought of in terms of potential customers, this duty applies equally to competition for resources, including employees.

Subsection (c) — This article no longer refers to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable only in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission.

The change in label is consistent with the Restatement (Third) of Agency § 8.02 (2006), which refers to the agent's "fiduciary duty" to act loyally, but eschews the word "fiduciary" when stating the agent's duties of "care, competence, and diligence." *Id* . § 8.08. However, the label change is merely semantics; no change is the law is intended.

The partnership agreement can raise the standard of care, or subject to Sections 4-105(c)(8) and (d)(2)(C), lower it. A person's practical exposure for breaching the duty of care involves not only the standard of care but also any partnership agreement provision that: (i) exonerates the person from liability for breach of the duty of care, Section 4-105(c)(8); or (ii) entitles the person to indemnification despite such breach, Section 4-408(b), comment.

Subsection (d) — This subsection refers to the "*contractual* obligation of good faith and fair dealing" (emphasis added) and thereby invokes the implied obligation that exists in every contract. *See* Restatement (Second) Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). The adjective ("contractual") should help avoid decisions like *Phelps v. Frampton*, 2007 MT 263, 339 Mont. 330, 342-43, 170 P.3d 474, 483 (2007) (holding that Montana's version of UPA (1997) creates a statutory obligation of good faith and fair dealing separate from the implied contractual covenant).

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights — *i.e.*, duties and rights "under this [Code]." However, for the most part those duties and rights apply to relationships *inter se* the partners and the limited partnership and function only to the extent not displaced by the partnership agreement. Those statutory default

rules are thus intended to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.

The contractual obligation of "good faith" has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware's famous corporate law exoneration provision; and (ii) that provision's exception "for acts or omissions not in good faith." Del. Code Ann. tit. 8, § 102(b)(7) (2012). In that context, good faith is an aspect of the duty of loyalty. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the "utmost good faith" sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other. *See, e.g., Meinhard v. Salmon*, 249 N.Y. 458, 477, 164 N.E. 545, 551 (1928) ("[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost good faith in all that relates to their common venture. Within its scope they stand in a fiduciary relationship."); *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 593, 328 N.E.2d 505, 515 (1975) ("[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the utmost good faith and loyalty.") (footnotes omitted) (citations omitted) (internal quotations omitted).

To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a general partner from acting in the general partner's own self-interest: "Fair dealing" is not akin to the fair process component of entire fairness, *i.e.*, whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care . . . It is rather a commitment to deal "fairly" in the sense of consistently with the terms of the parties' agreement and its purpose. Likewise "good faith" does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.

Gerber v. Enter. Products Holdings, LLC, 67 A.3d 400, 418-19 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)) (footnotes omitted) (citations omitted) (internal quotations omitted). *See also* Subsection (e).

Courts should not use the contractual obligation to change *ex post facto* the parties' or this Code's allocation of risk and power. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.

The partnership agreement or this article may grant discretion to a general partner, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a general partner may properly exercise discretion even though another partner (whether general or limited) suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur.

The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly-held purpose that legitimately comports with the parties' agreed-upon arrangements: An implied covenant claim . . . looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but *rather what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting*.

Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 418 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)) (emphasis added) (footnotes omitted) (citations omitted) (internal quotations omitted by *Gerber*).

In sum, the purpose of the contractual obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

As to the power of the partnership agreement to affect the contractual obligation of good faith and fair dealing, see Section 4-105(c)(7) (prohibiting elimination but allowing the agreement to "prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured"). For examples, see the comment to Section 4-105(c)(7). As to whether the obligation stated in this subsection applies to the benefit of transferees, see the comment to Section 4-107(b).

Subsection (e) — A general partner in a limited partnership has at least two different roles: (i) as a party to the limited partnership agreement, with rights and obligations under that agreement; and (ii) as manager or co-manager of the enterprise. This provision pertains to the first role. A general partner's exercise of rights under the partnership agreement is subject to the obligation of good faith and fair dealing, Subsection (d), but a general partner does not breach that contractual obligation "solely because the general partner's conduct furthers the general partner's own interest." In contrast, this provision is ineffective with regard to a general partner's duties as manager or co-manager. For example, a general partner's liability under Section 4-409(b)(3) (prohibiting competition) is not "solely because the general partner's conduct furthers the general partner's own interest." Rather, the liability results from the breach of a specific obligation — *i.e.*, the codified aspect of the duty of loyalty that prohibits competition.

Subsection (f) — Here and elsewhere in this Code, information "is material if there is a substantial likelihood that a reasonable [decision maker] would consider it important in deciding how to vote" or take other action under this Code or the partnership agreements. *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132 (1976).

The partnership agreement can provide additional or different methods of authorization or ratification, subject to the strictures of Section 4-105(c)(5), (d)(1), and (d)(3)(A)(B) and (D).

Subsection (g) — This subsection codifies judge-made law applicable to all business entities. *See, e.g., Lonergan v. EPE Holdings, LLC*, 5 A.3d

1008, 1019 (Del. Ch. 2010) (discussing "entire fairness" in the context of a limited partnership); *Gottsacker v. Monnier*, 281 Wis. 2d 361, 379, 697 N.W.2d 436, 444 (Wisc. 2005) (referring to "a willful failure to deal fairly with the LLC or its other members"); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994) (discussing "entire fairness" in the context of a corporation's merger with an affiliate).

Subsection (h) — This subsection is the modern, reformulated version of a language that sought to overturn the now-defunct notion that debts to partners were categorically inferior to debts to non-partner creditors. *See, e.g.*, ULPA (2001) § 112 ("A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner."). The reformulation makes clear that this provision has nothing to do with the fiduciary duty pertaining to conflict of interests. *See BT-I v. Equitable Life Assurance Soc'y of the United States*, 75 Cal. App. 4th 1406, 1415, 89 Cal. Rptr. 2d 811 (1999) (examining the prior formulation, explaining its history and stating "[w]e cannot discern anything in the purpose of [the prior formulation] that suggests an intent to affect a general partner's fiduciary duty to limited partners").

This subsection states a default rule. The partnership agreement may provide that debt to a general partner (or general partners generally) is subordinate to other partnership obligations. The agreement that creates the debt may do likewise.

Part 5
Contributions and Distributions

« Title 30 •, « Ch. 24 », « Pt. 5 », • § 30-24-501 »

Idaho Code § 30-24-501

§ 30-24-501. Form of contribution. — A contribution may consist of property transferred to, services performed for, or another benefit provided to the limited partnership or an agreement to transfer property to, perform services for, or provide another benefit to the partnership.

History.

I.C., § 30-24-501, as added by 2015, ch. 243, § 37, p. 758.

Official Comment

Introductory Comment. With the exception of Section 4-505, this part applies in the same way to both general and limited partners.

This section is intentionally quite broad, encompassing past, present, and promised benefits. Comparable language exists in most, if not all, limited partnership statutes, and case law recognizes the intended broadness of this approach. *See, e.g., Rival 1981-IV Drilling Program, Ltd. v. Guar. Bank & Trust*, 732 P.2d 1233, 1234 (Colo. Ct. App. 1986) (letter of credit as contribution); *Rehfuss v. Moore*, 19 A. 756, 757 (Pa. 1890) (patent rights); *Belgard v. Manchac Technologies, LLC*, 92 So.3d 660, 664 (La. Ct. App. 3d Cir. 2012) (establishing a line of credit).

This article does not contain a statute of frauds specifically applicable to promised contributions. Generally applicable statutes of fraud might apply, however. For example, a promise to contribute land to the limited partnership would be subject to the statute of frauds pertaining to land transfers. *See Gunsorek v. Hearland Bank*, 707 N.E.2d 557, 564 (Ohio 1997) (holding that where terms of oral partnership agreement required limited partner to contribute real property, statute of frauds barred enforceability of the agreement). Likewise, a promise that by its terms requires performance that extends beyond one year from the making of the contract would be subject to the one-year provision of the statute of frauds. See the comment to Section 4-102(a)(9).

§ 30-24-502. Liability for contribution. — (a) A person's obligation to make a contribution to a limited partnership is not excused by the person's death, disability, termination, or other inability to perform personally.

(b) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited partnership to contribute money equal to the value, as stated in the required information, of the part of the contribution that has not been made.

(c) The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all partners. If a creditor of a limited partnership extends credit or otherwise acts in reliance on an obligation described in subsection (a) of this section without knowledge or notice of a compromise under this subsection, the creditor may enforce the obligation.

History.

I.C., § 30-24-502, as added by 2015, ch. 243, § 37, p. 758.

Official Comment

Subsection (a) — Under common law principles of impracticability, an individual's death or incapacity will sometimes discharge a duty to render performance. Restatement (Second) of Contracts §§ 261 (Discharge by Supervening Impracticability), 262 (Death or Incapacity of Person Necessary For Performance). (1981). This subsection overrides those principles. Moreover, the reference to "perform personally" is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

Subsection (b) — This subsection is a statutory liquidated damage provision, exercisable at the option of the limited partnership, with the damage amount set according to the value of the promised, non-monetary contribution.

EXAMPLE: In order to become a partner, a person promises to contribute to the limited partnership various assets which the partnership

agreement values at $150,000. In return for the person's promise, and in light of the agreed value, the limited partnership admits the person as a partner with a right to receive 25% of the limited partnership's distributions.

The promised assets are subject to a security agreement, but the partner promises to contribute them "free and clear." Before the partner can contribute the assets, the secured party forecloses on the security interest and sells the assets at a public sale for $75,000. Even if the $75,000 reflects the actual fair market value of the assets, under this subsection the limited partnership has a claim against the partner for "money equal to the value . . . of the part of the contribution which has not been made" — *i.e.*, $150,000.

EXAMPLE: Same facts as the previous example, except that the public sale brings $225,000. The limited partnership is neither obliged to invoke this subsection nor limited to the $150,000 valuation. The limited partnership may instead sue for breach of the promise to make the contribution, asserting the $225,000 figure as evidence of the actual loss suffered as a result of the breach.

Subsection (c) — The unanimity requirement expressed in the first sentence might indirectly benefit creditors, but the requirement is nonetheless a default rule and therefore may be varied by the partnership agreement. The right of each partner to consent is not a "right[] under this [Code] of a person other than a partner." *See* Section 4-105(c)(18) (preventing the partnership agreement from affecting such rights). In contrast, the creditor right stated in the second sentence fits squarely within Section 4-105(c)(18) and therefore may not be varied by the partnership agreement.

§ 30-24-503. Sharing of and right to distributions before dissolution. — (a) Any distribution made by a limited partnership before its dissolution and winding up must be shared among the partners on the basis of the value, as stated in the required information when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner, except to the extent necessary to comply with a transfer effective under section 30-24-702, Idaho Code, or charging order in effect under section 30-24-703, Idaho Code.

(b) A person has a right to a distribution before the dissolution and winding up of a limited partnership only if the partnership decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.

(c) A person does not have a right to demand or receive a distribution from a limited partnership in any form other than money. Except as otherwise provided in section 30-24-810(f), Idaho Code, a partnership may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(d) If a partner or transferee becomes entitled to receive a distribution, the partner or transferee is entitled to all remedies available to a creditor of the limited partnership with respect to the distribution. However, the partnership's obligation to make a distribution is subject to offset for any amount owed to the partnership by the partner or a person dissociated as a partner on whose account the distribution is made.

History.

I.C., § 30-24-503, as added by 2015, ch. 243, § 37, p. 758.

Official Comment Past uniform unincorporated entity acts and many current limited partnership acts provide default rules for allocation of profits, and UPA (1997) even provided a default structure for maintaining capital accounts. For the following reasons, this article, incorporating changes made by the Harmonization Project, provides a default rule only for rights to share in distributions: • Capital accounts

are maintained for one purpose, to determine how distributions will be made to partners. The rules for maintenance of capital accounts can be very complex. Generally, however, profits increase capital account balances (and increase the amounts that will be distributed to the partners) and losses reduce capital account balances (and reduce the amounts that will be distributed to the partners). If the statute has a simple default rule for how distributions are to be made to the partners, providing an additional set of default profit and loss allocation provisions and capital account rules will be, at best, duplicative and, at worse, inconsistent with the distribution rules.

• Some argue that capital account rules and profit and loss allocation provisions are necessary to comply with tax requirements. Tax income or loss is allocated to partners according to the partners' economic interests in the partnership, and these interests are based on distributions that would be made to partners on liquidation of the partnership. By including default distribution provisions, this article includes the information necessary to make these tax determinations. To the extent the tax law allows partners to make further tax elections or satisfy alternative safe harbors, the partners may look to the tax law for guidance and include necessary provisions in their agreements.

Subsection (a) — The rule stated applies to redemptions as well as operating distributions but is a default rule in both contexts. *See* the comment to Section 4-102(a)(3)(A).

Subsection (b) — The second sentence of this subsection accords with Section 4-602(a)(3) — upon dissociation a partner is treated as a mere transferee of the partner's own transferable interest. Like most *inter se r* ules in this article, this one is subject to the limited partnership agreement. *See* the comment to Section 4-602(a)(3) and Section 4-605(a)(3).

Subsection (d) — *See also* Section 4-504(d) (pertaining to the rights of partners and transferees that receive a distribution in the form of indebtedness) and 4-504(e) (pertaining to solvency testing for payments on indebtedness issued to redeem an interest).

§ 30-24-504. Limitations on distributions. — (a) A limited partnership may not make a distribution, including a distribution under section 30-24-810, Idaho Code, if after the distribution:

(1) The partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's activities and affairs; or

(2) The partnership's total assets would be less than the sum of its total liabilities plus, the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to the rights of persons receiving the distribution.

(b) A limited partnership may base a determination that a distribution is not prohibited under subsection (a) of this section on:

(1) Financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(2) A fair valuation or other method that is reasonable under the circumstances.

(c) Except as otherwise provided in subsection (e) of this section, the effect of a distribution under subsection (a) of this section is measured:

(1) In the case of distribution as defined in section 30-24-102(4)(A), Idaho Code, as of the earlier of:

(A) The date money or other property is transferred or debt is incurred by the limited partnership; or

(B) The date the person entitled to the distribution ceases to own the interest or right being acquired by the partnership in return for the distribution;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) In all other cases, as of the date:

(A) The distribution is authorized, if the payment occurs not later than one hundred twenty (120) days after that date; or

(B) The payment is made, if the payment occurs more than one hundred twenty (120) days after the distribution is authorized.

(d) A limited partnership's indebtedness to a partner or transferee incurred by reason of a distribution made in accordance with this section is at parity with the partnership's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

(e) A limited partnership's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of subsection (a) of this section if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that payment of a distribution could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

(f) In measuring the effect of a distribution under section 30-24-810, Idaho Code, the liabilities of a dissolved limited partnership do not include any claim that has been disposed of under section 30-24-806, 30-24-807 or 30-24-808, Idaho Code.

History.

I.C., § 30-24-504, as added by 2015, ch. 243, § 37, p. 758.

Official Comment

Both this section and Section 4-505 were derived essentially from the Model Business Corporation Act § 6.40. Both sections are necessary and appropriate because a limited partnership provides its limited partners a corporate-like liability shield and a limited liability limited partnership provides the shield to general partners as well. With the exception noted in the comment to Subsection (a)(2), the provisions of this section are non-waivable. Section 4-105(c)(18).

"Distribution" does not include "amounts constituting reasonable compensation for present or past service or payments made in the ordinary

course of business under a bona fide retirement plan or other bona fide benefits program." Section 4-102(4)(B).

Subsection (a) — Insolvency is a fundamental issue under this section, and this subsection provides two tests of insolvency. The tests are disjunctive; a distribution violates this section if after the distribution the limited partnership fails either of the tests. The subsection applies both to interim and liquidating distributions.

Solvency is also a fundamental issue under bankruptcy and fraudulent transfer law, which provide their own respective definitions of the concept.

Subsection (a)(2) — The reference to "preferential rights upon dissolution and winding up" is a default rule, because removing this protection for preferred partners or transferees is an inter se matter. *See* Section 4-105(d)(1)(B). The rest of the section is not subject to change in the partnership agreement. Section 4-105(c)(18).

Subsection (b) — This subsection states a standard of ordinary care, in contrast with the generally-applicable standard stated in Section 4-409(c) (gross negligence).

Subsection (b)(2) — This alternative valuation provision is likely to be both useful and fair when the limited partnership has appreciated assets but for accounting purposes these assets are valued at book value less depreciation.

Subsection (c) — This subsection provides three alternative rules for determining the point(s) in time of as which to apply the Subsection (a) solvency tests. The timing depends on which of three categories encompasses a distribution: (i) a distribution in the nature of a redemption (regardless of whether the distribution includes a distribution of indebtedness); (ii) any distribution of indebtedness other than a distribution in the nature of a redemption; and (iii) any distribution that involves neither a redemption nor a distribution of indebtedness. A requirement for additional solvency testing pertaining to distributions of indebtedness appears in Subsection (e).

Subsection (c)(1) — Section 4-102(4)(A) encompasses distributions in the nature of a redemption.

Subsection (c)(1)(A) and (B) — Under Subparagraph (A), any beginning of payment activity triggers to the rule and sets the date as of when to apply the solvency tests. Under Subparagraph (B), the limited partnership's complete acquisition of the rights is necessary to trigger the rule.

Subsection (c)(2) — This provision states the general rule for distributions that are in the form of debt and which are not connected with a redemption.

Subsection (c)(3) — This provision states alternative rules for all distribution of money or property (*i.e.*, not debt). The measuring date depends on the length of time between the authorization and payment of the distribution.

Subsection (d) — *Compare* Subsection (d), *with* Section 4-503(d) (characterizing as a creditor a person who has become entitled to receive a distribution).

Subsection (e) — This subsection contains two rules pertaining to indebtedness issued as part of a distribution and the solvency tests of Subsection (a). The first sentence states the sensible rule that indebtedness that is essentially subordinated to the solvency requirement — *i.e.*, not payable if making payment would transgress that requirement — is not counted in determining liabilities for purposes of the solvency tests. The second sentence applies the solvency tests to each payment of principal and interest on any indebtedness issued as a distribution, in addition to any previous testing required by Subsection (c)(1)(A) or (c)(2).

> EXAMPLE: A limited partnership and one of its partners agree that the limited partnership will buy out the partner's entire ownership interest in the partnership in return for a promissory note from the partnership, payable in installments. Under the redemption agreement, the partner yields up all its interests and rights on January 15 and the partnership signs and delivers the note to the dissociated partner on February 15. Under the note, payment of interest is due monthly beginning March 15, with a balloon payment of the principal due December 30.
>
> Under Subsection (c)(1)(B), the solvency tests are applied as of January 15. Under Subsection (e), the solvency tests are again applied on

the March 15, April 15, etc., and again on December 30.

Subsection (f) — The cited sections provide methods for extinguishing or limiting the debts of a limited partnership that is winding up its affairs and activities and thus any debt affected by any of the cited sections is irrelevant for purposes of solvency testing.

§ 30-24-505. Liability for improper distributions. — (a) If a general partner consents to a distribution made in violation of section 30-24-504, Idaho Code, and in consenting to the distribution fails to comply with section 30-24-409, Idaho Code, the general partner is personally liable to the limited partnership for the amount of the distribution which exceeds the amount that could have been distributed without the violation of section 30-24-504, Idaho Code.

(b) A person that receives a distribution knowing that the distribution violated section 30-24-504, Idaho Code, is personally liable to the limited partnership, but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under section 30-24-504, Idaho Code.

(c) A general partner against which an action is commenced because the general partner is liable under subsection (a) of this section may: (1) Implead any other person that is liable under subsection (a) of this section and seek to enforce a right of contribution from the person; and (2) Implead any person that received a distribution in violation of subsection (b) of this section and seek to enforce a right of contribution from the person in the amount the person received in violation of subsection (b) of this section.

(d) An action under this section is barred unless commenced not later than two (2) years after the distribution.

History.

I.C., § 30-24-505, as added by 2015, ch. 243, § 37, p. 758.

Official Comment This section and Section 4-504 were derived essentially from Model Business Corporation Act § 6.40. As with Section 4-504, this section is appropriate and necessary due to the liability shield of a limited partnership. The provisions of this section are non-waivable. Section 4-105(c)(18).

This section contemplates two categories of liability: liability of those who have authorized improper distributions, Subsection (a), and the liability of those who have received improper distributions, Subsection (c). Liability

that has accrued under this section is not affected by a person subsequently ceasing to be a partner or transferee.

The liability is to the entity, not to the creditors of an insolvent entity. *See Hullett v. Cousin*, 63 P.3d 1029, 1036 (Ariz. 2003) (holding that where limited partners had no intent to defraud creditors, and had no reason to know the partnership was insolvent at the time, return of the partners' contributions was not an improper distribution and could not be used to satisfy creditor's claim against the partnership). However, some cases accord a creditor standing to invoke the statute. *See, e.g., Henkels & McCoy, Inc. v. Adochio*, 906 F. Supp. 244, 249-50 (E.D. Pa. 1995), *aff'd*, 138 F.3d 491, 503-04 (3d Cir. 1998) (holding limited partners liable to creditor where general partner knew or should have known the distributions were in violation of partnership agreement).

This section does not preclude or interfere with claims for fraudulent transfer. *See* the comment to Subsection (d).

Subsection (a) — The liability is not strict liability but rather attaches only to the extent a decision maker has failed to comply with the duties stated in Section 4-409. To the extent those duties have been permissibly revised by the partnership agreement, the revised standards apply to this subsection. *See also* Section 4-504(b)(1) (permitting reasonable reliance on specified financial information).

Subsection (b) — Actual knowledge is necessary to impose liability. Reason to know does not suffice. *Compare* Subsection (b), *with* Section 4-103(a)-(b).

Subsections (b) and (c)(2) — Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a general partner.

Subsection (e) — When the distribution is in the form of indebtedness, the distribution may occur on several different dates. *See* the comment to Section 4-504(e).

This statute of limitations applies only to actions "under this section" and does not affect claims under other applicable law, which most often is fraudulent transfer law. For a different approach, see Del. Code Ann. tit. 6,

§ 18-607(c) (West 2013) (applying a 3-year statute of limitations to claims "under this chapter or other applicable law"); N.Y. Ptr. Law § 121-607 (c) (same). *But see, e.g., In re The Heritage Org., LLC*, 413 BR 438, 461 (Bankr. ND Tex. 2009) (invoking the Texas Uniform Fraudulent Act [TUFTA] to recover distributions made by a Delaware LLC headquartered in Texas; rejecting Del. Code Ann. tit. 6, § 18-607(c) on choice of law grounds; stating that "the Delaware legislature cannot limit the reach of TUFTA").

Part 6
Dissociation

Idaho Code § 30-24-601

§ 30-24-601. Dissociation as limited partner. — (a) A person does not have a right to dissociate as a limited partner before the completion of the winding up of the limited partnership.

(b) A person is dissociated as a limited partner when:

(1) The limited partnership knows or has notice of the person's express will to withdraw as a limited partner, but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date;

(2) An event stated in the partnership agreement as causing the person's dissociation as a limited partner occurs;

(3) The person is expelled as a limited partner pursuant to the partnership agreement;

(4) The person is expelled as a limited partner by the affirmative vote or consent of all the other partners if:

(A) It is unlawful to carry on the limited partnership's activities and affairs with the person as a limited partner;

(B) There has been a transfer of all of the person's transferable interest in the partnership, other than:

(i) A transfer for security purposes; or

(ii) A charging order in effect under section 30-24-703, Idaho Code, which has not been foreclosed;

(C) The person is an entity and:

(i) The partnership notifies the person that it will be expelled as a limited partner because the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, the person's charter or the equivalent has been revoked,

or the person's right to conduct business has been suspended by the person's jurisdiction of formation; and

(ii) Not later than ninety (90) days after the notification, the statement of dissolution or the equivalent has not been withdrawn, rescinded, or revoked, the person has not been reinstated, or the person's charter or the equivalent or right to conduct business has not been reinstated; or

(D) The person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up;

(5) On application by the limited partnership or a partner in a direct action under section 30-24-901, Idaho Code, the person is expelled as a limited partner by judicial order because the person:

(A) Has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership's activities and affairs;

(B) Has committed willfully or persistently, or is committing willfully and persistently, a material breach of the partnership agreement or the contractual obligation of good faith and fair dealing under section 30-24-305(a), Idaho Code; or

(C) Has engaged or is engaging in conduct relating to the partnership's activities and affairs that makes it not reasonably practicable to carry on the activities and affairs with the person as a limited partner;

(6) In the case of an individual, the individual dies;

(7) In the case of a person that is a testamentary or inter vivos trust or is acting as a limited partner by virtue of being a trustee of such a trust, the trust's entire transferable interest in the limited partnership is distributed;

(8) In the case of a person that is an estate or is acting as a limited partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the limited partnership is distributed;

(9) In the case of a person that is not an individual, the existence of the person terminates;

(10) The limited partnership participates in a merger under chapter 22, title 30, Idaho Code, and:

(A) The partnership is not the surviving entity; or

(B) Otherwise as a result of the merger, the person ceases to be a limited partner;

(11) The limited partnership participates in an interest exchange under chapter 22, title 30, Idaho Code, and as a result of the interest exchange, the person ceases to be a limited partner;

(12) The limited partnership participates in a conversion under chapter 22, title 30, Idaho Code;

(13[)] The limited partnership participates in a domestication under chapter 22, title 30, Idaho Code, and as a result of the domestication, the person ceases to be a limited partner;

(14) The limited partnership dissolves and completes winding up; or

(15) In the case of a professional entity, restrictions or limitations are placed upon a limited partner's ability to continue to render professional services.

History.

I.C., § 30-24-601, as added by 2015, ch. 243, § 38, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in the designation for paragraph (b)(13) was added by the compiler to correct the enacting legislation.

Official Comment

Subsection (a) — This provision states a default rule.

Subsection (b) — This subsection states default rules, which the partnership agreement may vary. However, it would be nonsensical to vary some of the rules — *e.g.*, to provide that the death of a partner who is an individual does not cause the individual's dissociation as a partner,

Subsection (b)(6), or that an entity remains a partner even after the existence of the entity has terminated, Subsection (b)(9).

Subsection (b)(1) — The partnership agreement may vary this provision, even to the extent of eliminating a person's power to dissociate as a limited partner. Section 4-105(c)(11) prohibits the limited partnership agreement from eliminating the power to dissociate of a person as a general partner, but neither Section 4-105(c) nor (d) preserve as mandatory the power of a person to dissociate as a *limited* partner.

Subsection (b)(4)(B) — This provision permits expulsion when a limited partner no longer has any "skin in the game." Under this subparagraph (unless the limited partnership agreement provides otherwise), a limited partner's transferee can protect itself from the vulnerability of "bare naked transferee" status by obligating the partner/transferor to retain a 1% interest and exercise the partner's contract and governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

Subsection (b)(5) — By its terms, this provision does not permit a partner to bring a direct action for expulsion even if the partner could establish standing under Section 4-901(b). Dealing with a misbehaving limited partner is a management duty, properly reserved to the general partners. *Cf.* Section 4-603(5) (permitting an "application by the limited partnership or a partner in a direct action under Section 4-901" for a judicial order expelling a general partner).

Although the partnership agreement can revise or eliminate the possibility of judicial expulsion, doing so requires careful planning. *Cf. Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898, at *1, n.2 (Del. Ch. Dec. 9, 2013) (stating that "the right to judicial dissolution is a default right which the parties may eschew by contract" while reserving the question of "[w]hether the parties may, by contract, divest this Court of its authority to order a dissolution in all circumstances, even where it appears manifest that equity so requires — leaving, for instance, irreconcilable members locked away together forever like some alternative entity version of Sartre's Huis Clos").

For examples of conduct warranting an expulsion order in various contexts, see *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (discussing a

pattern of conduct); *Sherwood Park Bus. Ctr., L.L.C. v. Taggart*, 323 P.3d 551, 561 (Or. Ct. App. 2014) (upholding expulsion of a member who "had stolen a large amount of money from [the limited liability company], had intentionally failed to provide financial information, and had made himself unavailable to carry on the business"); *CCD, L.C. v. Millsap*, 116 P.3d 366, 373 (Utah 2005) (holding that a member's "misappropriat[ion of] trust account funds totaling at least $11,540.06 for his personal use" warranted expulsion, where the member's "misconduct continued the pattern of behavior that [had previously] resulted in losses to the company of $625,000[, where the new misconduct] . . . . took place after [the member's] prior wrongdoing had been discovered and after [the limited liability company] had assented to permit [the member] to atone for his misdeeds by fulfilling the terms of the amended operating agreement").

For an analysis that helps distinguish Paragraph (5)(C) from Paragraphs (5)(A) and (B), see *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510, at *15 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (interpreting predecessor law and noting that the "not reasonably practicable standard" does not require a showing of wrongful conduct). *Cf. Dunnagan v. Watson*, 204 S.W.3d 30, 40 (Tex. Ct. App. 2006) (same issue in the context of dissolution). Where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. *Robertson v. Jacobs Cattle Co.*, 830 N.W.2d 191, 201-02 (Neb. 2013) (discussing analogous provisions of UPA (1997)). "[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution." *Brennan v. Brennan Assocs.*, 977 A.2d 107, 121 (Conn. 2009) (general partnership).

Subsection (b)(7) and (8) — A change in trustee or personal representative does not cause dissociation.

Subsection (b)(9) — This provision is the entity analog to Subsection (b)(6) (death of an individual). Although in theory the partnership agreement could change this rule, doing so would be nonsensical. *See* the comment to Section 4-803(a). (noting that a terminated limited liability company cannot rescind its dissolution because "a 'dead' entity lacks both the capacity and power to bring itself back from the dead"). *See also* Subsection (b)(14).

Subsection (b)(10)(A) — If a limited partnership disappears as part of a merger, no person can continue as a partner of the limited partnership. When the merger takes effect, the partners of the disappearing entity are perforce dissociated. Depending on the plan of merger, those persons may become partners of a surviving limited partnership. In those circumstances, the merger will have dissociated them from one limited partnership and admitted them into partnership in the surviving entity. *See* Section 4-301(b)(2).

Subsection (b)(10)(B) — It is possible for a plan of merger to "shuffle the equity" of the surviving entity, even to the extent of "taking out" some or all of the owners of the surviving entity. A reverse triangular merger involving a limited partnership as the surviving entity would dissociate all the pre-merger partners of the partnership.

Subsection (b)(12) — By definition, a limited partnership that converts ceases to be a limited partnership. Thus, when the plan of conversion takes effect, all the partners of the converted entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will "shuffle the equity" and "take out" some of the partners of the converting limited partnership.

Subsection (b)(13) — Domestication does not by itself dissociate a partner, because the domesticated entity remains both a limited partnership and "the same entity without interruption as the domesticating company." Section 2-506(a)(1)(B). However, an "equity shuffle" could dissociate a partner.

§ 30-24-602. Effect of dissociation as limited partner. — (a) If a person is dissociated as a limited partner:

(1) Subject to section 30-24-704, Idaho Code, the person does not have further rights as a limited partner; (2) The person's contractual obligation of good faith and fair dealing as a limited partner under section 30-24-305(a), Idaho Code, ends with regard to matters arising and events occurring after the person's dissociation; and (3) Subject to section 30-24-704, Idaho Code, and chapter 22, title 30, Idaho Code, any transferable interest owned by the person in the person's capacity as a limited partner immediately before dissociation is owned by the person solely as a transferee.

(b) A person's dissociation as a limited partner does not of itself discharge the person from any debt, obligation, or other liability to the limited partnership or the other partners that the person incurred while a limited partner.

History.

I.C., § 30-24-602, as added by 2015, ch. 243, § 38, p. 758.

Official Comment Subsection (a) — This provision makes no reference to power-to-bind matters, because this article provides that a limited partner *qua* limited partner has no power to bind the limited partnership. Section 4-302(a).

Subsection (a)(2) — This provision does not determine the effect of a person's dissociation as a limited partner on the person's future obligations or rights under the partnership agreement. Some contractual obligations typically extend beyond dissociation — *e.g.*, buyout arrangements. To the extent provisions of the partnership agreement continue to apply, the common law obligation of good faith continues to apply as well. *See* the comment to 4-409(d). (explaining that the subsection "invokes the implied obligation that exists in every contract" as a matter of common law).

Subsection (a)(3) — This paragraph accords with Section 4-503(b) — dissociation does not entitle a person to any distribution, even if

dissociation takes the form of expulsion. *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2012).

Like most *inter se* rules in this article, this one is subject to the partnership agreement. For example, the partnership agreement has the power to provide for the buyout of a person's transferable interest in connection with the person's dissociation.

§ 30-24-603. Dissociation as general partner. — A person is dissociated as a general partner when:

(1) The limited partnership knows or has notice of the person's express will to withdraw as a general partner, but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date;

(2) An event stated in the partnership agreement as causing the person's dissociation as a general partner occurs;

(3) The person is expelled as a general partner pursuant to the partnership agreement;

(4) The person is expelled as a general partner by the affirmative vote or consent of all the other partners if:

(A) It is unlawful to carry on the limited partnership's activities and affairs with the person as a general partner;

(B) There has been a transfer all of the person's transferable interest in the partnership, other than:

(i) A transfer for security purposes; or

(ii) A charging order in effect under section 30-24-703, Idaho Code, which has not been foreclosed;

(C) The person is an entity and:

(i) The partnership notifies the person that it will be expelled as a general partner because the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, the person's charter or its equivalent has been revoked, or the person's right to conduct business has been suspended by the person's jurisdiction of its formation; and

(ii) Not later than ninety (90) days after the notification the statement of dissolution or the equivalent has not been withdrawn, rescinded, or revoked, the person has not been reinstated, or the person's charter or the equivalent of right to conduct business has not been reinstated; or

(D) The person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up;

(5) On application by the limited partnership or a partner in a direct action under section 30-24-901, Idaho Code, the person is expelled as a general partner by judicial order because the person:

(A) Has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership's activities and affairs;

(B) Has committed willfully or persistently, or is committing willfully or persistently, a material breach of the partnership agreement or a duty or obligation under section 30-24-409, Idaho Code; or

(C) Has engaged or is engaging in conduct relating to the partnership's activities and affairs that makes it not reasonably practicable to carry on the activities and affairs of the limited partnership with the person as a general partner;

(6) In the case of an individual:

(A) The individual dies;

(B) A guardian or general conservator for the individual is appointed; or

(C) A court orders that the individual has otherwise become incapable of performing the individual's duties as a general partner under this chapter or the partnership agreement;

(7) The person:

(A) Becomes a debtor in bankruptcy;

(B) Executes an assignment for the benefit of creditors; or

(C) Seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all the person's property;

(8) In the case of a person that is a testamentary or inter vivos trust or is acting as a general partner by virtue of being a trustee of such a trust, the trust's entire transferable interest in the limited partnership is distributed;

(9) In the case of a person that is an estate or is acting as a general partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the limited partnership is distributed;

(10) In the case of a person that is not an individual, the existence of the person terminates;

(11) The limited partnership participates in a merger under chapter 22, title 30, Idaho Code, and:

(A) The partnership is not the surviving entity; or

(B) Otherwise as a result of the merger, the person ceases to be a general partner;

(12) The limited partnership participates in an interest exchange under chapter 22, title 30, Idaho Code, and as a result of the interest exchange, the person ceases to be a general partner;

(13) The limited partnership participates in a conversion under chapter 22, title 30, Idaho Code;

(14) The limited partnership participates in a domestication under chapter 22, title 30, Idaho Code, and as a result of the domestication, the person ceases to be a general partner;

(15) The limited partnership dissolves and completes winding up; or

(16) In the case of a professional entity, restrictions or limitations are placed upon a general partner's ability to continue to render professional services.

History.

I.C., § 30-24-603, as added by 2015, ch. 243, § 38, p. 758.

Official Comment

This section mostly states default rules, which the limited partnership agreement may vary. However, it would make no sense to vary some of the rules — *e.g.* ,, to provide that death does *not* cause an individual's dissociation, Paragraph (6)(A), or that person (other than an individual) remains a general partner even *after* "the existence of the person terminates." Paragraph (10).

Paragraph (1) — Limited partnership agreements often require notice of dissociation to be in writing and to specify the effective date of the dissociation. The agreement cannot eliminate the power of a general partner to dissociate by express will, Section 4-105(c)(11) but can eliminate the right and thereby make the dissociation wrongful.

Paragraph (3) — Many partnership agreements provide for "no cause" expulsion, and courts considering such provisions have taken somewhat different approaches. *Compare Gelder Med. Grp. v. Webber*, 41 N.Y.2d 680, 684, 363 N.E.2d 573, 576 (1977) *with Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 240, 664 N.E.2d 239, 245 (Ill. App. Ct. 1996). *See also* Section 4-409(d) and comment. (stating and explaining the implied contractual covenant of good faith and fair dealing).

Paragraph (4)(B) — This paragraph permits expulsion when a general partner no longer has any "skin in the game." Under this paragraph (unless the partnership agreement provides otherwise), a general partner's transferee can protect itself from the vulnerability of "bare naked assignee" status, comment to Section 4-107(b), by obligating the general partner/transferor to retain a 1% interest and exercise the partner's governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

Paragraph (5) — The reference to "a direct action under Section 4-901" reflects the "separate entity" nature of a limited partnership. Section 4-901 limits a partner's standing to bring a direct action to circumstances in which the partner can "plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership."

EXAMPLE: General Partner Alpha breaches the limited partnership agreement by purporting to oust General Partner Beta from General Partner Beta's role in managing the limited partnership. General Partner Beta has a direct claim against General Partner Alpha, not only for breach of contract, but also for expulsion under Paragraph 5.

EXAMPLE: General Partner Alpha breaches the limited partnership agreement (and also Section 409(c)) through grossly negligent conduct which harms the profitability of the limited partnership. Depending on the terms of the limited partnership agreement and the allocation of

power among the partners, General Partner Beta may be able to cause the limited partnership to invoke Paragraph 5 and seek General Partner Alpha's expulsion. But General Partner Beta has no standing individually to seek General Partner Alpha's expulsion, except through a derivative claim. (The same is true for a claim of breach of contract. *See* the comment to Section 4-901(b).)

Paragraph (5)(C) — This provision has an analog among the causes for dissolution. See Section 4-801(a)(6)(B). For examples of conduct warranting an expulsion order, see *Della Ratta v. Dyas*, 183 Md. App. 344, 365-66, 961 A.2d 629, 642 (2008), *aff'd*, 414 Md. 556, 996 A.2d 382 (2010) (noting that "[t]he trial court expressly found that [two major capital] calls 'were issued in bad faith' . . . [and the] court also found that, '[by] another improper accounting movement' in [the partnership], $580,000 was taken 'for executive office expenses which was improper'") (third bracket in original); *Brennan v. Brennan Associates*, 293 Conn. 60, 76-77, 977 A.2d 107, 117-18 (2009) (referring to the expelled partner's "moral turpitude and criminal fraud, and failure to be honest in court as to the extent of his criminal wrongdoing" and "his baseless claims of fraud" against a fellow partner; stating "he has rung the bell and it cannot be unrung").

For an analysis that helps distinguish Paragraph (5)(C) from Paragraphs (5)(A) and (B), see *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 at *15 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (interpreting predecessor law and noting that the "not reasonably practicable standard" does not require a showing of wrongful conduct). *Cf. Dunnagan v. Watson*, 204 S.W.3d 30, 40 (Tex. App. 2006) (same issue in the context of dissolution).

Where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 870-72, 830 N.W.2d 191, 201-02 (2013) (discussing analogous provisions of UPA (1997)). "[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution." *Brennan v. Brennan Associates*, 293 Conn. 60, 83, 977 A.2d 107, 121 (2009) (general partnership).

Paragraph (6)(B) and (C) — No comparable provisions appear in Section 4-601 (dealing with the dissociation of a limited partner), because, given the limited rights and duties of limited partners, the stated occurrences do not necessarily justify dissociation.

Paragraph 7(A) — This provision is subject to bankruptcy law. *See, e.g.*, 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Paragraphs (8) and (9) — A change in trustee or personal representative does not cause dissociation.

Paragraph (10) — This provision is the entity analog to Paragraph (7)(A) (death of an individual). Although in theory the partnership agreement could change this rule, doing so would be nonsensical. See the comment to Section 4-803(a). (noting that a terminated limited partnership cannot rescind its dissolution because "a 'dead' entity lacks both the capacity and power to bring itself back from the dead"). *See also* Paragraph (15).

Paragraph (11)(A) — If a limited partnership disappears as part of a merger, no person can continue as a partner of the partnership. When the merger takes effect, the partners of the disappearing partnership are perforce dissociated. Depending on the plan of merger, those persons may become partners of a surviving limited partnership. In those circumstances, the merger will have dissociated them from one limited partnership and admitted them into partnership in the surviving limited partnership. *See* Section 4-401(b)(2).

Paragraph (11)(B) — It is possible for a plan of merger to "shuffle the equity" of the surviving entity, even to the extent of "taking out" some or all of the owners of the surviving entity. A reverse triangular merger involving a limited partnership as the surviving entity would dissociate all the pre-merger partners of the limited partnership.

Paragraph (13) — By definition, a limited partnership that converts ceases to be a limited partnership. *See* Section 2-406. Thus, when the plan of conversion takes effect, all the partners of the converted entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will "shuffle the equity" and "take out" some of the partners of the converting LLC.

Paragraph (14) — Domestication does not by itself dissociate a partner, because the domesticated entity remains both a limited partnership and "the same entity without interruption as the domesticating company." Section 2-506(a)(1)(B). However, an "equity shuffle" could dissociate a general partner.

§ 30-24-604. Power to dissociate as general partner — Wrongful dissociation. — (a) A person has the power to dissociate as a general partner at any time, rightfully or wrongfully, by withdrawing as a general partner by express will under section 30-24-603(1), Idaho Code.

(b) A person's dissociation as a general partner is wrongful only if the dissociation:

(1) Is in breach of an express provision of the partnership agreement; or

(2) Occurs before the completion of the winding up of the limited partnership, and:

(A) The person withdraws as a general partner by express will;

(B) The person is expelled as a general partner by judicial order under section 30-24-603(5), Idaho Code;

(C) The person is dissociated as a general partner under section 30-24-603(7), Idaho Code; or

(D) In the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated as a general partner because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a general partner is liable to the limited partnership and, subject to section 30-24-901, Idaho Code, to the other partners for damages caused by the dissociation. The liability is in addition to any debt, obligation, or other liability of the general partner to the partnership or the other partners.

History.

I.C., § 30-24-604, as added by 2015, ch. 243, § 38, p. 758.

Official Comment

Subsection (a) — The limited partnership agreement may not eliminate this power. See Section 4-105(c)(11). In this respect, a general partner in a

limited partnership is analogous to a general partner in general partnership. *See* Section 3-105(c)(9).

Subsection (b) — This subsection list exhaustively ("only if") the dissociations that are "wrongful," but the list is a default rule. The limited partnership agreement can expand the list; e.g., by making wrongful a dissociation that beaches the implied contractual covenant of good faith and fair dealing. In theory, the partnership agreement can provide for liquidated damages (subject to the requirements of contract law) and, in theory, can also contract or even eliminate the list of wrongful dissociations.

Subsection (b)(1) — The reference to "an express provision of the partnership agreement" means that a person's dissociation as a general partner in breach of the obligation of good faith and fair dealing is not wrongful dissociation for the purposes of this section. The breach might be actionable on other grounds.

Subsection (b)(2) — The reference to "before the termination of the limited partnership" reflects the expectation that each general partner will shepherd the limited partnership through winding up. See the comment to Section 4-406(f). A person's obligation to remain as general partner through winding up continues even if another general partner dissociates and even if that dissociation leads to the limited partnership's premature dissolution under Section 4-801(3)(A).

Subsection (b)(2)(C) — This subsection refers to Section 4-603(7), which involves inter alia dissociation on account of bankruptcy, which in turn is subject to bankruptcy law. *See, e.g.*, 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Subsection (c) — A person who prematurely dissociates as a general partner risks liability for any resulting damages. For example, the limited partnership might incur substantial expenses in replacing the general partner's expertise, reputation, or creditworthiness.

In effect, this subsection equates wrongful dissociation with breach of contract. Accordingly, courts should look to contract law to determine what consequential damages are recoverable. *See Hadley v. Baxendale*, 9 Exch. 341 (1854); Restatement (Second) of Contracts § 351 (1981); *see also Williams v. Hildebrand*, 247 S.W.2d 356, 358 (Ark. 1952) (interpreting UPA

(1914) § 38(2)(a)(II), pertaining to wrongful dissolution, and stating that "the measure of damages, when the partnership was to have continued for a fixed term, is the profits that the injured partner would have received").

The language "subject to Section 4-901" is intended to preserve the distinction between direct and derivative claims.

§ 30-24-605. Effect of dissociation as general partner. — (a) If a person is dissociated as a general partner:

(1) The person's right to participate as a general partner in the management and conduct of the limited partnership's activities and affairs terminates; (2) The person's duties and obligations as a general partner under section 30-24-409, Idaho Code, end with regard to matters arising and events occurring after the person's dissociation; (3) The person may sign and deliver to the secretary of state for filing a statement of dissociation pertaining to the person and, at the request of the limited partnership, shall sign an amendment to the certificate of limited partnership that states the person has dissociated as a general partner; and (4) Subject to section 30-24-704, Idaho Code, and chapter 22, title 30, Idaho Code, any transferable interest owned by the person in the person's capacity as a general partner immediately before dissociation is owned by the person solely as a transferee.

(b) A person's dissociation as a general partner does not of itself discharge the person from any debt, obligation, or other liability to the limited partnership or the other partners that the person incurred while a general partner.

History.

I.C., § 30-24-605, as added by 2015, ch. 243, § 38, p. 758.

Official Comment Subsection (a)(1) — Once a person dissociates as a general partner, the person loses all management rights as a general partner regardless of what happens to the limited partnership. This rule contrasts with Section 3-603(b)(1), which permits a dissociated general partner to participate in winding up in some circumstances.

Subsection (a)(2) — This provision establishes a dividing line, separating out "matters arising and events occurring after the person's dissociation." If the limited partnership has continuing projects with clients, ongoing relationships with clients, or both, the dividing line requires special

attention with regard to non-competition and partnership opportunities duties. *See* Section 4-409(b)(1) and (3).

Disputes involving law firms have generated much of the relevant case law.*See, e.g., Meehan v. Shaughnessy*, 404 Mass. 419, 422, 535 N.E.2d 1255, 1257 (1989); Jewel v. Boxer, 156 Cal. App. 3d 171, 175, 203 Cal. Rptr. 13, 15 (Ct. App. 1984). To a large extent, a well-drawn partnership agreement can delineate the parties' respective rights and responsibilities and thereby avoid problems. However, if the partnership becomes insolvent, the bankruptcy court may well scrutinize the partners' inter se arrangements. *See Geron v. Robinson & Cole LLP*, 476 B.R. 732, 743 (S.D.N.Y. 2012) (considering whether a law firm had "fraudulently transferred . . . assets when its partners adopted the Jewel Waiver [releasing rights recognized by *Jewel v. Boxer*] on the eve of dissolution without consideration").

This provision does not determine the effect of a person's dissociation as a general partner on the person's future obligations or rights under the partnership agreement. Some contractual obligations typically extend beyond dissociation — *e.g*., non-competition provisions, buyout arrangements. To the extent provisions of the partnership agreement continue to apply, the common law obligation of good faith continues to apply as well. *See* the comment to 4-409(d) (explaining that the subsection "invokes the implied obligation that exists in every contract" as a matter of common law).

Subsection (a)(3) — Both records covered by this provision have the same effect under Section 4-103(d) — namely, to give constructive notice that the person has dissociated as a general partner. The notice benefits the person by curtailing any further personal liability under Sections 4-607, 4-805, and Article 2. The notice benefits the limited partnership by curtailing any lingering power to bind under Sections 4-606, 4-804, and Article 2.

The limited partnership is in any event obligated to amend its certificate of limited partnership to reflect the dissociation of a person as general partner. *See* Section 4-202(d)(2). In most circumstances, the amendment requires the signature of the person that has dissociated. Section 4-203(a)(5)(C). If that signature is required and the person refuses or fails to sign, the

limited partnership may invoke Section 1-210 (Signing and Filing Pursuant to Judicial Order).

Subsection (a)(4) — As provided in Section 4-503(b), dissociation does not result in a distribution. In general, when a person dissociates as a general partner, the person's rights as a general partner disappear and, subject to Section 4-109 (Dual Capacity), the person's status degrades to that of a mere transferee — even when the dissociation comes in the form of expulsion. *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2012). On distinguishing between a person's rights of a general partner and as a limited partners, see Section 4-108(9)(C) (providing that, for any person that is both a general partner and a limited partner, the required information must state which transferable interest is owned in which capacity).

Like most *inter se* rules in this article, this one is subject to the partnership agreement. For example, the limited partnership agreement might provide for the buyout of a person's transferable interest in connection with the person's dissociation.

Section 2-704 provides additional information rights when an individual's death has caused dissociation. Article 2 covers organic transactions such as mergers and conversions.

Subsection (b) — A general partner's obligation to safeguard trade secrets and other confidential or proprietary information is incurred when the partner learns or otherwise obtains the information. This subsection preserves the obligation post-dissociation.

§ 30-24-606. Power to bind and liability of person dissociated as general partner. — (a) After a person is dissociated as a general partner and before the limited partnership is merged out of existence, converted, or domesticated under chapter 22, title 30, Idaho Code, or dissolved, the partnership is bound by an act of the person only if:

(1) The act would have bound the partnership under section 30-24-402, Idaho Code, before the dissociation; and

(2) At the time the other party enters into the transaction:

(A) Less than two (2) years has passed since the dissociation; and

(B) The other party does not know or have notice of the dissociation and reasonably believes that the person is a general partner.

(b) If a limited partnership is bound under subsection (a) of this section, the person dissociated as a general partner that caused the partnership to be bound is liable:

(1) To the partnership for any damage caused to the partnership arising from the obligation incurred under subsection (a) of this section; and

(2) If a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the liability.

History.

I.C., § 30-24-606, as added by 2015, ch. 243, § 38, p. 758.

Official Comment

A person's dissociation as a general partner ends immediately the person's actual authority to act for the partnership. *See* Section 4-605(a)(1). However, the person's apparent authority may linger.

This section does not affect a person's power to bind a partnership in another capacity — *e.g.*, as an employee with actual authority.

Subsection (a) — This subsection codifies and constrains the lingering apparent authority of a person dissociated as a general partner. The constraint is in the phrase "only if."

The provision applies until the limited partnership dissolves or under [Article] 2 ceases to be governed by this article. Once a limited partnership dissolves, Section 4-804 applies.

Subsection (a)(1) — Section 4-402 states a general partner's statutory apparent authority. This provision causes the apparent authority to linger.

Subsection (a)(2)(A) — In any event, any lingering apparent authority ends two years after the dissociation.

Subsection (a)(2)(B) — A person might have notice under Section 4-103(d)(1) (statement of dissociation) as well as under Section 4-103(b)(1) (person "ha[ving] reason to know the fact from all the facts known to the person at the time in question").

Subsection (b) — The liability stated in this subsection is not exhaustive. For example, if a person dissociated as a general partner causes a limited partnership to be bound under Subsection (a) and, due to a guaranty, some other person — not a general partner nor dissociated as a general partner — is liable on the resulting obligation, that other person may have a claim under other law against the person dissociated as a general partner.

§ 30-24-607. Liability of person dissociated as general partner to other persons. — (a) A person's dissociation as a general partner does not of itself discharge the person's liability as a general partner for a debt, obligation, or other liability of the limited partnership incurred before dissociation. Except as otherwise provided in subsections (b) and (c) of this section, the person is not liable for a limited partnership obligation incurred after dissociation.

(b) A person whose dissociation as a general partner results in a dissolution and winding up of the limited partnership's activities and affairs is liable on an obligation incurred by the limited partnership under section 30-24-805, Idaho Code, to the same extent as a general partner under section 30-24-404, Idaho Code.

(c) A person that is dissociated as a general partner without the dissociation resulting in a dissolution and winding up of the limited partnership's activities and affairs is liable on a transaction entered into by the partnership after the dissociation only if:

(1) A general partner would be liable on the transaction; and

(2) At the time the other party enters into the transaction:

(A) Less than two (2) years has passed since the dissociation; and

(B) The other party does not have knowledge or notice of the dissociation and reasonably believes that the person is a general partner.

(d) By agreement with a creditor of a limited partnership and the partnership, a person dissociated as a general partner may be released from liability for a debt, obligation, or other liability of the partnership.

(e) A person dissociated as a general partner is released from liability for a debt, obligation, or other liability of the limited partnership if the partnership's creditor, with knowledge or notice of the person's dissociation as a general partner but without the person's consent, agrees to a material alteration in the nature or time of payment of the debt, obligation, or other liability.

History.

I.C., § 30-24-607, as added by 2015, ch. 243, § 38, p. 758.

Official Comment

To the extent a limited partnership has been a limited liability limited partnership throughout its existence, the liability rules stated in this section are moot. *See, e.g.*, subsection (c)(1).

Subsection (a) — A person's dissociation as a general partner does not categorically preclude the person being liable as a general partner for subsequently incurred obligations of the limited partnership. If the dissociation results in dissolution, Subsection (b) applies and the person will be liable as a general partner on any partnership obligation incurred under Section 4-805. If the dissociation does not result in dissolution, Subsection (c) applies.

The phrase "liability as a general partner for an obligation of the limited partnership" refers to liability under Section 4-404. As stated in the comments to Section 4-404(b) and (c), other law determines when a partnership obligation is "incurred."

Subsection (b) — In these circumstances, a person's dissociation as a general partner has no effect on the person's liability exposure, even if any or all of the following occur:

• The certificate of limited partnership is amended to state that the person has dissociated as a general partner, as required by Section 4-202(d)(2).

• The person has filed a statement of dissociation, as permitted by Section 4-605(a)(3).

• The person was the sole general partner, and the limited partnership is wound up by someone else under Section 4-802(c) or (d).

However, amending the certificate of limited partnership to indicate dissolution would protect the person to the same extent as the amendment would protect the remaining general partners. See Sections 4-802(b)(2)(A) and 4-804.

Subsection (c) — The rule stated here for the "lingering liability" of a person dissociated as a general partner parallels the rule stated in Section 4-606 for the lingering apparent authority of a person dissociated as a general partner.

Subsection (c)(2)(B) — A person might have notice under Section 4-103(d)(1) as well as under Section 4-103(b)(1).

Subsections (c) and (d) — These provisions trace back to UPA (1914) § 36(2), (3).

Part 7
Transferable Interests and Rights of Transferees and Creditors

Idaho Code § 30-24-701

§ 30-24-701. Nature of transferable interest. — A transferable interest is personal property.

History.

I.C., § 30-24-701, as added by 2015, ch. 243, § 39, p. 758.

Official Comment

For the definition of transferable interest, see Section 4-102(a)(11). Absent a contrary provision in the partnership agreement or the consent of the partners, a "transferable interest" is the only interest in a limited partnership that can be transferred to a person not already a partner. *See* Section 4-702. As to whether a partner may transfer governance rights to a fellow partner, the question is moot absent a provision in the partnership agreement changing the default rule. See Section 406(a) (allocating general partner governance rights *per capita*) and 4-406(b) (requiring unanimous agreement of all partners to take specified action). In the default mode, a general partner's transfer of governance rights to another general partner: (i) does not increase the transferee's governance rights; (ii) eliminates the transferor's governance rights; and (iii) thereby changes the denominator but not the numerator in calculating governance rights

EXAMPLE: LCN Company is a limited partnership with three general partners, Laura, Charles, and Nora. The partnership agreement does not displace this article's default rule on the allocation of governance rights among general partners. Thus, each general partner has 1/3 of those rights. Laura transfers her entire ownership interest to Charles. The transfer does not increase Charles's governance rights but does eliminate Laura's. After the transfer, Laura has no governance rights (regardless of whether Charles and Nora agree to expel Laura under Section 4-603(4)(B)). As a result, Charles and Nora each have ½ of the governance rights.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the rules stated in those Articles.

§ 30-24-702. Transfer of transferable interest. — (a) A transfer, in whole or in part, of a transferable interest:

(1) Is permissible, except the transfer of a transferable interest in a professional entity is not permissible without compliance with section 30-21-901(i), Idaho Code;

(2) Does not by itself cause a partner's dissociation or a dissolution and winding up of the limited partnership's activities and affairs; and

(3) Subject to section 30-24-704, Idaho Code, does not entitle the transferee to:

(A) Participate in the management or conduct of the partnership's activities and affairs; or

(B) Except as otherwise provided in subsection (c) of this section, have access to required information, records, or other information concerning the partnership's activities and affairs.

(b) A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(c) In a dissolution and winding up of a limited partnership, a transferee is entitled to an account of the partnership's transactions only from the date of dissolution.

(d) A transferable interest may be evidenced by a certificate of the interest issued by a limited partnership in a record, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(e) A limited partnership need not give effect to a transferee's rights under this section until the partnership knows or has notice of the transfer.

(f) A transfer of a transferable interest in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having knowledge or notice of the restriction at the time of transfer.

(g) Except as otherwise provided in sections 30-24-601(b)(4)(B) and 30-24-603(4)(B), Idaho Code, if a general or limited partner transfers a

transferable interest, the transferor retains the rights of a general or limited partner other than the transferable interest transferred and retains all the duties and obligations of a general or limited partner.

(h) If a general or limited partner transfers a transferable interest to a person that becomes a general or limited partner with respect to the transferred interest, the transferee is liable for the transferor's obligations under sections 30-24-502 and 30-24-505, Idaho Code, known to the transferee when the transferee becomes a partner.

History.

I.C., § 30-24-702, as added by 2015, ch. 243, § 39, p. 758.

Official Comment

One of the most fundamental characteristics of limited partnership law is its fidelity to the "pick your partner" principle. *See, e.g., Bynum v. Frisby*, 73 Nev. 145, 149-50, 311 P.2d 972, 975 (Nev. 1957) (stating: (i) "the assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners"; and (ii) absent consent by the remaining partners "[t]he stranger remains a stranger" with no rights to management or even information).

This section is the core of the article's provisions reflecting and protecting that principle. The provisions of this section apply regardless of whether the interest pertains to a general partner or a limited partner. A partner's rights in a limited partnership are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the partnership agreement otherwise provides, a partner acting without the consent of all other partners lacks both the power and the right to: (i) bestow partnership on a non-partner, Sections 4-301(b)(3), 4-401(b)(3); or (ii) transfer to a non-partner anything other than some or all of the partner's transferable interest, Section 4-702(a)(3). The rights of a mere transferee are quite limited — *i.e.*, to receive distributions), Section 4-702(b), and, if the limited partnership dissolves and winds up, to receive specified information pertaining to the limited partnership from the date of dissolution. Section 4-702(c).

This section applies regardless of whether the transferor is a partner, a transferee of a partner, a transferee of a transferee, *etc*. *See* Section 4-102(a)(11) (defining "transferable interest" in terms of a right "initially owned by a person in the person's capacity as a partner" regardless of "whether or not the person remains a partner or continues to own any part of the right").

This section does not directly consider whether a partner may transfer governance rights to another partner without obtaining consent from all the other partners. As noted above, comment to Section 4-701, the question is moot under this article's default rule for allocating governance rights.

However, the question can be pivotal when the partnership agreement displaces the default rule on governance rights but does not determine whether transfer restrictions (whether contractual, statutory, or both) apply to transfers of governance rights from one partner to another. Case law is scant and pertains to LLCs. Nonetheless, the case law suggests that this article does not protect partners from control shifts that result from transfers among partners (as distinguished from transfers to non-partners who seek thereby to become partners).). *Blythe v. Bell*, No. 11 CVS 933. 2012 WL 7807800, at ¶ 6 (N.C. Dist. Dec. 10, 2012) (holding in a case of "first impression in North Carolina" that "in the absence of articles of incorporation or an operating agreement to the contrary . . . the assignment of control [(*i.e*., governance)] interests between members is effective without unanimous member consent"); *Achaian, Inc. v. Leemon Family L.L.C*., 25 A.3d 800, 810 (Del. Ch. 2011) (Strine, Ch.) (holding that the terms of the LLC agreement did not preclude one member of a three-member LLC from transferring the member's entire interest (including governance rights) to a second member without first having the consent of the third member; stating that the third member's "argument relies on a very thinly sliced version of [the 'pick-your-partner principle, the strained version being] . . . that once one chooses his initial co-members, one continues to hold a veto over how much additional voting power they may acquire'; explaining that '[t]he problem for [the third member] is that nothing in the LLC Agreement supports [that member's] reading of it that would require an already admitted Member, like [the acquirer (*i.e*., the second member)], to be become once, twice (or even three times) a Member each and every time that Member acquires an additional block of Interests'").

Other law may affect the applicability of this section. *See* 11 U.S.C. § 541(c)(1) (providing that, initially at least, all property of a debtor becomes part of the bankruptcy estate regardless of restrictions on transfer); UCC §§ 9-406, 9-408 (overriding specified restrictions on assignment in specified circumstances, regardless of whether state law or a contract impose the restrictions).

In any event, this section does not apply to the transfer of ownership interests in a partner that is an entity.

EXAMPLE: ABC, LP has three partners: one general partner — Ralph (an individual); and two limited partners — Alice, Inc. ("Alice"), and Norton, LLC ("Norton"). Section 4-702 applies to any attempt by Ralph, Alice, or Norton to transfer their respective partnership interest in ABC. Section 4-702 is inapplicable, however, to a change in control of Alice or Norton, or even a complete change in their respective ownership.

Subsection (a) — The definition of "transfer," Section 1-102(50), and this subsection's reference to "in whole or in part" combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones. Thus, for example, a charging order under Section 4-703 effects a transfer of part of the judgment debtor's transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a partner's rights to distribution.

Subsection (a)(2) — The phrase "by itself" contemplates Sections 4-601(b)(4)(B) and 4-603(4)(B); each create a risk of dissociation via expulsion when a partner transfers all of the partner's transferable interest.

Subsection (a)(3) — Mere transferees have no right to participate in management or otherwise intrude as the partners carry on the affairs of the limited partnership and their activities as partners.

Because Section 1-102(50) defines "transfer" to include "a transfer by operation of law," this section affects the power of other law to effect transfers of a partner's ownership interest. For example, a divorce court lacks the power to award a partner's spouse anything beyond the partner's transferable interest. Nor does the partner have the power to enter into a property settlement purporting to effect any greater transfer.

For the divorce court, the best solution is to value the partner's complete ownership interest (*i.e.*, the transferable interest as enhanced by the management and information rights and the standing to sue) and: (i) if possible, award the partner's spouse marital property of equal value; or (ii) if not possible, award the partner's spouse a money judgment and a charging order to enforce the judgment.

Granting the non-partner any part of the partner's transferable interest is almost always imprudent; marital discord will almost inevitably carry over into the business relationship. Granting the partner's ex-spouse the entire transferable interest is rarely a viable alternative. If the partner is an active participant in the limited partnership, the approach is impossible. The partner's transferable interest will typically constitute much or all of the partner's remuneration for the partner's activity. Even if the partner is essentially passive, granting the transferable interest to the ex-spouse puts him or her at great risk as a "bare naked assignee." *See* the comment to Section 4-107(b).

When a partner dies, subject to the limited partnership agreement other law may effect a transfer of the partner's transferable interest to the partner's estate or personal representative. However, for the reasons just stated, other law lacks the power to transfer anything more than a transferable interest. (Section 4-704 does provide extra information rights for the purposes of settling the estate of the deceased partner.)

Subsection (a)(3)(B) — *See* Sections 4-304(i) and 4-407(i) (providing that the information rights stated in those sections do not apply to transferees).

Subsection (b) — Amounts due under this subsection are of course subject to offset for any amount owed to the limited partnership by the partner or person dissociated as a partner on whose account the distribution is made. Section 4-503(d). As to whether a limited partnership may properly offset for claims against a transferor that was never a partner is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (c) — This very limited grant of information rights encompasses only transactions occurring at or after the date of the limited partnership's dissolution. The transferee has only the right to information as

to the allocation of net assets among the limited partnership's creditors, partners, and transferees — and only from the date of dissolution.

This subsection does not prevent a transferee from contracting with a partner-transferor to require the partner-transferor to disclose further information to the transferee. Whether such an agreement would breach the limited partnership agreement, the implied contractual obligation of good faith and fair dealing, Section 4-409(d), or a fiduciary duty depends on the circumstances.

If a dissolved limited partnership rescinds its dissolution, Section 4-803, this subsection no longer applies.

Subsection (d) — The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform Commercial Code.

Subsection (f) — This provision originated as UPA (1997) § 503(e), was then consistent with UCC § 9-318(3), and is now consistent with UCC § 9-406(a) (stating that "an account debtor . . . may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee").

The term "notice" includes "reason to know," Section 4-103(b)(1), and ordinarily a potential transferee has reason to inquire about transfer restrictions that might be contained in the limited partnership agreement.

Subsection (g) — Under this subsection, a partner (whether general or limited) remains as such (with all attendant rights and obligations) even after permanently transferring the entirety of the transferable interest, unless: (i) the other partners opt for expulsion under Section 4-601(4)(B); or (ii) as otherwise provided in the partnership agreement.

§ 30-24-703. Charging order. — (a) On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited partnership to pay over to the person to which the charging order was issued any distribution that otherwise would be paid to the judgment debtor.

(b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a) of this section, the court may:

(1) Appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

(2) Make all other orders necessary to give effect to the charging order.

(c) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a partner, and is subject to section 30-24-702, Idaho Code.

(d) At any time before foreclosure under subsection (c) of this section, the partner or transferee whose transferable interest is subject to a charging order under subsection (a) of this section may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(e) At any time before foreclosure under subsection (c) of this section, a limited partnership or one (1) or more partners whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

(f) This act does not deprive any partner or transferee of the benefit of any exemption law applicable to the transferable interest of the partner or transferee.

(g) This section provides the exclusive remedy by which a person seeking, in the capacity of a judgment creditor, to enforce a judgment against a partner or transferee may satisfy the judgment from the judgment debtor's transferable interest.

History.

I.C., § 30-24-703, as added by 2015, ch. 243, § 39, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

The charging order concept dates back to the English Partnership Act of 1890 and in the United States has been a fundamental part of law of unincorporated business organizations since 1914. See UPA (1914) § 28. As much a remedy limitation as a remedy, the charging order is the sole method by which a person acting as judgment creditor of a partner or transferee can extract value from the partner's or transferee's ownership interest in a limited partnership. See the comment to Subsection (g).

Under this section, the judgment creditor of a partner or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the partner or transferee whose interest is subject to the order. However, the judgment creditor has no say in the timing or amount of those distributions. The charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited partnership.

This section applies regardless of whether the transferable interest at issue is owned by a person in the capacity of a general partner, limited partner, or transferee. The partnership agreement has no power to alter the provisions of this section to the prejudice of third parties. Section 4-105(c)(18).

By its terms, this section does not apply to foreign limited partnerships. *See* Section 4-102(a)(7) (defining "[l]imited partnership" to mean "an entity

formed under this [chapter] or which becomes subject to this [chapter]") (emphasis added); *see also Fannie Mae v. Heather Apartments Ltd. P'ship*, A13-0562, 2013 WL 6223564, at *6 (Minn. Ct. App. Dec. 2, 2013) (considering the remedies available to a judgment creditor with respect to the judgment debtor's interest in a Cook Islands LLC; rejecting the debtor's argument that the creditor's "only remedy is to obtain a charging order under" [the Minnesota LLC statute]; explaining that "this argument fails because that statute only applies to Minnesota limited liability companies," which that statute "defines . . . as 'a limited liability company, other than a foreign limited liability company, *organized or governed by this chapter'"*) (emphasis added) (statutory citations omitted).

Subsection (a) — The phrase "judgment debtor" encompasses both partners and transferees. The lien pertains only to a distribution, which excludes "amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program." Section 4-103(a)(3)(B). A judgment creditor that wishes to levy on such amounts should use the appropriate creditor's remedy, such as garnishment (which may be subject to exemptions or exclusions not relevant to a charging order). *Cf. PB Real Estate, Inc. v. Dem II Props.*, 719 A.2d 73, 76 (Conn. 1998) (rejecting the contention of an LLC's two members that "payments of $28,000 to each of them" should be treated "as expenses for wages" rather than as distributions).

Whether an application for a charging order must be served on the limited partnership, the judgment debtor, or both is a matter for other law; principally, the law of remedies and civil procedure. The order itself must be served on the limited partnership. Whether the order must also be served on the judgment debtor is a matter for other law.

If a distribution consists of rights to acquire interests in a limited partnership, the charging order applies only to those rights within the definition of transferable interest. See Section 4-102(a)(11) (defining transferable interest).

Subsection (b) — Paragraph (2) refers to "other orders" rather than "additional orders." Therefore, given appropriate circumstances, a court may invoke Paragraph (1), Paragraph (2), or both.

Subsection (b)(1) — The receiver contemplated here is emphatically not a receiver for the limited partnership, but rather a receiver for the distributions subject to the charging order. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than "the extent necessary to effectuate the collection of distributions pursuant to a charging order." For a correctly narrow reading of this provision, see *Wells Fargo Bank, Nat'l Ass'n v. Continuous Control Solutions, Inc*., No. 11-1285, 2012 WL 3195759 (Iowa Ct. App. Aug. 8, 2012).

Subsection (b)(2) — This paragraph must be understood in the context of: (i) the very limited nature of the charging order; and (ii) the importance of preventing overreaching on behalf of a person that is not a judgment creditor of the limited partnership, has no claim on the limited partnership's assets, and has no right to interfere in the activities, affairs, and management of the limited partnership. In particular, the court's power to make "all other orders" is limited to "orders necessary to give effect to the charging order."

EXAMPLE: A judgment creditor with a charging order believes that the limited partnership should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the limited partnership to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

EXAMPLE: A judgment creditor with a judgment for $10,000 against a partner obtains a charging order against the partner's transferable interest. Having been properly served with the order, the limited partnership nonetheless fails to comply and makes a $3000 distribution to the partner. The court has the power to order the limited partnership to pay $3000 to the judgment creditor to "give effect to the charging order."

Under Subsection (b)(2), the court has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order.

EXAMPLE: General Partner A of ABC, LP has for some years received distributions form the limited partnership. However, when a judgment creditor of General Partner A obtains a charging order against General

Partner A's transferable interest, the limited partnership ceases to make distributions to General Partner A and instead provides a salary to General Partner A equivalent to former distributions. A court might deem this salary a disguised distribution. (In any event, however, the salary will be subject to garnishment.)

This article has no specific rules for determining the fate or effect of a charging order when the limited partnership undergoes a merger, conversion, interest exchange, or domestication under [Article] 2. In the proper circumstances, such an organic change might trigger an order under Subsection (b)(2).

Subsection (c) — The phrase "that distributions under the charging order will not pay the judgment debt within a reasonable period of time" comes from case law. *See, e.g., Nigri v. Lotz*, 453 S.E.2d 780, 783 (Ga. Ct. App. 1995). *Stewart v. Lanier Park Med. Office Bldg., Ltd.*, 578 S.E.2d 572, 574 (Ga. Ct. App. 2003) ("Judicial sale may be appropriate where . . . it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable amount of time."). A purchaser at a foreclosure sale obtains only the very limited rights of a mere transferee under Section 4-702 and is in some ways more vulnerable and less powerful than the holder of a charging order. After foreclosure and sale, Subsection (b) no longer applies. More generally, the court is no longer involved in the matter. For the vulnerability of a transferee, see the comment to Section 4-107(b).

Subsection (d) — This provision allows the judgment debtor to end the charging order without need for a hearing.

Subsection (e) — Traditionally, charging order provisions referred to the possibility of "redeeming" an interest subject to a charging order. That usage was confusing, leaving several important questions unanswered. This article substitutes a far simpler approach, contemplating the limited partnership or its partners buying the underlying judgment and thereby dispensing with any interference the judgment creditor might seek to inflict on the partnership.

In many circumstances, buying the judgment is superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment; and (ii) the limited

partnership or the other partners might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor's consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the limited partnership.

Whether a limited partnership should invoke this provision is a question for the general partners. Section 4-406(a). If the charging order pertains to the transferable interest of a general partner, subject to the partnership agreement, that partner should not be involved in deciding the question. See Section 4-409(b)(2).

Subsection (f) — This subsection preserves otherwise applicable exemptions but does not create any. *In re Foos*, 405 B.R. 604, 609 (Bankr. N.D. Ohio 2009) (interpreting the comparable provision in UPA (1997) and stating that "it is clear that [the provision] does not create an exemption").

Subsection (g) — This subsection does not override Article 9 of the Uniform Commercial Code, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a "reverse pierce" where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. *Cf. Trust, Inc. v. First Flight L.P.*, 580 S.E.2d 806, 810 (Va. 2003) (stating that "Virginia does recognize the concept of outsider reverse piercing and that this concept can be applied to a Virginia limited partnership"); *In re Burwell*, 391 B.R. 831, 837 (B.A.P. 8th Cir. 2008) (applying Minnesota law). Likewise, this subsection does not supplant fraudulent transfer law.

§ 30-24-704. Power of legal representative of deceased partner. — If a partner dies, the deceased partner's legal representative may exercise:

(1) The rights of a transferee provided in section 30-24-702(c), Idaho Code; and (2) For the purposes of settling the estate, the rights of a current limited partner under section 30-24-304, Idaho Code.

History.

I.C., § 30-24-704, as added by 2015, ch. 243, § 39, p. 758.

Official Comment

The estate and those claiming through the estate are transferees, and as such they have very limited rights to information. This section provides temporary, additional information rights to the legal representative of the estate. Sections 4-304 and 4-702(c) pertain only to information rights.

Part 8
Dissolution and Winding Up

Idaho Code § 30-24-801

§ 30-24-801. Events causing dissolution. — (a) A limited partnership is dissolved, and its activities and affairs must be wound up, upon the occurrence of any of the following:

(1) An event or circumstance that the partnership agreement states causes dissolution;

(2) The affirmative vote or consent of all general partners and of limited partners owning a majority of the rights to receive distributions as limited partners at the time the vote or consent is to be effective;

(3) After the dissociation of a person as a general partner:

(A) If the partnership has at least one (1) remaining general partner, the affirmative vote or consent to dissolve the partnership not later than ninety (90) days after the dissociation by partners owning a majority of the rights to receive distributions as partners at the time the vote or consent is to be effective; or

(B) If the partnership does not have a remaining general partner, the passage of ninety (90) days after the dissociation, unless before the end of the period:

(i) Consent to continue the activities and affairs of the partnership and admit at least one (1) general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective; and

(ii) At least one (1) person is admitted as a general partner in accordance with the consent;

(4) The passage of ninety (90) consecutive days after the dissociation of the partnership's last limited partner, unless before the end of the period the partnership admits at least one (1) limited partner;

(5) The passage of ninety (90) consecutive days during which the partnership has only one (1) partner, unless before the end of the period:

(A) The partnership admits at least one (1) person as a partner;

(B) If the previously sole remaining partner is only a general partner, the partnership admits the person as a limited partner; and

(C) If the previously sole remaining partner is only a limited partner, the partnership admits a person as a general partner;

(6) On application by a partner, the entry by the district court of an order dissolving the partnership on the grounds that:

(A) The conduct of all or substantially all the partnership's activities and affairs is unlawful; or

(B) It is not reasonably practicable to carry on the partnership's activities and affairs in conformity with the certificate of limited partnership and partnership agreement; or

(7) The signing and filing of a statement of administrative dissolution by the secretary of state under section 24-1-602, Idaho Code.

(b) If an event occurs that imposes a deadline on a limited partnership under subsection (a) of this section and before the partnership has met the requirements of the deadline, another event occurs that imposes a different deadline on the partnership under subsection (a) of this section:

(1) The occurrence of the second event does not affect the deadline caused by the first event; and

(2) The partnership's meeting of the requirements of the first deadline does not extend the second deadline.

History.

I.C., § 30-24-801, as added by 2015, ch. 243, § 40, p. 758; am. 2020, ch. 82, § 31, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "section 24-1-602, Idaho Code" for "section 30-21-811, Idaho Code" at the end of paragraph (a)(7).

Official Comment

"Dissolution" has been a term of art in the law of unincorporated business organizations since at least the time of Roman law. Joseph Story, Commentaries on the Law of Partnership § 266, at 408 (2d ed. 1850) ("The Roman law . . . declared, that partnership might be dissolved in various ways . . . ."). Dissolution does not end a limited partnership's existence but rather changes the purpose of that existence: "A dissolved limited partnership shall wind up its activities and affairs and . . . the partnership continues after dissolution only for the purpose of winding up." Section 4-802(a). The partnership may, but need not, amend its certificate of limited partnership to state that dissolution has occurred. Section 4-802(b)(2)(A). The limited partnership terminates when winding up is complete. The partnership may, but need not, file a statement of termination. Section 4-802(b)(2)(F).

Except for Paragraphs (a)(6) and (7), this section comprises default rules. Paragraph 7 is fully mandatory, Section 4-105(c)(3)(B); Paragraph 6 is mandatory only with regard to the stated grounds for dissolution. *See* the comment to Section 4-105(c)(12). Moreover, a partnership agreement can provide additional causes of dissolution. See Subsection (a)(1). Variations to the statutory causes of dissolution are commonplace.

Section 4-803 permits rescission of dissolution in some circumstances. In some circumstances, an amendment to the limited partnership agreement might avert dissolution — *e.g.*, by revising an agreed-upon deadline for selling the partnership assets and winding up the business. A retroactive amendment may also be possible. *See Kindred Ltd. P'ship v. Screen Actors Guild, Inc.*, CV082220PSGPJWX, 2009 WL 279080, at *5-6 (C.D. Cal. Feb. 3, 2009) (giving effect to an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997) § 802(b) permitted a partnership to rescind dissolution).

Subsection (a)(2) — Although most actions involving limited partner consent require unanimous consent (*e.g.*, Section 4-406(b)), this provision requires only the specified majority consent. Rights to receive distributions

owned by a person that is both a general and a limited partner figure into the limited partner determination only to the extent those rights are owned in the person's capacity as a limited partner. *See* Section 4-108(9)(C).

Example: XYZ is a limited partnership with three general partners, each of whom is also a limited partner, and five other limited partners. Rights to receive distributions are allocated as follows:

Partner #1 as general partner — 3%

Partner #2 as general partner — 2%

Partner #3 as general partner — 1%

Partner #1 as limited partner — 7%

Partner #2 as limited partner — 3%

Partner #3 as limited partner — 4%

Partner #4 as limited partner — 5%

Partner #5 as limited partner — 5%

Partner #6 as limited partner — 5%

Partner #7 as limited partner — 5%

Partner #8 as limited partner — 5%

Several non-partner transferees, in the aggregate — 55%

Distribution rights owned by persons as limited partners amount to 39% of total distribution rights. A majority is therefore anything greater than 19.5%. If only Partners 1, 2, 3, and 4 consent to dissolve, the limited partnership is not dissolved. Together these partners own as limited partners 19% of the distribution rights owned by persons as limited partners — just short of the necessary majority. For purposes of this calculation, distribution rights owned by non-partner transferees are irrelevant. So, too, are distribution rights owned by persons as general partners. (However, dissolution under this provision requires "the consent of all general partners.")

Subsection (a)(3) — Historically, the dissociation of any general partner from a limited partnership could lead to dissolution (subject of course to the

partnership agreement). This provision continues that concept, albeit while modernizing the consent mechanisms.

Subsection (a)(3)(A) — Unlike Subsection (a)(2), this provision makes no distinction between distribution rights owned by persons as general partners and distribution rights owned by persons as limited partners. Distribution rights owned by non-partner transferees are irrelevant.

Subsection (a)(4) and (5) — These provisions reflect the number and type of partners required for a limited partnership to come into existence. Section 4-201(d).

Subsection (a)(6) — The partnership agreement cannot vary the causes of dissolution stated in this provision. However, the partnership agreement may contain a forum selection clause or change the forum from "the appropriate court" to binding arbitration. Section 4-105(c)(12), comment.

As to whether the court of another jurisdiction can properly order dissolution of a limited partnership formed under this article, the majority rule is clearly no. "[T]he courts of several states have held that jurisdiction to dissolve a corporation rests only in the courts of the state of incorporation." *In re Blixseth*, 484 B.R. 360, 370 (B.A.P. 9th Cir. 2012) (citing cases, including a case involving an LLC). *But see In re Mercantile Guar. Co*., 48 Cal. Rptr. 589, 591-93 (Cal. Ct. App. 1965) (explaining that "[w]e are . . . required to determine whether the courts of a state in which a foreign corporation has done business and in which its assets are there located have jurisdiction to wind up its affairs, even though the corporation was organized in another state," stating that "the question is not one of jurisdiction or power in the court of the state which is not the legal domicile of a foreign corporation, but it is a question . . . of the balance of convenience, of whether considerations of public policy, efficiency, expedience and justice to all parties interested demand that jurisdiction be retained in the foreign court, or that it be declined under the rule of forum non conveniens," and holding that "[t]he circumstances of the case at bench require a holding that the California courts assume jurisdiction of the winding up of [a Delaware corporation's] affairs preparatory to a dissolution").

Subsection (a)(6)(B) — For an analytic framework for applying this provision, see *Roth v. Laurus U.S. Fund, L.P.*, CIV.A. 5566-VCN, 2011 WL

808953, at *3(Del. Ch. Feb. 25, 2011); *see also Mandell v. Centrum Frontier Corp*., 407 N.E.2d 821, 829 (Ill. App. Ct. 1980) (upholding a decree dissolving a limited partnership ("[b]ecause the partnership had a negative cash flow during 15 months of the 17 months prior to filing this suit" and "find[ing] that the trial court properly decreed dissolution . . . on the ground that [the limited partnership] could only be carried on at a loss").

§ 30-24-802. Winding up. — (a) A dissolved limited partnership shall wind up its activities and affairs, and, except as otherwise provided in section 30-24-803, Idaho Code, the partnership continues after dissolution only for the purpose of winding up.

(b) In winding up its activities and affairs, the limited partnership:

(1) Shall discharge the partnership's debts, obligations, and other liabilities, settle and close the partnership's activities and affairs, and marshal and distribute the assets of the partnership; and

(2) May:

(A) Amend its certificate of limited partnership to state that the limited partnership is dissolved;

(B) Preserve the partnership activities, affairs, and property as a going concern for a reasonable time;

(C) Prosecute and defend actions and proceedings, whether civil, criminal, or administrative;

(D) Transfer the partnership's property;

(E) Settle disputes by mediation or arbitration;

(F) Deliver to the secretary of state for filing a statement of termination stating the name of the partnership and that the partnership is terminated; and

(G) Perform other acts necessary or appropriate to the winding up.

(c) If a dissolved limited partnership does not have a general partner, a person to wind up the dissolved partnership's activities and affairs may be appointed by the affirmative vote or consent of limited partners owning a majority of the rights to receive distributions as limited partners at the time the vote or consent is to be effective. A person appointed under this subsection:

(1) Has the powers of a general partner under section 30-24-804, Idaho Code, but is not liable for the debts, obligations, and other liabilities of

the partnership solely by reason of having or exercising those powers or otherwise acting to wind up the dissolved partnership's activities and affairs; and

(2) Shall deliver promptly to the secretary of state for filing an amendment to the partnership's certificate of limited partnership stating:

(A) That the partnership does not have a general partner;

(B) The name and street and mailing addresses of the person; and

(C) That the person has been appointed pursuant to this subsection to wind up the partnership.

(d) On the application of a partner, the district court may order judicial supervision of the winding up of a dissolved limited partnership, including the appointment of a person to wind up the partnership's activities and affairs, if:

(1) The partnership does not have a general partner and within a reasonable time following the dissolution no person has been appointed pursuant to subsection (c) of this section; or

(2) The applicant establishes other good cause.

History.

I.C., § 30-24-802, as added by 2015, ch. 243, § 40, p. 758.

Official Comment

Under the default rules of this article, dissolution does not change governance arrangements. However, dissolution does change the context for determining for the purposes of Section 4-406(b)(3) whether to "sell, lease, exchange, or otherwise dispose of all, or substantially all, of the limited partnership's property, with or without the good will" is "other than in the usual and regular course of the limited partnership's activities and affairs."

Subsection (a) — *See* the comment to Section 4-801(a)(2).

Subsection (b) — The particular circumstances determine how long winding up may continue without giving "good cause" for court intervention under Section 4-702(d)(2). There is no "hard and fast" rule. *See, e.g., Mathis v. Meyeres*, 574 P.2d 447, 450 (Alaska 1978) (stating that

"we are aware of [no authority] requiring that deadlines be set in the winding up of a partnership"); *8182 Md. Assocs., Ltd. P'ship v. Sheehan*, 14 S.W.3d 576, 581 (Mo. 2000) ("The Uniform Partnership Law contemplates that dissolved partnerships may continue in business for a short, long or indefinite period of time . . . .") (quoting *Schoeller v. Schoeller*, 497 S.W.2d 860, 867 (Mo. Ct. App. 1973)).

"Winding up usually entails the time necessary for the partners to finish old business, collect and pay debts, and finally distribute remaining assets to the partners." *Gibson v. Deuth*, 270 N.W.2d 632, 635 (Iowa 1978). "Generally the best interests of the partnership will be served by winding up the partnership affairs as quickly as possible." *Doting v. Trunk*, 856 P.2d 536, 540 (Mont. 1993). However, in some circumstances, a long period of winding up is not only appropriate but necessary. *Lebanon Trotting Ass'n v. Battista*, 306 N.E.2d 769, 772 (Ohio Ct. App. 1972) ("[I]f the only means of availing the partners of the benefit of the value of the lease would be to continue to operate under such lease until its expiration, then such operation may continue as part of the winding up of the partnership affairs after dissolution. It is not necessary that a partnership, in the absence of the consent of all the partners, abandon a valuable asset upon dissolution merely because it may have no ready market value, but the value of such asset can continue to inure to the benefit of the partners through the continuation of the partnership after dissolution.").

Subsection (b)(2)(A) and (F) — For the constructive notice effect of the specified amendment and a statement of termination, see Sections 4-103(d)(2)(A) and (B).

Subsection (c) — Section 4-409 does not apply to a person appointed under this section. Such person will inevitably be an agent of the dissolved limited partnership, acting pursuant to a contract. Thus, agency and contract law will determine the person's duties.

Subsection (d) — Section 4-409 does not apply to a person appointed under this section. The applicable standards of conduct might come from any or all of these sources: the court order, the state law pertaining to receiverships, agency law, and contract law.

§ 30-24-803. Rescinding dissolution. — (a) A limited partnership may rescind its dissolution, unless a statement of termination applicable to the partnership is effective, the district court has entered an order under section 30-24-801(a) (6), Idaho Code, dissolving the partnership, or the secretary of state has dissolved the partnership under section 30-21-602, Idaho Code.

(b) Rescinding dissolution under this section requires:

(1) The affirmative vote or consent of each partner; and

(2) If the limited partnership has delivered to the secretary of state for filing an amendment to the certificate of limited partnership stating that the partnership is dissolved and:

(A) The amendment is not effective, the filing by the partnership of a statement of withdrawal under section 30-21-204, Idaho Code, applicable to the amendment; or

(B) The amendment is effective, the delivery by the partnership to the secretary of state for filing of an amendment to the certificate of limited partnership stating that dissolution has been rescinded under this section.

(c) If a limited partnership rescinds its dissolution:

(1) The partnership resumes carrying on its activities and affairs as if dissolution had never occurred;

(2) Subject to paragraph (3) of this subsection, any liability incurred by the partnership after the dissolution and before the rescission is effective is determined as if dissolution had never occurred; and

(3) The rights of a third party arising out of conduct in reliance on the dissolution before the third party knew or had notice of the rescission may not be adversely affected.

History.

I.C., § 30-24-803, as added by 2015, ch. 243, § 40, p. 758; am. 2020, ch. 82, § 32, p. 174.

STATUTORY NOTES

Amendments.

The 2020 amendment, by ch. 82, substituted "section 30-21-602, Idaho Code" for "section 30-24-811, Idaho Code" at the end of subsection (a).

Official Comment

The Harmonization Project added this section.

Subsection (a) — The first exclusion results inevitably from the effect of a statement of termination — *i.e.*, the limited partnership ceases to exist as an entity. A "dead" entity lacks both the capacity and power to bring itself back from the dead.

The second and third exclusions pertain to dissolutions effected by outsiders — *i.e.*, the court and the filing office.

Subsections (b)(1) — The requirement of unanimous consent protects any vested rights of or reliance by partners. However, the partnership agreement may vary this provision.

Subsection (c)(3) — This paragraph protects third parties. *E.g.*, *Neurobehavorial Assocs., P.A. v. Cypress Creek Hosp., Inc.*, 995 S.W.2d 326, 331 (Tex. Ct. App. 1999) ("If the Hospital had the right to terminate the Agreement when it did because the Association was then dissolved, then even though the Association can revoke articles of dissolution and have that relate back to the date of dissolution, it would be grossly unfair to let the Association assert its *ex post facto* change as a defense. Surely the Association would be estopped from doing so, having created the very conditions that gave the Hospital the correct impression that it was then dissolved.").

§ 30-24-804. Power to bind partnership after dissolution. — (a) A limited partnership is bound by a general partner's act after dissolution which:

(1) Is appropriate for winding up the partnership's activities and affairs; or

(2) Would have bound the partnership under section 30-24-402, Idaho Code, before dissolution, if, at the time the other party enters into the transaction, the other party does not know or have notice of the dissolution.

(b) A person dissociated as a general partner binds a limited partnership through an act occurring after dissolution if:

(1) At the time the other party enters into the transaction:

(A) Less than two (2) years has passed since the dissociation; and

(B) The other party does not know or have notice of the dissociation and reasonably believes that the person is a general partner; and

(2) The act:

(A) Is appropriate for winding up the partnership's activities and affairs; or

(B) Would have bound the partnership under section 30-24-402, Idaho Code, before dissolution and at the time the other party enters into the transaction the other party does not know or have notice of the dissolution.

History.

I.C., § 30-24-804, as added by 2015, ch. 243, § 40, p. 758.

Official Comment

This section provides the "power to bind" rules applicable once dissolution occurs. The section originated in UPA (1997), which significantly departed from the approach of UPA (1914). ULPA (2001)

accepted the UPA (1997) construct but revised the language for stylistic reasons. The Harmonization Project accepted the ULPA (2001) language.

In general, this section parallels Section 4-606 (power to bind of a person dissociated as general partner when dissolution does not result from the dissociation). However, one significant difference exists. Section 4-606(a)(2)(A) contains a provision analogous to a statute of repose. A person's power to bind the partnership terminates two years after the date of dissociation. Subsection (b) contains a comparable provision, but Subsection (a) does not.

Subsections (a) and (b) — Subsection (a) states the power-to-bind rules for persons still general partners when dissolution occurs. Subsection (b) pertains to persons dissociated as a general partner before dissolution, including a general partner whose dissociation results in dissolution.

Subsection (a)(1) — This paragraph states a rule of inherent agency power. *See* Restatement (Second) of Agency § 8A (1958) defining "inherent agency power" as "the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent"). Thus, a general partner might act without actual or apparent authority and still bind the limited partnership. The partnership agreement cannot change the stated rule, because the rule pertains to the rights of third parties under this article. *See* Section 4-105(c)(18).

If a general partner's words or conduct trigger this paragraph, thereby binding the limited partnership, and the general partner lacks the actual authority to do so, the general partner breaches an agent's duty to act within authority, and is liable to the limited partnership for any resulting damages. Restatement (Third) of Agency) § 8.09(1) (2006) ("An agent has a duty to take action only within the scope of the agent's actual authority"). The general partner might also be liable for breach of the partnership agreement.

Subsection (a)(2) — A person might have notice under Section 4-103(d)(2)(A) (amendment of certificate of limited partnership to indicate dissolution) as well as under Section 103(b)(1) (reason to know).

Subsection (b) — This subsection deals with the post-dissolution power to bind of a person dissociated as a general partner. For the most part: (i)

Paragraph 1 replicates Section 4-606, pertaining to the pre-dissolution power to bind of a person dissociated as a general partner; and (ii) Paragraph 2 replicates Subsection (a) of this section, which states the post-dissolution power to bind of a person who is still a general partner.

For a person dissociated as a general partner to bind a dissolved limited partnership:

- the person's dissociation must have:
  - been rightful; and
  - resulted in dissolution; and
- the person's act must satisfy both Paragraphs 1 and 2.

Subsection (b)(1)(B) — A person might have notice under Section 4-103(d)(1) (amendment to certificate of limited partnership indicating dissociation or statement of dissociation) as well as under Section 4-103(b)(1).

Subsection (b)(2)(B) — A person might have notice under Section 4-103(d)(2)(A) (amendment of certificate of limited partnership to indicate dissolution) as well as under Section 4-103(b)(1).

§ 30-24-805. Liability after dissolution of general partner and person dissociated as general partner. — (a) If a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation under section 30-24-804(a), Idaho Code, by an act that is not appropriate for winding up the partnership's activities and affairs, the general partner is liable:

(1) To the partnership for any damage caused to the partnership arising from the obligation; and

(2) If another general partner or a person dissociated as a general partner is liable for the obligation, to that other general partner or person for any damage caused to that other general partner or person arising from the liability.

(b) If a person dissociated as a general partner causes a limited partnership to incur an obligation under section 30-24-804(b), Idaho Code, the person is liable:

(1) To the partnership for any damage caused to the partnership arising from the obligation; and

(2) If a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the obligation.

History.

I.C., § 30-24-805, as added by 2015, ch. 243, § 40, p. 758.

Official Comment

This section parallels Section 4-606(b). It is possible for more than one person to be liable under this section on account of the same limited partnership obligation. This article does not provide any rule for apportioning liability in that circumstance.

Subsection (a)(2) — If the limited partnership is not a limited liability limited partnership, the liability created by this paragraph includes liability under Sections 4-404(a), 4-607(b), and 4-607(c). The article also applies when a partner or person dissociated as a general partner suffers damage due to a contract of guaranty.

Other law determines liability (if any) to a person that is neither a general partner nor dissociated as a general partner.

§ 30-24-806. Known claims against dissolved limited partnership. — (a) Except as otherwise provided in subsection (d) of this section, a dissolved limited partnership may give notice of a known claim under subsection (b) of this section, which has the effect provided in subsection (c) of this section.

(b) A dissolved limited partnership may in a record notify its known claimants of the dissolution. The notice must: (1) Specify the information required to be included in a claim;

(2) State that a claim must be in writing and provide a mailing address to which the claim is to be sent; (3) State the deadline for receipt of a claim, which may not be less than one hundred twenty (120) days after the date the notice is received by the claimant; (4) State that the claim will be barred if not received by the deadline; and (5) Unless the partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner that is based on section 30-24-404, Idaho Code.

(c) A claim against a dissolved limited partnership is barred if the requirements of subsection (b) of this section are met and: (1) The claim is not received by the specified deadline; or

(2) If the claim is timely received but rejected by the partnership:

(A) The partnership causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the partnership to enforce the claim not later than ninety (90) days after the claimant receives the notice; and (B) The claimant does not commence the required action not later than ninety (90) days after the claimant receives the notice.

(d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

History.

I.C., § 30-24-806, as added by 2015, ch. 243, § 40, p. 758.

Official Comment

Sections 4-806, 4-807, and 4-808 provide rules under which a dissolved limited partnership may achieve finality with regard to claims.

Source: This section is derived almost verbatim from Model Business Corporation Act § 14.06.

Subsection (b)(5) — *See* the comment to section 4-809.

§ 30-24-807. Other claims against dissolved limited partnership. — (a) A dissolved limited partnership may publish notice of its dissolution and request persons having claims against the partnership to present them in accordance with the notice.

(b) A notice under subsection (a) of this section must:

(1) Be published at least once in a newspaper of general circulation in the county in this state in which the dissolved limited partnership's principal office is located or, if the principal office is not located in this state, in the county in which the office of the partnership's registered agent is or was last located;

(2) Describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent;

(3) State that a claim against the partnership is barred unless an action to enforce the claim is commenced not later than three (3) years after publication of the notice; and

(4) Unless the partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner that is based on section 30-24-404, Idaho Code.

(c) If a dissolved limited partnership publishes a notice in accordance with subsection (b) of this section, the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership not later than three (3) years after the publication date of the notice:

(1) A claimant that did not receive notice in a record under section 30-24-806, Idaho Code;

(2) A claimant whose claim was timely sent to the partnership but not acted on; and

(3) A claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) A claim not barred under this section or section 30-24-806, Idaho Code, may be enforced:

(1) Against the dissolved limited partnership, to the extent of its undistributed assets;

(2) Except as otherwise provided in section 30-24-808, Idaho Code, if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person's proportionate share of the claim or of the partnership's assets distributed to the partner or transferee after dissolution, whichever is less, but a person's total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution; and

(3) Against any person liable on the claim under sections 30-24-404 and 30-24-607, Idaho Code.

History.

I.C., § 30-24-807, as added by 2015, ch. 243, § 40, p. 758.

Official Comment

Source: This section is derived almost verbatim from Model Business Corporation Act § 14.07.

Subsection (b)(4) — *See* comment to Section 4-809.

Subsection (d)(2) — Liability under this paragraph extends to those who have received distributions under a charging order. *See* the comment to Section 4-702 (explaining that the beneficiary of a charging order is a transferee). Unlike Section 4-505(b) (recapture of improper interim distributions), this paragraph contains no "knowledge" element.

§ 30-24-808. Court proceedings. — [(a)](1) A dissolved limited partnership that has published a notice under section 30-24-807, Idaho Code, may file an application with the district court in the county where the partnership's principal office is located or, if the principal office is not located in this state, where the office of its registered agent is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are reasonably expected to arise after the date of dissolution based on facts known to the partnership and:

(1) At the time of the application: (A) Are contingent; or (B) Have not been made known to the partnership; or (2) Are based on an event occurring after the date of dissolution.

(b) Security is not required for any claim that is or is reasonably anticipated to be barred under section 30-24-807, Idaho Code.

(c) Not later than ten (10) days after the filing of an application under subsection (a) of this section, the dissolved limited partnership shall give notice of the proceeding to each claimant holding a contingent claim known to the partnership.

(d) In a proceeding brought under this section, the court may appoint a guardian ad litem to represent all claimants whose identities are unknown. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, must be paid by the dissolved limited partnership.

(e) A dissolved limited partnership that provides security in the amount and form ordered by the court under subsection (a) of this section satisfies the partnership's obligations with respect to claims that are contingent, have not been made known to the partnership, or are based on an event occurring after the date of dissolution, and such claims may not be enforced against a partner or transferee on account of assets received in liquidation.

History.

I.C., § 30-24-808, as added by 2015, ch. 243, § 40, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion at the beginning of the first paragraph of this section was added by the compiler to conform to the standard statutory designation scheme.

Official Comment

Source: This section is derived almost verbatim from Model Business Corporation Act § 14.08.

§ 30-24-809. Liability of general partner and person dissociated as general partner when claim against limited partnership barred. — If a claim against a dissolved limited partnership is barred under section 30-24-806, 30-24-807 or 30-24-808, Idaho Code, any corresponding claim under section 30-24-404 or 30-24-607, Idaho Code, is also barred.

History.

I.C., § 30-24-809, as added by 2015, ch. 243, § 40, p. 758.

Official Comment

A general partner's liability under Sections 4-404 and 4-607 is vicarious liability — liability solely by status and solely for the "debts, obligations, and other liabilities of the limited partnership." To the extent a claim pertaining to the underlying debt, obligation, or other liability is barred, a claim pertaining to the corresponding vicarious liability should likewise be barred.

§ 30-24-810. Disposition of assets in winding up — When contributions required. — (a) In winding up its activities and affairs, a limited partnership shall apply its assets, including the contributions required by this section, to discharge the partnership's obligations to creditors, including partners that are creditors.

(b) After a limited partnership complies with subsection (a) of this section, any surplus must be distributed in the following order, subject to any charging order in effect under section 30-24-703, Idaho Code:

(1) To each person owning a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and

(2) Among partners and persons dissociated as partners in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership, except to the extent necessary to comply with any transfer effective under section 30-24-702, Idaho Code.

(c) If a limited partnership's assets are insufficient to satisfy all of its obligations under subsection (a) of this section, with respect to each unsatisfied obligation incurred when the partnership was not a limited liability limited partnership, the following rules apply:

(1) Each person that was a general partner when the obligation was incurred and that has not been released from the obligation under section 30-24-607, Idaho Code, shall contribute to the partnership for the purpose of enabling the partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of a general partner in effect for each of those persons when the obligation was incurred.

(2) If a person does not contribute the full amount required under paragraph (1) of this subsection with respect to an unsatisfied obligation of the partnership, the other persons required to contribute by paragraph (1) of this subsection on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the

right to receive distributions in the capacity of a general partner in effect for each of those other persons when the obligation was incurred.

(3) If a person does not make the additional contribution required by paragraph (2) of this subsection, further additional contributions are determined and due in the same manner as provided in that paragraph.

(d) A person that makes an additional contribution under subsection (c)(2) or (3) of this section may recover from any person whose failure to contribute under subsection (c)(1) or (2) of this section necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person's liability under this subsection may not exceed the amount the person failed to contribute.

(e) If a limited partnership does not have sufficient surplus to comply with subsection (b)(1) of this section, any surplus must be distributed among the owners of transferable interests in proportion to the value of the respective unreturned contributions.

(f) All distributions made under subsections (b) and (c) of this section must be paid in money.

History.

I.C., § 30-24-810, as added by 2015, ch. 243, § 40, p. 758.

Official Comment

In some circumstances, this article requires a partner to make payments to the limited partnership. *See, e.g.*, Sections 4-502(b), 4-505(a), 4-505(b), 4-810(c). In other circumstances, this act requires a partner to make payments to other partners. *See, e.g.*, Sections 4-505(c), 4-810(d). In no circumstances does this article require a partner to make a payment for the purpose of equalizing or otherwise reallocating capital losses incurred by partners.

EXAMPLE: XYZ Limited Partnership ("XYZ") has one general partner and four limited partners. As indicated by its name, XYZ is not a limited liability limited partnership. According to XYZ's required information, the value of each partner's contributions to XYZ are:

General partner — $5,000

Limited partner #1 — $10,000

Limited partner #2 — $15,000

Limited partner #3 — $20,000

Limited partner #4 — $25,000

XYZ is unsuccessful and eventually dissolves without ever having made a distribution to its partners. XYZ lacks any assets with which to return to the partners the value of their respective contributions. No partner is obliged to make any payment either to the limited partnership or to fellow partners to adjust these capital losses. These losses are not part of "the limited partnership's obligations to creditors." Section 4-810(a).

EXAMPLE: Same facts, except that Limited Partner #4 loaned $25,000 to XYZ, and XYZ lacks the assets to repay the loan. The general partner must contribute to the limited partnership whatever funds are necessary to enable XYZ to satisfy the obligation owned to Limited Partner #4 on account of the loan. Section 4-810(a) and (c).

Subsection (a) — This subsection is non-waivable as to creditors who are not partners. *See* Section 4-105(c)(18) (stating that the partnership agreement may not "restrict the rights under this [Code] of a person other than a partner"). However, if a creditor is willing, a dissolved limited partnership may certainly make agreements with the creditor specifying the terms under which the limited partnership will "discharge the partnership's obligations to" the creditor.

Subsection (b) — For the most part, this subsection states default rules. For example, partnership agreements often provide for different distribution rights upon liquidation than during operations. However, distributions under these subsections (or otherwise under the partnership agreement) are subject to charging orders, Section 4-703. As to the extent the partnership agreement can be amended to affect the distribution rights of persons already transferees, see Section 4-107(b).

Subsection (c) — This section applies obligation by obligation, because a person — *qua* general partner or person dissociated as a general partner — is required to contribute to the limited partnership to satisfy a partnership obligation only if, when the obligation was incurred: (i) the person was a general partner; and (ii) the limited partnership was not an LLLP. *See*

Section 4-404(b), (c). As for when a limited partnership obligation is incurred, see the comments to Section 4-404(b) and (c).

The partnership agreement can change the allocation *inter se* general partners and persons dissociated as general partners but cannot prejudice the rights of non-partner creditors.

> EXAMPLE: The A-B Limited Partnership (the "Partnership") owes Creditor $150, an obligation incurred when General Partners A and B were the only general partners, sharing distributions equally, and the Limited Partnership was not an LLLP. The Partnership has no funds to pay Creditor. Although Subsection (c)(1) would require Partners A and B each to contribute equally (*i.e.*, $75), the A-B Partnership Agreement provides that General Partner A has the entire contribution obligation and General Partner B has none. As between General Partners A and B, General Partner A is obligated to contribute $150 and General Partner B nothing. However, as to Creditor, General Partner B still has a contribution obligation of $75.
>
> This formal distinction will have practical consequences only if General Partner A does not contribute the full $150. Also, Creditor may have problems establishing standing. *Cf.* see the comment to Section 4-505.

Subsection (c)(2) and (3) — These provisions are analogous to buy-sell provisions that: (i) provide that an owner's effort to sell the ownership interest triggers an option to purchase allocated among all the other owners; (ii) make the option conditional on the entire interest being purchased; and (iii) provide for successive allocations to take up any previous allocations that were not unexercised.

Subsection (e) — If a limited partnership has been a limited liability limited partnership throughout the partnership's existence, this subsection is consistent with this article's approach to loss sharing. If a partnership has been a limited liability limited partnership during only part of the partnership's existence, the issue of loss sharing upon dissolution: (i) can be exceedingly complicated, varying radically depending on the circumstances; (ii) is therefore not amenable to a statutory "gap filler"; and (iii) thus should always be addressed in the partnership agreement.

However, in case the partnership agreement does not address the issue, this article must provide a default rule. *See* the comment to Section 4-105(b) ("To the extent the partnership agreement does not determine an inter se matter, this article determines the matter."). This subsection applies to fill the gap. This approach has the virtues of simplicity and certainty but in no way resembles what "typical" partners might agree if they were to consider the matter ab initio, especially if the partnership was never a LLLP. *Cf*. Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. Miami L. Rev. 425, 448 (1987) ("[T]he various norms established by the Act, applicable in the absence of agreements to the contrary, represent the supposed understandings partners most likely reach if they choose to bargain on the various issues.").

§ 30-24-811. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Administrative dissolution — sections 30-21-601 and 30-21-602, Idaho Code.

(2) Reinstatement — section 30-21-603, Idaho Code.

(3) Judicial review of denial of reinstatement — section 30-21-604, Idaho Code.

History.

I.C., § 30-24-811, as added by 2015, ch. 243, § 40, p. 758.

Part 9
Actions By Partners

§ 30-24-901. Direct action by partner. — (a) Subject to subsection (b) of this section, a partner may maintain a direct action against another partner or the limited partnership, with or without an accounting as to the partnership's activities and affairs, to enforce the partner's rights and protect the partner's interests, including rights and interests under the partnership agreement or this act or arising independently of the partnership relationship.

(b) A partner maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership.

(c) A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

History.

I.C., § 30-24-901, as added by 2015, ch. 243, § 41, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment Subsection (a) — A partner's rights under this subsection are subject to the rule of standing stated in Subsection (b). The phrase "otherwise protect the partner's interests" pertains to remedies and creates no additional causes of action.

The last phrase of this subsection ("or arising independently . . .") does not create any new rights, obligations, or remedies, and is included merely to emphasize that a person being a partner in a limited partnership does not preclude the person from enforcing rights existing "independently of the partnership relationship" (*e.g.*, as a creditor).

Subsection (b) — This subsection codifies the rule of standing that predominates in entity law. *See, e.g., Mallia v. PaineWebber, Inc.*, 889 F. Supp. 277, 282 (S.D. Tex. 1995) ("[T]o bring a direct representative action against a general partner, a limited partner must demonstrate either direct injury or an injury that exists independently of the partnerships."); *JonesH. F. Ahmanson & Co.*, 460 P.2d 464, 470 (Cal. 1969) (stating that "the action is derivative, *i.e.*, in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets" (quoting *Gagnon Co., Inc. v. Nevada Desert Inn*, 289 P.2d 466, 471 (Cal. 1955) (internal quotation marks omitted)); *Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12, 17 (Del. Ch. 1992) (stating that direct action by holders of interest in partnership is not permitted for indirect injuries from general partners' misconduct); *Tzolis v. Wolff*, 884 N.E.2d 1005, 1008 (N.Y. 2008) (holding that derivative actions exist under New York LLC law and referring to "the traditional line between direct and derivative claims"); *see also CML V, LLC v. Bax*, 6 A.3d 238, 245 (Del. Ch. 2010) (noting that issues of standing viz-a-viz direct and derivative claims are comparable regardless of whether the entity is a limited partnership, a limited liability company, or a corporation), *aff'd*, 28 A.3d 1037 (Del. 2011).

The distinction between direct and derivative claims protects the partnership agreement. If any partner can sue directly over any management issue, the mere threat of suit can interfere with the partners' agreed-upon arrangements.

Although in ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract, within a limited partnership different circumstances typically exist. A partner does not have a direct claim against a general partner merely because the general partner has breached the partnership agreement. Likewise a general partner's violation of this article does not automatically create a direct claim for every other partner. To have standing in his, her, or its own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

EXAMPLE: Through grossly negligent conduct, in violation of Section 4-409(c), the general partner of a limited partnership reduces the net

assets of the limited partnership by fifty percent, which in turns decreases the value of Limited Partner A's investment by $3,000,000. A has no standing to bring a direct claim; the damage is merely derivative of the damage first suffered by the limited partnership. The partner may, however, bring a derivative claim. Sections 4-902 through 4-906.

EXAMPLE: Same facts, except in addition to violating Section 4-409(c), the general partner's conduct breaches an express provision of the partnership agreement to which Limited Partner A is a signatory. The analysis and the result are the same.

EXAMPLE: A partnership agreement defines "distributable cash" and requires the limited partnership to periodically distribute that cash among all partners. The limited partnership's general partner fails to distribute the cash. Each partner has a direct claim against the general partner and the limited partnership.

The reference to "threatened injury" is to encompass potential claims for preventative relief, such as a temporary restraining order or preliminary injunction.

This section's standing rule is subject to reasonable alterations by the partnership agreement. *See* the comment to Section 4-105(c)(14).

Subsection (c) — This subsection originated as UPA (1997) § 405(c) and reversed the rule stated in UPA (1914) § 43. This subsection inevitably implies that other law governs the accrual of a claim under Subsection (b) as well as the statute of limitations applicable to those claims. As a result, partners must take care not to "to sit on their claims" waiting for the partnership to dissolve. *Veloski v. State Farm Mut. Auto Ins. Co.*, 719 N.E.2d 574, 576 (Ohio Ct. App. 1998).

§ 30-24-902. Derivation action. — A partner may maintain a derivative action to enforce a right of a limited partnership if:

(1) The partner first makes a demand on the general partners, requesting that they cause the partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or

(2) A demand under subsection (1) of this section would be futile.

History.

I.C., § 30-24-902, as added by 2015, ch. 243, § 41, p. 758.

Official Comment

By its terms, this section permits a general partner as well as a limited partner to bring a derivative action, subject of course to Section 4-903.

Paragraph (1) — The demand requirement recognizes that, presumptively at least, the decision to cause a limited partnership to bring suit is a business decision, to be made by those who manage the business. Deborah A. DeMott, Shareholder Derivative Actions: Law and Practice § 5.9 (Westlaw, Nov. 4, 2012) (Demand on directors — Rationales for demand).

Paragraph (2) — Some jurisdictions have a "universal demand" requirement, but the approach stated here is by far the majority one. Deborah A. Demott, Shareholder Derivative Actions: Law and Practice § 5.12 (Westlaw, Nov. 4, 2012).

§ 30-24-903. Proper plaintiff. — A derivative action to enforce a right of a limited partnership may be maintained only by a person that is a partner at the time the action is commenced and:

(1) Was a partner when the conduct giving rise to the action occurred; or

(2) Whose status as a partner devolved on the person by operation of law or pursuant to the terms of the partnership agreement from a person that was a partner at the time of the conduct.

History.

I.C., § 30-24-903, as added by 2015, ch. 243, § 41, p. 758.

Official Comment

The rule stated here is conventional in both the law of unincorporated entities and corporate law. Persons dissociated as partners have no standing to bring a derivative action. *A fortiori*, mere transferees have no standing. *See* the comment to Section 4-107(b) and Section 4-702.

Paragraph (2) — This paragraph will be inapposite if the limited partnership has only two partners, one of whom is the derivative plaintiff. In that limited circumstance, the plaintiff's death would cause the derivative action to abate. The "pick your partner" principal enshrined in Section 4-702 would prevent the decedent's heirs from succeeding to plaintiff status in the derivative action (except in the unlikely event that the remaining partner consents to the heirs becoming partners). The analysis and result will be the same if the derivative plaintiff is an entity whose existence terminates.

This article takes no position on whether:

• the death of partner abates a direct claim against the limited partnership or a fellow partner; and

• bringing a direct claim precludes a person from being a proper plaintiff for a derivative claim.

As to the latter issue, see, *e.g., Cordts-Auth v. Crunk, L.L.C.*, 815 F. Supp. 2d 778, 793-94 (S.D.N.Y. 2011) (discussing the potential conflict of interest), *aff'd*, 479 F. App'x 375 (2d Cir. 2012).

§ 30-24-904. Pleading. — In a derivative action, the complaint must state with particularity:

(1) The date and content of the plaintiff's demand and the response to the demand by the general partner; or (2) Why the demand should be excused as futile.

History.

I.C., § 30-24-904, as added by 2015, ch. 243, § 41, p. 758.

Official Comment This section parallels Section 4-902. The pleading requirement first appeared in a uniform act in 1976. ULPA (1976) § 1003.

§ 30-24-905. Special litigation committee. — (a) If a limited partnership is named as or made a party in a derivative proceeding, the partnership may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the partnership. If the partnership appoints a special litigation committee, on motion by the committee made in the name of the partnership, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from:

(1) Enforcing a person's right to information under section 30-24-304 or 30-24-407, Idaho Code; or

(2) Granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee must be composed of one (1) or more disinterested and independent individuals, who may be partners.

(c) A special litigation committee may be appointed:

(1) By a majority of the general partners not named as parties in the proceeding; or

(2) If all general partners are named as parties in the proceeding, by a majority of the general partners named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited partnership that the proceeding:

(1) Continue under the control of the plaintiff;

(2) Continue under the control of the committee;

(3) Be settled on terms approved by the committee; or

(4) Be dismissed.

(e) After making a determination under subsection (d) of this section, a special litigation committee shall file with the court a statement of its

determination and its report supporting its determination and shall serve each party with a copy of the determination and report. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) of this section and allow the action to continue under the control of the plaintiff.

History.

I.C., § 30-24-905, as added by 2015, ch. 243, § 41, p. 758.

Official Comment

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. An "SLC" can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of partners who are neither plaintiffs nor defendants (if any), and bring the benefits of a specially tailored business judgment to any judicial decision.

This section's approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited partnership. Use of an SLC is optional. A partnership agreement can preclude the use of SLCs, rendering this section inapplicable, but cannot otherwise vary this section. *See* Section 105(c)(15).

Subsection (a)(1) — Sections 4-304 and 4-407 pertain to information rights. On the availability of these remedies pending the SLC's investigation, *compare* Section 4-410, *with Kaufman v. Computer Assoc. Int'l, Inc*., No. Civ.A. 699-N, 2005 WL 3470589, at *1 (Del. Ch. Dec. 21, 2005) (presenting "the question of whether to stay a books and records action under 8 Del. C. § 220 at the request of a special litigation committee when a derivative action encompassing substantially the same allegations of

wrongdoing filed by different plaintiffs is pending in another jurisdiction"; concluding "[f]or reasons that have much to do with the light burden imposed by the plaintiff's demand in this case . . . that the special litigation committee's motion to stay the books and records action should be denied").

Subsection (e) — The standard stated for judicial review of the SLC determination follows *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979) rather than *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), because the latter's reference to a court's business judgment has generally not been followed in other states. In essence, an SLC is intended to function as a surrogate decision-maker, allowing the limited partnership to make what is fundamentally a business decision. If a court determines that "the members of the committee were disinterested and independent and [that] . . . the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof," it makes no sense to substitute the court's legal judgment for the business judgment of the SLC.

Houle v. Low, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court's role in reviewing an SLC decision:

> The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]'s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment. . . . [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff's derivative suit. . . . The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof — the [entity].

For a discussion of how a court should approach the question of independence, see *Einhorn v. Culea*, 612 N.W.2d 78, 91 (Wis. 2000).

§ 30-24-906. Proceeds and expenses. — (a) Except as otherwise provided in subsection (b) of this section:

(1) Any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited partnership and not to the plaintiff; and (2) If the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the partnership.

(b) If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited partnership.

(c) A derivative action on behalf of a limited partnership may not be voluntarily dismissed or settled without the court's approval.

History.

I.C., § 30-24-906, as added by 2015, ch. 243, § 41, p. 758.

Official Comment

Subsection (c) — This provision is intended to prevent collusion.

Chapter 25
LIMITED LIABILITY COMPANIES

Part 1. General Provisions

Sec.

Part 2. Formation — Certificate of Organization and Other Filings

Part 3. Relations of Members and Managers to Persons Dealing With Limited Liability Company

Part 4. Relations of Members to Each Other and to Limited Liability Company

Part 5. Transferable Interests and Rights of Transferees and Creditors

Part 6. Dissociation

Part 7. Dissolution and Winding Up

Part 8. Actions By Members

Part 1
General Provisions

§ 30-25-101. Short title. — This chapter may be cited as the "Idaho Uniform Limited Liability Company Act."

History.

I.C., § 30-25-101, as added by 2015, ch. 243, § 43, p. 758.

Official Comment

This article replaces a state's current limited liability company statute, whether or not that statute is based on ULLCA (1996) or ULLCA (2006). Section 5-110 contains transition provisions for the applicability of this article to limited liability companies formed before the effective date of the Code (Section 1-708).

§ 30-25-102. Definitions. — (a) In this chapter:

(1) “Certificate of organization” means the certificate required by section 30-25-201, Idaho Code. The term includes the certificate as amended or restated.

(2) “Contribution,” except in the phrase “right of contribution,” means property or a benefit described in section 30-25-402, Idaho Code, that is provided by a person to a limited liability company to become a member or in the person’s capacity as a member.

(3) “Distribution” means a transfer of money or other property from a limited liability company to a person on account of a transferable interest or in the person’s capacity as a member. The term:

(A) Includes:

(i) A redemption or other purchase by a limited liability company of a transferable interest; and

(ii) A transfer to a member in return for the member’s relinquishment of any right to participate as a member in the management or conduct of the company’s activities and affairs or to have access to records or other information concerning the company’s activities and affairs; and

(B) Does not include amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program.

(4) “Limited liability company” means an entity formed under this chapter or that becomes subject to this chapter under chapter 22, title 30, Idaho Code, or section 30-25-110, Idaho Code.

(5) “Manager” means a person that under the operating agreement of a manager-managed limited liability company is responsible, alone or in concert with others, for performing the management functions stated in section 30-25-407(c), Idaho Code.

(6) “Manager-managed limited liability company” means a limited liability company that qualifies under section 30-25-407(a), Idaho Code.

(7) “Member” means a person that:

(A) Has become a member of a limited liability company under section 30-25-401, Idaho Code, or was a member in a company when the company became subject to this chapter under section 30-25-110, Idaho Code; and

(B) Has not dissociated under section 30-25-602, Idaho Code.

(8) “Member-managed limited liability company” means a limited liability company that is not a manager-managed limited liability company.

(9) “Operating agreement” means the agreement, whether or not referred to as an operating agreement and whether oral, implied, in a record, or in any combination thereof, of all the members of a limited liability company, including a sole member, concerning the matters described in section 30-25-105(a), Idaho Code. The term includes the agreement as amended or restated.

(10) “Organizer” means a person that acts under section 30-25-201, Idaho Code, to form a limited liability company.

(11) “Transferable interest” means the right, as initially owned by a person in the person’s capacity as a member, to receive distributions from a limited liability company, whether or not the person remains a member or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

(12) “Transferee” means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a member. The term includes a person that owns a transferable interest under section 30-25-603(a)(3), Idaho Code.

(b) The following definitions outside this chapter apply to this chapter:

(1) “Debtor in bankruptcy” — section 30-21-102(7), Idaho Code.

(2) “Foreign” — section 30-21-102(15), Idaho Code.

(3) “Jurisdiction” — section 30-21-102(22), Idaho Code.

(4) “Jurisdiction of formation” — section 30-21-102(23), Idaho Code.

(5) “Person” — section 30-21-102(35), Idaho Code.

(6) “Principal office” — section 30-21-102(36), Idaho Code.

(7) “Property” — section 30-21-102(41), Idaho Code.

(8) “Record” — section 30-21-102(44), Idaho Code.

(9) “Registered agent” — section 30-21-102(45), Idaho Code.

(10) “Sign” — section 30-21-102(47), Idaho Code.

(11) “State” — section 30-21-102(48), Idaho Code.

(12) “Transfer” — section 30-21-102(50), Idaho Code.

History.

I.C., § 30-25-102, as added by 2015, ch. 243, § 43, p. 758.

CASE NOTES

Operating Agreement.

Where oral operating agreement of LLC stated that, once a written agreement was ready to be signed, individuals could only become members by signing that agreement, individuals who at times acted as members were not in fact members without signing the written agreement. Johnson v. Crossett, 163 Idaho 200, 408 P.3d 1272 (2018).

Official Comment

Subsection (a) contains definitions for terms used throughout this article. Subsection (b) contains a list of definitions in Article 1 that are applicable to limited liability companies.

“Certificate of organization” [(a)(1)] — The original ULLCA (1996) and most other LLC statutes use “articles of organization” rather than “certificate of organization.” This article purposely uses the latter term to signal that the certificate: (i) merely reflects the existence of an LLC (rather than being the locus for important governance rules); and (ii) is significantly different from articles of *incorporation*, which have a substantially greater

power to affect *inter se* rules for the corporate entity and its owners. For the relationship between the certificate of organization and the operating agreement, see Section 5-107(d).

"Contribution" [(a)(2)] — This definition serves to distinguish capital contributions from other circumstances under which a member or would-be member might provide benefits to a limited liability company (*e.g.*, providing services to the LLC as an employee or independent contractor, leasing property to the LLC).

This definition also distinguishes "contributions" from capital raised from transferees who invest to be a contribution, the property or benefit must be "provided by a person to a limited liability company to become a member or in the person's capacity as a member." This approach is common in LLC statutes. *See, e.g.*, N.Y. Ltd. Liab. Co. Law § 102(f) (McKinney 2013) ("Contribution' means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to render services that a member contributes to a limited liability company in his or her capacity as a member."); Del. Code Ann. tit. 6, § 18-101(3) (West 2013) ("Contribution' means any cash, property, services rendered or a promissory note or other obligation to contribute cash or property or to perform services, which a person contributes to a limited liability company in the person's capacity as a member.").

In contrast, operating agreements sometimes provide for contributions from transferees. In such circumstances, the default rules for liquidating distributions should be altered accordingly. *See* Section 5-707(b)(1) (referring to distributions to be made "to each person owning a transferable interest that reflects *contributions* made and not previously returned") (emphasis added).

"Distribution" [(a)(3)(A) — redemptions included] — This provision specifically refers to transactions between a limited liability company and one of its members, which in the corporate context would be labeled a "redemption." The paragraph has subparts because ownership interests in an LLC are conceptually bifurcated into economic rights ("transferable interests") and governance and information rights.

Under Section 5-404(a), "[a]ny distribution made by a limited liability company before its dissolution and winding up must be in equal shares

among members and persons dissociated as members. . . .” Since a redemption is a distribution, absent authorization in the operating agreement an LLC may not redeem the interest of one member or transferee without redeeming (or at least offering to redeem) the interests of all other members and transferees to a comparable extent.

The law of close corporations has flirted with a similar notion. *See, e.g., Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 598, 328 N.E.2d 505, 518 (1975) (stating, with regard to closely held corporations, “if the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price”); *Toner v. Baltimore Envelope Co.*, 304 Md. 256, 273, 498 A.2d 642, 650 (1985) (rejecting the “per se breach of duty” approach); *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 850, 353 N.E.2d 657, 663 (1976) (stating that “untempered application of the strict good faith standard enunciated in *Donahue* to . . . will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned”).

An operating agreement can override Section 5-404(a)’s equal treatment requirement without specifically mentioning redemptions.

> EXAMPLE: Ryan, LLC is a manager-managed limited liability company whose operating agreement: (i) includes a list (the “protected list”) of decisions or actions that may be taken only with the consent of all members; and (ii) provides that all other decisions and acts may be taken as the manager determines. The protected list does not include redemptions. The operating agreement overrides the Section 5-404(a)’s equal treatment requirement.

[(a)(3)(B) — exclusion] — This exclusion affects the reach of: (i) the charging order remedy under Section 5-503; and (ii) Section 5-405’s clawback provision. The effect on the clawback provision reflects the law in several states, *see, e.g.*, Del. Code Ann., tit. 6, § 18-607(b) (2012) and Va. Code Ann. § 13.1-1036 (2012), and makes sense conceptually and as a matter of policy. *See In re Tri-River Trading, LLC*, 329 B.R. 252, 266

(B.A.P. 8th Cir. 2005), *aff'd*, 452 F.3d 756 (8th Cir. 2006) ("We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.").

"Limited liability company" [(a)(4)] — This definition makes no reference to a limited liability company having members upon formation, but Section 5-201(d) does.

"Manager" [(a)(5)] — The article uses "manager" as a term of art, whose applicability under this article is confined to manager-managed LLCs. The phrase "manager-managed" is itself a term of art, referring only to an LLC whose operating agreement refers to the LLC as such. *See* Paragraph (a)(6) (defining "manager-managed limited liability company"). Thus, for purposes of this article, if the members of a *member* -managed LLC delegate plenipotentiary management authority to one person (whether or not a member), this article's references to "manager" do not apply to that person, even if the members or their operating agreement refers to the person as a "manager."

This approach has the potential for confusion, but confusion around the term "manager" is common to all LLC statutes. The confusion stems from the choice to define "manager" as a term of art in a way that can be at odds with other, common usages of the word. For example, a member-managed LLC might well have an "office manager" or a "property manager." Moreover, in a manager-managed LLC, the "property manager" is not likely to be a manager as the term is used in many LLC statutes. For this nomenclature problem, the best solution is to have the operating agreement carefully delineate who is and is not a manager as this article uses that label.

For cases exemplifying the complexity and problems, *see, e.g., In re Weddle*, 353 BR 892, 895 n.2 (Bankr. D. Idaho 2006) ("Plaintiff appears to argue that Debtors were managers of the LLC. However, Plaintiff's use of the term 'managers' to describe Debtors' duties under their employment agreement is not synonymous with 'manager' of the LLC within the use of that term in the operating agreement, the articles of incorporation, or chapter 6 of title 53 of the Idaho Code. The court views Debtors' 'management' role in the daily operation of the lodge as separate and distinct from management of the LLC."); *Brown v. MR Group, LLC*, 693 N.W.2d 138, 143 (Wis. App. 2005) (declining to use the dictionary

definition of "manager" in determining coverage of a policy applicable to a limited liability company and its "managers" and relying instead on the meaning of the term under the Wisconsin LLC act); *Old Nat'l Villages, LLC v. Lenox Pine, LLC*, 659 S.E. 2d 891, 893 (Ga. Ct. App. 2008) (treating the label "general manager" as a manager "under Georgia's LLC statute").

Under this article, the category of "person" is not limited to individuals. Therefore, a "manager" need not be a natural person. For example, one limited liability company can serve as the manager of another limited liability company.

After a person ceases to be a manager, the term "manager" continues to apply to the person's conduct while a manager. *See* Section 5-407(c)(6).

"Manager-managed limited liability company" [(a)(6)] — This article authorizes a private agreement (the operating agreement) rather than a public document (certificate or articles of organization) to establish an LLC's status as a manager-managed limited liability company, thereby departing from most existing LLC statutes. Using the operating agreement makes sense, because under this article managerial structure creates no statutory power to bind the entity. *See* Section 5-301 (eliminating statutory apparent authority).

The only direct consequences of manager-managed status are *inter se* — principally the triggering of a set of rules concerning management structure, fiduciary duty, and information rights. *See* Sections 5-407 through 5-410. The rules on management structure are entirely default provisions — subject to change in whole or in part by the operating agreement. The operating agreement can also significantly affect the provisions on fiduciary duty and information rights. *See* Section 5-105.

An LLC that is "manager-managed" under this definition does not change its management structure simply because the members fail to designate anyone to act as a manager. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

“Member” [(a)(7)] — After a person has been dissociated as a member under Section 5-602, the term “member” continues to apply to the person’s conduct while a member. *See* Section 5-603(b).

“Member-managed limited liability company” [(a)(8)] — Under this article, member-management is the default mode. *See* Section 5-407(a).

Some member-managed LLCs give important managerial responsibilities to one or more members. Because “manager” is a term of art under this article and applies only to manager-managed LLC, referring to such members as “managers” risks confusion. *See* the comment to Subsection (a)(5) (Manager). In contrast, “managing member” or some other designation such as Chief Executive Officer avoids the defined term of “manager” and thereby avoids confusion.

“Operating agreement” [(a)(9)] — This definition must be read in conjunction with Sections 5-105 through 5-107, which further describe the operating agreement. In particular, although this definition refers to “the agreement . . . of all the members,” the limited liability company itself is bound by and may enforce the agreement. Section 5-106(a).

An operating agreement is a contract, and therefore all statutory language pertaining to the operating agreement must be understood in the context of the law of contracts.

The definition of “operating agreement” is very broad and recognizes a wide scope of authority for the operating agreement: “the matters described in Section 5-105(a).” Those matters include not only all relations *inter se* the members and the limited liability company but also all “activities and affairs of the company and the conduct of those activities and affairs.” Section 5-105(a)(3). Moreover, the definition puts no limits on the form of the operating agreement. To the contrary, the definition contains the phrase “whether oral, implied, in a record, or in any combination thereof.”

Unless the operating agreement itself provides otherwise:

• an operating agreement may comprise a number of separate documents (or records), however denominated; and

• subject to Section 5-106(b) (deeming new members to assent to the then-existing operating agreement), a document, record, understanding, *etc.*

can be part of the operating agreement only with the assent of all persons then members.

An agreement among less than all members might well be enforceable among those members as parties, but would not be part of the operating agreement. However, under Section 5-105(a)(4), an amendment to an operating agreement can be made with less than unanimous consent if the operating agreement itself so provides.

An agreement to form an LLC is not itself an operating agreement. The term “operating agreement” presupposes at least one “member,” and a person cannot be a member of an LLC before the LLC exists. However, as soon as a limited liability company has any members, the limited liability company perforce has an operating agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in some way through the mechanism of an LLC; (ii) they form the LLC or cause it to be formed; and (iii) without further ado or agreement, they become the LLC’s initial members. An operating agreement exists. In the words of Subsection (a)(9), “all the members” have agreed on who the members are, and that agreement — no matter how informal or rudimentary — is an agreement “concerning the matters described in Section 5-105(a).” To the extent the agreement does not provide the *inter se* “rules of the game,” this article “fills in the gaps.” Section 5-105(b).

The result is the same when a person becomes the sole initial member of an LLC, so long as the person has any understanding or intention with regard to the LLC. Any such understanding or intention constitutes an “agreement of all the members of the limited liability company, including a sole member.” Subsection (a)(9).

It may seem oxymoronic to refer an “agreement of . . . a sole member,” but this approach is common in LLC statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. § 29-601 (14)(b) (2012) (defining operating agreement to mean “[i]n the case of a limited liability company that has a single member, any written or oral statement of the member made in good faith purporting to govern the affairs of a limited liability company or the conduct of its business as of the effective time of the statement”); Wash. Rev. Code Ann. § 25.15.005 (5) (2012) (defining limited liability company agreement to include “any written statement of the sole member”).

This re-definition of "agreement" is a function of "path dependence." LLC statutes initially required an LLC to have at least two members, and almost all LLC statutes contemplated an agreement among members as an LLC's key organic document. Because LLC statutes make the operating agreement the principal way to override statutory default rules, the advent of single member LLCs made it necessary to provide that a sole member could make an operating agreement.

This article states no rule as to whether the statute of frauds applies to operating agreements. Case law suggests that the answer is yes. *Olson v. Halvorsen*, 986 A.2d 1150, 1161 (Del. 2009) ("The legislative history of the LLC Act does not demonstrate the General Assembly's intent to place LLC agreements outside of the statute of frauds.") (applying the one-year provision to an alleged oral buy-out agreement), *negated* by 2010 Del. Laws, ch. 287 (H.B. 372), §§ 1, 31 (pertaining to statutes of fraud generally).

The Delaware court decision is consistent with partnership cases.

> Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing [and signed by the party to be bound]; however, a contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside the Statute of Frauds.

Abbott v. Hurst, 643 So. 2d 589, 592 (Ala. 1994) (citations omitted).

Likewise, the land provision of the statute of frauds:

> applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.

Froiseth v. Nowlin, 156 Wash. 314, 316, 287 P. 55, 56 (Wash. 1930) (quoting 27 C.J.S. § 220); *see also E. Piedmont 120 Associates, L.P. v. Sheppard*, 209 Ga. App. 664, 665, 434 S.E.2d 101, 102 (1993) (same, stating that "the fact that promises covered by the Statute of Frauds are

made in the context of a partnership or joint venture agreement does not render the statute inapplicable"); *Filippi v. Filippi*, 818 A.2d 608, 618 (R.I. 2003) (applying the statute of frauds to an alleged oral agreement to transfer land owned by a limited partnership to one of its partners).

In contrast, the land provision does not apply to a member's ownership interest in an LLC, no matter how much the LLC owns or deals in real property. Interests in a limited liability company are personal property and reflect no direct interest in the entity's assets. *See* Sections 5-102(24), 5-501. Thus, the real property issues pertaining to the LLC's ownership of land do not "flow through" to the members and membership interests. *See, e.g., Wooten v. Marshall*, 153 F. Supp. 759, 763-64 (S.D. N.Y. 1957) (involving an "oral agreement for a joint venture concerning the purchase, exploitation and eventual disposition of this 160 acre tract" and stating "[t]he real property acquired and dealt with by the venturers takes on the character of personal property as between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]"); *see also Wade v. DeHart*, 1926 WL 2944 (Ohio Com. Pl. 1926), *aff'd sub nom., Wade v. De Hart*, 26 Ohio App. 177, 159 N.E. 838 (1927) (same).

On the question of how far a written (or "in a record") operating agreement can go to prevent oral or implied-in-fact terms, see the comment to Section 5-105(a)(4). For the effect of a pre-formation agreement, see Section 5-106(c). For the limited liability company's status viz-a-viz the operating agreement, see Section 5-106(a).

"Organizer" [(a)(10)] — An organizer need not be a prospective member of the limited liability company. Unless the organizer will be the sole initial member of the limited liability company, as a matter of agency law and Section 5-401(a) and (b), the organizer is acting on behalf of the person or persons who have agreed to become the initial member or members of the limited liability company. The organizer does not act on behalf of the limited liability company, because a person cannot be an agent of an organization that does not yet exist. Restatement (Third) of Agency § 4.04, cmt. c (2006) (Nonexistent Principals).

"Transferable interest" [(a)(11)] — Absent a contrary provision in the operating agreement or the consent of the members, a "transferable interest"

is the only interest in an LLC, which can be transferred to a non-member. *See* the comment to Section 5-502.

This paragraph defines "transferable interest" as an interest "initially owned by a person in the person's capacity as a member," because this act does not contemplate an LLC directly creating interests that comprise only economic rights. *See* Sections 5-401 (addressing how a person becomes a member) and 5-502 (addressing how a person becomes a transferee).

"Transferee" [(a)(12)] — This definition should be read in light of Section 5-603(a)(3), which subject to limited exceptions provides that "any transferable interest owned by the person in the person's capacity as a member immediately before dissociation as a member is owned by the person solely as a transferee."

§ 30-25-103. Knowledge — Notice. — (a) A person knows a fact if the person:

(1) Has actual knowledge of it; or

(2) Is deemed to know it under subsection (d)(1) of this section or law other than this act.

(b) A person has notice of a fact if the person:

(1) Has reason to know the fact from all the facts known to the person at the time in question; or

(2) Is deemed to have notice of the fact under subsection (d)(2) of this section.

(c) Subject to section 30-25-210(f) [30-21-212], Idaho Code, a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to know the fact.

(d) A person not a member is deemed:

(1) To know of a limitation on authority to transfer real property as provided in section 30-25-302(g), Idaho Code; and

(2) To have notice of a limited liability company's:

(A) Dissolution ninety (90) days after a statement of dissolution under section 30-25-702(b)(2)(A), Idaho Code, becomes effective;

(B) Termination ninety (90) days after a statement of termination under section 30-25-702(b)(2)(F), Idaho Code, becomes effective; and

(C) Participation in a merger, interest exchange, conversion, or domestication, ninety (90) days after articles of merger, interest exchange, conversion, or domestication under chapter 22, title 30, Idaho Code, become effective.

History.

I.C., § 30-25-103, as added by 2015, ch. 243, § 43, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

The bracketed insertion near the beginning of subsection (c) was added by the compiler to correct the reference in the enacting legislation.

Official Comment

This section is substantially slimmer than the corresponding provisions of previous uniform acts pertaining to business organizations: UPA (1997), ULLCA (1996), and ULPA (2001). Each of those acts borrowed heavily from the comparable Uniform Commercial Code provision. This article relies instead on generally applicable principles of agency law, *see* Section 1-702; therefore, this section is confined mostly to rules specifically tailored to this article.

Several facets of this section warrant particular note. First, and most fundamentally, because this article does not provide for "statutory apparent authority," Section 5-301, this section contains no special rules for attributing to an LLC information possessed, communicated to, or communicated by a member or manager.

Second, the section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this article than in other circumstances; and (iv) are the subject of considerable attention in the Restatement (Third) of Agency (2006).

Third, this article does not define "notice" to include "knowledge." Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for the uninitiated. In ordinary usage, notice has a meaning separate from knowledge. This article follows ordinary usage and therefore contains some references to "knowledge or notice."

Subsection (a)(2) — In this context, the most important source of "law other than this [Code]" is the common law of agency.

Subsection (b)(1) — The "facts known to the person at the time in question" include facts the person is deemed to know under Subsection (a)(2).

Subsection (c) — If a person "notifies" another person of a fact, the other person has "reason to know" the fact and therefore has notice under Subsection (b)(1). However, a person can have "notice" of a fact without having been "notifie[d]" of the fact.

Section 1-212 pertains to delivery of records *by* the filing office.

Subsection (d) — This subsection provides constructive notice of facts stated in specified filed public records.

Subsection (d)(2) — Under this article, the power to bind a limited liability company to a third party is primarily a matter of agency law. See comment to Section 5-301. The constructive notice provided under this paragraph will be relevant if a third party makes a claim under agency law that someone who purported to act on behalf of a limited liability company had the apparent authority to do so.

§ 30-25-104. Governing law. — The law of this state governs:

(1) The internal affairs of a limited liability company; and (2) The liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of a limited liability company.

History.

I.C., § 30-25-104, as added by 2015, ch. 243, § 43, p. 758.

Official Comment

Paragraph (1) — Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the operating agreement, relations among the members as members, relations between the limited liability company and a member as a member, relations between a manager-managed limited liability company and a manager, and relations between a manager of a manager-managed limited liability company and the members as members. *Compare* Paragraph 1, *with* Restatement (Second) of Conflict of Laws § 302, cmt. a (1971) (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

"Internal affairs" do not encompass the power *vel non* of a person to bind a limited liability company. Restatement (Second) of Conflict of Laws § 292(2) (1971) ("The principal will be held bound by the agent's action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority."); *Id*. § 295(1) ("Whether a partnership is bound by action taken on its behalf by an agent in dealing with a third person is determined by the local law of the state selected by application of the rule of § 292."); Restatement (First) of Conflict of Laws § 345, cmt. c (1934) (Law Governing Effect of Act of Agent or Partner) ("If . . . the principal or partner sends the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only for authorized but for

unauthorized conduct of the agent or partner in accordance with the law of that state."). *See also Farm & Ranch Services, Ltd. v. LT Farm & Ranch, L.L.C.*, 779 F. Supp. 2d 949, 960 (S.D. Iowa 2011).

The operating agreement cannot alter this section. *See* Section 5-105(c)(1). This approach comports with the law of other businesses entities whose formation or legal status depends at least in part on a publicly-filed record. *See, e.g.*, Section 4-104 (stating that the law of the state of formation is the governing law of a limited partnership).

However, an operating agreement may lawfully incorporate by reference the provisions of another state's LLC statute. If done correctly, this incorporation makes the foreign statutory language part of the operating agreement, and the incorporated terms (together with the rest of the operating agreement) then govern the members (and those claiming through the members) to the extent not prohibited by this article. *See* Section 5-105. This approach: (i) does *not* switch the limited liability company's governing law to that of another state; (ii) instead takes the provisions of another state's law and incorporates them by reference into the contract among the members; (iii) raises complex drafting issues — *e.g.*, how to address subsequent changes to the incorporated law (whether occurring by statutory amendment or court decision); and (iv) thus is rarely, if ever, a good idea.

Paragraph (2) — This paragraph obviously encompasses Section 5-304 (the liability shield) but does not necessarily encompass a claim that a member or manager is liable to a third party for: (i) having purported inaccurately to have the actual authority to bind a limited liability company to the third party; or (ii) having committed a tort against the third party while acting on the limited liability company's behalf or in the course of the company's business. That liability is not by status (*i.e.*, not "as member . . . [or] as manager") but rather results from function or conduct. *Compare* Paragraph 2, *with* Section 5-301(b) (stating that, although this article does not make a member as member the agent of a limited liability company, other law may make an LLC liable for the conduct of a member).

"Internal affairs" and the "liability of a member as a member" are mentioned separately because it can be argued that the liability of members and managers to third parties is not an internal affair. *See, e.g.,* Restatement (Second) of Conflict of Laws § 307 (1971) (treating shareholders' liability

separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. *See, e.g.*, *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993) (holding that the corporation's "primary purpose is to insulate shareholders from legal liability" and therefore "the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away") (quoting *Soviet Pan Am Travel Effort v. Travel Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991) (internal quotation marks omitted).

In any event, most (if not all) LLC statutes follow the rule stated in this paragraph. *See, e.g.*, Ariz. Rev. Stat. Ann. § 29-801(A)(1) (2013) (stating that "[t]he laws of the state or another jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members"); Ga. Code Ann. § 14-11-701 (West 2013)(a) (stating that "[t]he laws of the jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and other owners"); N.Y. Ltd. Liab. Co. Law § 801(a) (McKinney 2013) (stating that "[t]he laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs and the liability of its members and managers").

Moreover, in the case law, "[t]he general rule is that a plaintiff's alter ego theory is governed by the law of the state in which the business at issue is organized." *Rual Trade Ltd. v. Viva Trade L.L.C.*, 549 F. Supp. 2d 1067, 1077 (E.D. Wis. 2008); *see also In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 787 (Bankr. W.D. La. 2013) (stating both conceptual and policy rationales for choosing the law of the state of formation); *In re Saba Enterprises, Inc.*, 421 B.R. 626, 648-51 (Bankr. S.D.N.Y. 2009) (examining the issue in detail and applying the state of formation rule).

§ 30-25-105. Operating agreement — Scope — Function — Limitations. — (a) Except as otherwise provided in subsections (c) and (d) of this section, the operating agreement governs:

(1) Relations among the members as members and between the members and the limited liability company;

(2) The rights and duties under this act of a person in the capacity of manager;

(3) The activities and affairs of the company and the conduct of those activities and affairs; and

(4) The means and conditions for amending the operating agreement.

(b) To the extent the operating agreement does not provide for a matter described in subsection (a) of this section, this chapter governs the matter.

(c) An operating agreement may not:

(1) Vary the law applicable under section 30-25-104, Idaho Code;

(2) Vary a limited liability company's capacity under section 30-25-109, Idaho Code, to sue and be sued in its own name;

(3) Vary any requirement, procedure, or other provision of this act pertaining to:

(A) Registered agents; or

(B) The secretary of state, including provisions pertaining to records authorized or required to be delivered to the secretary of state for filing under this act;

(4) Vary the provisions of section 30-25-204, Idaho Code;

(5) Alter or eliminate the duty of loyalty or the duty of care, except as otherwise provided in subsection (d) of this section;

(6) Eliminate the contractual obligation of good faith and fair dealing under section 30-25-409(d), Idaho Code, but the operating agreement may prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured;

(7) Relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law;

(8) Unreasonably restrict the duties and rights under section 30-25-410, Idaho Code, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;

(9) Vary the causes of dissolution specified in section 30-25-701(a)(4), Idaho Code;

(10) Vary the requirement to wind up the company's activities and affairs as specified in section 30-25-702(a), (b)(1) and (e), Idaho Code;

(11) Unreasonably restrict the right of a member to maintain an action under part 8 of this chapter;

(12) Vary the provisions of section 30-25-805, Idaho Code, but the operating agreement may provide that the company may not have a special litigation committee;

(13) Vary the right of a member to approve a merger, interest exchange, conversion, or domestication under section 30-22-203(a)(2), 30-22-303(a)(2), 30-22-403(a)(2) or 30-22-503(a)(2), Idaho Code; or

(14) Vary the required contents of a plan of merger under section 30-22-202(a), Idaho Code, plan of interest exchange under section 30-22-302(a), Idaho Code, plan of conversion under section 30-22-402(a), Idaho Code, or plan of domestication under section 30-22-502(a), Idaho Code; or

(15) Except as otherwise provided in sections 30-25-106 and 30-25-107(b), Idaho Code, restrict the rights under this chapter of a person other than a member or manager.

(d) Subject to subsection (c)(7) of this section, without limiting other terms that may be included in an operating agreement, the following rules apply:

(1) The operating agreement may:

(A) Specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one (1) or more disinterested and independent persons after full disclosure of all material facts; and

(B) Alter the prohibition in section 30-25-405(a)(2), Idaho Code, so that the prohibition requires only that the company's total assets not be less than the sum of its total liabilities.

(2) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of a responsibility that the member otherwise would have under this chapter and imposes the responsibility on one (1) or more other members, the agreement also may eliminate or limit any fiduciary duty of the member relieved of the responsibility that would have pertained to the responsibility.

(3) If not manifestly unreasonable, the operating agreement may:

(A) Alter or eliminate the aspects of the duty of loyalty stated in section 30-25-409(b) and (i), Idaho Code;

(B) Identify specific types or categories of activities that do not violate the duty of loyalty;

(C) Alter the duty of care, but may not authorize conduct involving bad faith, willful or intentional misconduct, or knowing violation of law; and

(D) Alter or eliminate any other fiduciary duty.

(e) The court shall decide as a matter of law whether a term of an operating agreement is manifestly unreasonable under subsection (c)(6) or (d)(3) of this section. The court:

(1) Shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and

(2) May invalidate the term only if, in light of the purposes, activities, and affairs of the limited liability company, it is readily apparent that:

(A) The objective of the term is unreasonable; or

(B) The term is an unreasonable means to achieve the provision's objective.

History.

I.C., § 30-25-105, as added by 2015, ch. 243, § 43, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Principal Provisions of this Article Concerning the Operating Agreement

The operating agreement is pivotal to a limited liability company, and Sections 5-105 through 5-107 are pivotal to this article. They must be read together, along with Section 5-102(a)(9) (defining the operating agreement).

This section performs five essential functions. Subsection (a) establishes the primacy of the operating agreement in establishing relations *inter se* the limited liability company, its member or members, and any manager. Subsection (b) recognizes this article as comprising mostly default rules — *i.e.*, gap fillers for issues as to which the operating agreement provides no rule. Subsection (c) lists the few mandatory provisions of the article. Subsection (d) lists some provisions frequently found in operating agreements, authorizing some unconditionally and others so long as "not manifestly unreasonable." Subsection (e) delineates in detail both the meaning of "not manifestly unreasonable" and the information relevant to a determining a claim that a provision of an operating agreement is manifestly unreasonable.

Section 5-106 details the effect of an operating agreement on the limited liability company and on persons becoming members of an LLC. Section 5-107 concerns the effect of an operating agreement on third parties.

Role and Inevitability of Operating Agreement

A limited liability company is as much a creature of contract as of statute, *TravelCenters of Am., L.L.C. v. Brog*, CIV.A. 3516-CC, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008) (stating that "limited liability companies are creatures of contract"); *Gottsacker v. Monnier*, 281 Wis. 2d

361, 370, 697 N.W.2d 436, 440 (2005) (stating that "from the partnership form, the LLC borrows . . . internal governance by contract"), and Section 5-102(a)(9) delineates a very broad scope for "operating agreement." As a result, once an LLC comes into existence and has a member, the LLC necessarily has an operating agreement. *See* the comment to Section 5-102(a)(9). Accordingly, this article refers to "the operating agreement" rather than "an operating agreement." This phrasing should not, however, be read to require a limited liability company or its members to take any formal action to adopt an operating agreement.

The operating agreement is the exclusive consensual process for modifying this article's various default rules pertaining to relationships *inter se* the members and between the members and the limited liability company. Section 5-105(b). The operating agreement also has power over "the rights and duties under this [Code] of a person in the capacity of manager," Subsection (a)(2), and "the obligations of a limited liability company and its members to a person in the person's capacity as a transferee or person dissociated as a member," Section 5-107(b). For the relationship between the operating agreement and certificate of formation, see Section 5-107(d).

The Operating Agreement and the Fiduciary and Other Duties of Those Who Manage

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization's owners can affect the fiduciary and other duties of those who manage the organization (*e.g.*, members in a member-managed LLC; managers in a manager-managed LLC). As explained in detail in the comment to Subsection (d)(3), this article rejects the notion that a contract can completely transform an inherently fiduciary relationship into a merely arm's length association. Within that limitation, however, this section provides substantial power to the operating agreement to reshape, limit, and eliminate fiduciary and other managerial duties.

Subsection (a) recognizes that the operating agreement is the map to the parties' deal and that any claim by a member of managerial misconduct must be assessed first under the relevant terms of the operating agreement. Subsection (d) specifically validates arrangements commonly used to

reshape managerial duties and limit the consequences of breaching those duties. Subsection (c) contains relevant limitations, but those limitations: (i) must be read together with subsection (d); and (ii) do not preclude the operating agreement fundamentally redesigning the duties applicable to those who manage the organization. For the article's design of those duties, see Sections 5-409 and 5-410.

Subsection (a) — This section describes the very broad scope of a limited liability company's operating agreement, which includes all matters constituting "internal affairs." it Compare Subsection (a), *with* Section 5-104(1) (using the phrase "internal affairs" in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in Subsection (c), including the broad restriction stated in Paragraph (c)(15) (concerning the rights of third parties under this article).

Subsection (a)(1) — This paragraph encompasses all the rights and duties of each member, including rights and duties pertaining to transactions under Article 2.

Subsection (a)(2) — Under this paragraph, the operating agreement has the power to affect the rights and duties of managers (including non-member managers). Because the term "[o]perating agreement . . . includes the agreement as amended or restated," Section 5-102(a)(9), this paragraph gives the members the ongoing power to define the role of an LLC's managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the LLC and the manager. A non-member manager might also have rights under Section 5-107(a).

Subsection (a)(4) — Under this provision, the operating agreement can control both the quantum of consent required (*e.g*., majority of members) and the means by which the consent is manifested (*e.g*., prohibiting modifications except when consented to in writing). *See* the comment to Section 5-107(a).

Under subsection (b), if the operating agreement does not address the issue, this article provides the rule. Section 5-407(b)(4)(C) and 5-407(c)(3)(C) each require the affirmative vote or consent of all the members. Under Section 1-702 (Supplemental Principles of Law), the parole evidence rule

will apply to a written operating agreement when appropriate under contract law.

Subsection (b) — To the extent the operating agreement does not determine an *inter se* matter, this article determines the matter. The operating agreement may vary any provision of this article pertaining to *inter se* matters, except as provided in Subsections (c) and (d).

Sometimes — but not always — the comments to this article refer to a variable provision as a "default rule" and a non-waivable provision as "mandatory." These references are merely to draw attention to the default/mandatory distinction in particular contexts and have neither the intent nor the power to affect the default/mandatory status of provisions of this article whose comments lack a comparable reference.

Subsection (c) — This subsection lists provisions of this article whose respective effects cannot be varied or may be varied subject to a stated limitation. For historical reasons, this subsection uses the words "vary" and "alter" interchangeably. No difference in meaning is intended.

If a person claims that a term of the operating agreement violates this subsection, as a matter of ordinary procedural law the burden of proof is on the person making the claim.

Subsection (c)(1) — Section 5-104 states that this article provides the law applicable to: (i) the internal affairs of an LLC formed under this article; and (ii) the liability of members and managers for obligations of the LLC. The organizers of an LLC make this choice of law by choosing to form an LLC under this article. Domestication to another jurisdiction will re-set the choice of law, see Sections 2-501 through 2-506, but the operating agreement cannot, see the comment to Section 5-104(1).

Subsection (c) contains no parallel prohibition on varying Section 1-501 (stating the governing law for foreign limited liability companies), because a prohibition is unnecessary. As a matter of fundamental contract law, an agreement among members of one limited liability company is powerless to govern the affairs of another limited liability company.

Subsection (c)(2) — Under this article, a limited liability company is emphatically an entity, and the members lack the power to alter that characteristic.

Subsection (c)(3) — This prohibition is arguably implicit in Subsection (c)(15) (affecting rights of third parties under this article) but is specifically noted to avoid doubt.

Subsection (c)(4) — This provision means that the operating agreement cannot affect the right of an "aggrieved" person to seek the court's help when "a person required by this [Code] to sign a record or deliver a record to the [Secretary of State] for filing under this [Code] does not do so." Section 5-204(a).

Subsection (c)(5) — This limitation is less powerful than might first appear, because Subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care, including restricting and substantially eliminating those duties.

Subsection (c)(6) — Section 5-409(d) refers to the "contractual obligation of good faith and fair dealing," which contract law implies in every contract. The operating agreement cannot eliminate this obligation, neither in whole (*i.e.*, generally) nor in part (*i.e.*, as applicable to specified situations).

However, an operating agreement may "prescribe the standards . . . by which the performance of the obligation is to be measured."

> EXAMPLE: The operating agreement of a manager-managed LLC gives the manager the discretion to cause the LLC to enter into contracts with affiliates of the manager (so-called "Conflict Transactions"). The agreement further provides: "When causing the Company to enter into a Conflict Transaction, the manager complies with Section 5-409(d) of [this article] if a disinterested person, knowledgeable in the subject matter, states in writing that the terms and conditions of the Conflict Transaction are equivalent to the terms and conditions that would be agreed to by persons at arm's length in comparable circumstances." This provision "prescribe[s] the standards by which the performance of the [Section 5-409(d)] obligation is to be measured."

> EXAMPLE: Same facts as the previous example, except that, during the performance of a Conflict Transaction, the manager causes the LLC to waive material protections under the applicable contract. The standard stated in the previous example is inapposite to this conduct. Section 5-

409(d) therefore applies to the conduct without any direct contractual delineation. (However, other terms of the agreement may be relevant to determining whether the conduct violates Section 5-409(d). *See* the comment to Section 5-409(d).)

EXAMPLE: The operating agreement of a manager-managed LLC gives the manager "sole discretion" to make various decisions. The agreement further provides: "Whenever this agreement requires or permits a manager to make a decision that has the potential to benefit one class of members to the detriment of another class, the manager complies with Section 5-409(d) of [this article] if the manager makes the decision with:

a. the honest belief that the decision:

i. serves the best interests of the LLC; or

ii. at least does not injure or otherwise disserve those interests; and

b. the reasonable belief that the decision breaches no member's rights under this agreement."

This provision "prescribe[s] the standards by which the performance of the [Section 5-409(d)] obligation is to be measured." *Compare* Section 5-105(c)(6), *with Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) (considering such a situation in the context of the right to call preferred stock and deciding by a 3-2 vote that exercising the call did not breach the implied covenant of good faith and fair dealing).

An operating agreement that seeks to prescribe standards for measuring the contractual obligation of good faith and fair dealing under Section 5-409(d) should expressly refer to the obligation. *See Gerber v. Enter. Prods. Hldgs., L.L.C.*, 67 A.3d 400, 418 (Del. 2013) (distinguishing between the implied contractual covenant and an express contractual obligation of "good faith" as stated in a limited partnership agreement).

For an explanation of the function and role of the covenant of good faith and fair dealing, see the comment to Section 5-409(d). For the rules delimiting the "not manifestly unreasonable" requirement, see Subsection (e).

Subsection (c)(7) — These restrictions are ubiquitous in the law of business entities and, in conjunction with other provisions of this section,

control the otherwise very broad power of an operating agreement to affect fiduciary and other duties. The restrictions are central to the raft of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695 (Del. 2009). Delaware led the response with Del. Code Ann. tit. 8, § 102(b)(7), and a number of LLC statutes have similar provisions. *E.g.*, Ga. Code Ann. § 14-11-305(4)(A) (2011). For an extreme example, *see* Va. Code Ann. § 13.1-1025 (B) (2012). In this context, "conduct" includes both acts and omissions. Black's Law Dictionary (9th ed. 2009) (defining conduct as "[p]ersonal behavior, whether by action or inaction").

The term "bad faith" has multiple meanings, and the context determines which meaning applies. In the context of the duty of loyalty, "bad faith" includes conduct motivated by ill will or other intent purposely to harm another person. The concept also includes conduct from which a person derives an improper personal benefit. *See, e.g., Mroz v. Hoaloha Na Eha, Inc.*, 410 F. Supp. 2d 919, 936-37 (D. Haw. 2005) (denying a motion to dismiss a claim that "the Majority Partners" were personally liable for the partnership's wrongful termination of the plaintiff; quoting the complaint as alleging that "the Majority Partners, individually and as a group, acted with malice and/or ill will, and/or with an intent to serve their own personal interests and/or without an intent to serve company interests, and/or outside of the scope of their authority and/or without justification"); *BOGNC, L.L.C. v. Cornelius NC Self-Storage L.L.C.*, 10 CVS 19072, 2013 WL 1867065, at *9 (N.C. Super. [Business Court] May 1, 2013) (noting that "no . . . [exculpatory] provision may limit a manager's liability for acts known to be in conflict with the interests of the limited liability company, or for acts from which the manager derived an improper personal benefit") (citing N.C. Gen. Stat. § 57C-3-32(b)); *Lasica v. Savers Grp. of Minn., L.L.C.*, A12-0092, 2012 WL 3553246, at *2 (Minn. Ct. App. Aug. 20, 2012) (noting that an "individual seeking indemnification [under statute providing for indemnification)] must have acted in good faith and must not have received an improper personal benefit") (citing Minn. Stat. § 322B.699, subdivs. 2(a)(2), (3) (2010)).

In the context of the duty of care, the concept of bad faith comes primarily from corporate law and means an extreme breach of the duty (*i.e.*,

"the failure to exercise *honest judgment* in the lawful and legitimate furtherance of corporate purposes." *Deblinger v. Sani-Pine Products Co., Inc.*, 107 A.D.3d 659, 661, 967 N.Y.S.2d 394 (2013) (quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994 (1979) (emphasis added) (internal quotation marks omitted).

Thus, when a plaintiff alleges bad faith as pertaining to the duty of care, "[t]he burden . . . is to show irrationality: a plaintiff must demonstrate that no reasonable business person could possibly authorize the action in good faith. Put positively, the decision must go so far beyond the bounds of reasonable business judgment that its only explanation is bad faith." *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (discussing then prevailing Delaware law) (citation omited); *see also KDW Restructuring & Liquidation Servs. LLC v. Greenfield*, 874 F. Supp. 2d 213, 226 (S.D.N.Y. 2012) (referring to a lack of "a rationale corporate purpose" and "a disregard for the duty to examine all available information — *information that was readily at hand* ") (emphasis added).

With regard to both the duty of loyalty and the duty of care, "bad faith" is entirely distinct from the meaning of "good faith" in the contractual covenant of good faith and fair dealing. See the comment to Section 5-409(d).

Subsection (c)(7) pertains to indirect as well as direct efforts to "relieve or exonerate" and thus limits how far an operating agreement can go in providing for indemnification. *See* Section 5-408(b) (stating a default rule for indemnification). Also, in accordance with this paragraph, an exculpatory provision cannot shield against a member's claim of oppression. *See* Section 5-701(a)(4)(C).

Although this paragraph does not expressly address contracts between an LLC and a member or manager, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

> EXAMPLE: A manager-managed LLC enters into a management contract with its sole manager, and the contract provides the manager exoneration for liability to the LLC even for willful and intentional misconduct. Most likely, contract law will treat the provision as against public policy and therefore unenforceable. Restatement (Second) of Contracts § 195(1) (1981) ("A term exempting a party from tort liability

for harm caused intentionally or recklessly is unenforceable on grounds of public policy."). If not, a court should hold the provision unenforceable to avoid evisceration of Subsection (c)(7). (Or, the court could invoke the policy expressed in Subsection (c)(7) as grounds for holding the provision unenforceable under contract law.)

Subsection (c)(8) — Although phrased as a restriction, this provision grants substantial power to the operating agreement.

EXAMPLE: A law firm operates as a limited liability company, and the operating agreement provides that a "Compensation Committee" periodically decides each member's compensation. The agreement also states that only members who are on the Compensation Committee may have access to the Committee's compensation decisions pertaining to other members. This restriction is reasonable.

This article also empowers the LLC "as a matter within the ordinary course of its activities and affairs [to] impose reasonable restrictions and conditions on access to and use of information" obtained under Section 5-410. *See* Section 5-410(h).

In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored. In addition, a restriction that is reasonable viz-a-viz a non-managing member in a manager-managed LLC might be unreasonable viz-a-viz a managing member or in the context of a member-managed LLC.

Subsection (c)(9) — The operating agreement may not change the stated grounds for judicial dissolution but may determine the forum in which a claim for dissolution under Section 5-701(a)(4) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and in operating agreements in particular.

The approach of this paragraph differs from the law of Delaware. *Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898, at *1, n.2 (Del. Ch. Dec. 9, 2013) (stating that "the right to judicial dissolution is a default right which the parties may eschew by contract" but reserving the question of "[w]hether the parties may, by contract, divest this Court of its

authority to order a dissolution in all circumstances, even where it appears manifest that equity so requires — leaving, for instance, irreconcilable members locked away together forever like some alternative entity version of Sartre's *Huis Clos* ").

Subsection (c)(10) — The cited provisions comprise the non-waivable aspects of winding up a dissolved limited liability company. The other provisions of Section 5-702 are default rules.

Subsection (c)(11) — Part 8 delineates a member's rights to bring direct and derivative actions. It would be unreasonable to frustrate these rights but not unreasonable to channel their exercise. For example, the operating agreement might select a forum, require pre-suit mediation, provide for arbitration of both direct and derivative claims, or override Section 5-802 and require "universal demand" in all derivative cases. Similarly, it is not unreasonable to provide for liquidated damages consonant with the law of contracts. In contrast, it would be unreasonable for an operating agreement to both: (i) require a would-be derivative plaintiff to make demand regardless of futility; and (ii) bar taking the claim to court no matter how long the management group ponders the demand.

Subsection (c)(12) — An operating agreement may not alter this article's rules for a special litigation committee but may preclude entirely the use of such a committee.

Subsection (c)(13) — Section 2-203(a)(1), 2-303(a)(1), 2-403(a)(1), 2-503(a)(1), and 1053(a)(1) each requires the consent or the affirmative vote of all members. The operating agreement may modify these requirements. In contrast, under the sections stated in this subsection:

- each member is protected from being merged, exchanged, converted, or domesticated "into" the status of a partner in a general partnership that is not a limited liability partnership (or a comparable "unshielded" position in some other organization) without the member having *directly* consented to either:
  - the merger, interest exchange, conversion, or domestication; or
  - an operating agreement provision that permits such transactions to occur with less than unanimous consent of the members; and

• merely consenting to an operating agreement provision that permits amendment of the agreement with less than unanimous consent of the members does not qualify as the requisite direct consent.

Subsection (c)(14) — Because these plans are the basic "deal documents" for each of the organic transactions contemplated in Article 10, the operating agreement may not vary the contents of these plans.

Subsection (c)(15) — This limitation pertains only to "the rights under this [Code] of" third parties other than members and managers. Moreover, the limitation is subject to two substantial exceptions: Section 5-106 (pertaining to the operating agreement's relationship to the limited liability company itself and to persons becoming members) and Section 5-107(b) (pertaining to the operating agreement's power over the rights of transferees).

Subsection (d) — The operating agreement has plenipotentiary power over the matters described in Subsection (a), except as specifically limited by Subsections (c) and (d)(3). However, for the convenience of practitioners and the courts. Paragraphs 1 and 2 list various terms often found in operating agreements. No negative inference should be drawn about terms not listed; the listing is provided "without limiting other terms that may be included in an operating agreement."

Paragraph 3 lists terms subject to the "not manifestly unreasonable" standard. Subsection (e) delineates that standard. The same standard applies to terms of an operating agreement which seek to "prescribe the standards . . . by which the performance of the [Section 5-409(d)] obligation [of good faith and fair dealing] is to be measured." Subsection (c)(6).

Subsection (d)(1)(A) — An arrangement *not* involving "one or more disinterested and independent persons" acting "after full disclosure of all material facts" would "alter . . . the aspects of the duty of loyalty stated in Section 5-409(b) and (i)" and would therefore be subject to the "not manifestly unreasonable standard" of Subsection (d)(3)(A).

For the meaning of "material" as applied to information, see comment to Section 5-409(f).

Subsection (d)(1)(B) — Section 5-405(a)(2) prohibits distributions:

• *not merely* when, after the distribution, “the company’s total assets would be less than the sum of its total liabilities,”

• *but also* when, after the distribution, the assets would less than the total liabilities “plus the amount that would be needed, if the company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of members and transferees whose preferential rights are superior to those of persons receiving the distribution.”

The second part of the solvency test pertains to preferential rights to distributions, is thus a matter *inter se* the members and any transferees, and is therefore subject to change in the operating agreement.

In contrast, the first part of the solvency test protects third parties — creditors of the LLC — and therefore cannot be changed by the operating agreement. Subsection (c)(15). Likewise, the operating agreement cannot change the solvency test stated in Section 5-405(a)(1) (providing that “the company would not be able to pay its debts as they become due in the ordinary course of the company’s activities and affairs”).

Subsection (d)(2) — This provision is limited to member-managed limited liability companies on the premise that: (i) managers are collectively responsible; and (ii) managers may properly delegate a duty but the delegation does not discharge the duty. However, in a manager-managed LLC (as well as in a member-managed LLC), subject to Subsection (d)(3) the operating agreement may alter or even eliminate fiduciary duties.

EXAMPLE: ABC LLC (“ABC”) is a member-managed LLC. ABC has two entirely separate lines of business, the Alpha business and the Beta business. Under ABC’s operating agreement:

• Member 1’s responsibilities pertain exclusively to the Alpha business, while responsibility for:

- the Beta business is allocated exclusively to Member 2; and
- ABC’s overall operations is allocated exclusively to Member 3.

• Member 2’s responsibilities pertain exclusively to the Beta business, while responsibility for:

- the Alpha business is allocated exclusively to Member 1; and

- ABC's overall operations is allocated exclusively to Member 3.

- Member 1 has no fiduciary duties pertaining to the Beta business.
- Member 2 has no fiduciary duties pertaining to the Alpha business.

The elimination of Member 1's fiduciary duties with regard to the Beta business and Member 2's fiduciary duties with regard to the Alpha business are enforceable, without regard to the "manifestly unreasonable" standard of Subsection (d)(3).

Subsection (d)(3) — This article rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of "freedom of contract" against the dangers that inescapably exist when some persons have power over the interests of others. *Cf*. Leo E. Strine, Jr. J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom,* Elgar Handbook on Alternative Entities (Eds. Mark Lowenstein and Robert Hillman), forthcoming 2014,, Edward Elgar Publishing 2014) (noting that an "argument often made in favor of [Delaware] alternative entity statutes is that they allow for the elimination of fiduciary duties and the establishment of a purely contractual relationship between entity managers and investors" and stating that "[a]s judges who have seen our fair share of alternative entity disputes, we do not immediately grasp why this would be seen as a compelling advantage"); available at SSRN: http://ssrn.com/abstract=2481039, at 9-10 (footnote omitted).

Under this article, a properly drafted operating agreement may substantially alter and even eliminate fiduciary duties. However, two important limitations exist.

First, arrangements subject to this subsection may not be "manifestly unreasonable." See Subsection (e) (delineating this standard).

Second, the operating agreement may not transform the relationship *inter se* members, managers, and the LLC into an entirely arm's length arrangement. For example, displacement of fiduciary duties is effective only to the extent that the displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence of fiduciary duty. *See, e.g., Paige Capital Mgmt, L.L.C. v. Lerner Master Fund, L.L.C.*, Civ. A. No. 5502-CS, 2011 WL 3505355, at *31 (Del. Ch. Aug. 8, 2011) (Del. Ch.

2011) (stating that, even under a statute that "permits the waiver of fiduciary duties . . . such waivers must be set forth clearly"); *Kelly v. Blum*, Civ. A. No. 4516-VCP, 2010 WL 629850, at *10, n.70 (Del. Ch. Feb. 24, 2010) ("Having been granted great contractual freedom by the LLC Act, drafters of or parties to an LLC agreement should be expected to provide . . . clear and unambiguous provisions when they desire to expand, restrict or eliminate the operation of traditional fiduciary duties"). It would therefore be manifestly unreasonable for an operating agreement to negate this rule.

Although Subsection (d)(3) does not expressly address contracts between an LLC and a member or manager, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

EXAMPLE: A manager-managed LLC enters into a management contract with its sole manager, and the contract provides that the duties of loyalty stated in Section 5-409(b) and (i) are entirely eliminated. If the operating agreement were to so provide, the provision would be subject to the "manifestly unreasonable standard." Section 5-105(d)(3)(A). Absent the authorization provided by Section 105(d)(3)(A), the management contract's attempt to waive fiduciary duties may be unenforceable as a matter of public policy and contract law. *See Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 57, 133 Cal. Rptr. 2d 218 (2003) (stating that "waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in private close corporations is against public policy and a contract provision in a buy-sell agreement purporting to effect such a waiver is void"). If not, a court should hold the provision unenforceable nonetheless so as to avoid eviscerating Subsection (d)(3).

Subsection (d)(3)(A) — Subject to the "not manifestly unreasonable" standard, this paragraph empowers the operating agreement to eliminate *all* aspects of the duty of loyalty listed in Section 5-409(b). The obligation of good faith and fair dealing, Section 5-409(d), would remain. See Subsection (c)(6). As to any other, uncodified aspects of the duty of loyalty, see Subsection (d)(3)(D) (empowering the operating agreement to "alter or eliminate any other fiduciary duty").

EXAMPLE: Joint Venture LLC ("JV") is a manager-managed limited liability company, with two members, Kappa, Inc. ("Kappa") and

Lambda, LLC ("Lambda"). The operating agreement provides that:

- JV is managed by a "board of managers" consisting of one person appointed by Kappa and one person appointed by Lambda;

- each appointee:

  - owes fiduciary and any other duties exclusively to the member that made the appointment; and

  - owes no duties to the other member and the limited liability company.

The "not manifestly unreasonable" standard applies to these provisions under Subsection (d)(3)(A) and (D), and the provisions are not manifestly unreasonable. Note that the provisions do not affect the duties of Kappa and Lambda to:

- to the limited liability company, under applicable case law (pertaining to the obligations of owners of an entity who control the entity indirectly); and

- to each other, under applicable case law and Section 5-701(a)(4)(C)(ii) (providing for judicial dissolution when "the managers or those members in control of the company . . . have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the [member seeking dissolution").

EXAMPLE: ABC LLC ("ABC") is a manager-managed limited liability company with three managers and two entirely separate lines of business, the Alpha business and the Beta business. Under ABC's operating agreement:

- Manager 1's responsibilities pertain exclusively to the Alpha business; responsibility for:

  - the Beta business is allocated exclusively to Manager 2; and

  - ABC's overall operations is allocated exclusively to Manager 3.

- Manager 2's responsibilities pertain exclusively to the Beta business; responsibility for:

  - the Alpha business is allocated exclusively to Manager 1; and

• ABC's overall operations is allocated exclusively to Manager 3.

• Manager 1 has no fiduciary duties pertaining to the Beta business.

• Manager 2 has no fiduciary duties pertaining to the Alpha business.

The "not manifestly unreasonable" standard applies to these provisions under Subsection (d)(3)(A) and (D), and the provisions are not manifestly unreasonable.

Subsection (d)(3)(B) — Under this paragraph, an operating agreement might provide that an affiliate of a manager of a manager-managed LLC will provide compensated services to the LLC at a price not exceeding market price, or that the manager may pursue opportunities that otherwise would be company opportunities. Such arrangements are commonplace and permissible.

Subsection (d)(3)(C) — In this context, "conduct" includes both acts and omissions. Black's Law Dictionary (9th ed. 2009) (defining conduct as "[p]ersonal behavior, whether by action or inaction"). Subject to the "not manifestly unreasonable" standard and the bedrock requirements stated here and in Subsection (c)(7), the operating agreement can reduce the duty of care substantially. In particular, the operating agreement can eliminate the aspects of the duty of care pertaining to gross negligence and recklessness.

This provision replicates in a particular context the general rule stated in Subsection (c)(7). For the meaning of "bad faith" in the context of the duty of care, see the comment to Subsection (c)(7).

Subsection (e) — The "not manifestly unreasonable" concept became part of uniform business entity statutes when UPA (1997) imported the concept from the Uniform Commercial Code. (In the current version of the Uniform Commercial Code, the concept appears in Section 1-302(b).)

This subsection provides rules for applying the concept, specifying:

• who decides the issue of "manifestly unreasonable"

□• "the court . . . as a matter of law," Subsection (e);

• the framework for determining the issue

□• determination to be made "in light of the purposes, activities, and affairs of the limited liability company," Subsection (e)(2);

• the temporal setting for determining the issue

□• “determination [to be made] as of the time the challenged term became part of the operating agreement,” Subsection (e)(1); and

• what information is admissible for determining the issue

□• “only circumstances existing” when “the challenged term became part of the operating agreement,” Subsection (e)(1).

The subsection also provides a very demanding standard for persons claiming that a term of an operating agreement is “manifestly unreasonable.” “The court . . . may invalidate the term only if, in light of the purposes, activities, and affairs of the limited liability company, it is *readily apparent* that: (A) the objective of the term is unreasonable; or (B) the term is an unreasonable means to achieve the term’s objective.” Subsection (e)(2) (emphasis added).

Subsection (e) is fundamental to this article, because: (i) this article generally defers to the agreement among the members; and (ii) Subsection (e) safeguards the operating agreement in at least four ways:

• Determining manifest unreasonableness *inter se* owners of an organization is a different task than doing so in a commercial context, where concepts like “usages of trade” are available to inform the analysis. Each business organization must be understood in its own terms and context

• If loosely applied, the concept of “manifestly unreasonable” would permit a court to rewrite the members’ agreement, which would destroy the balance this article seeks to establish between freedom of contract and fiduciary duty.

• Case law has not adequately delineated the concept. *See, e.g., In re Brobeck, Phleger & Harrison L.L.P.*, 408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) (“RUPA [UPA (1997)] does not define what is ‘manifestly unreasonable’ and the parties have not cited, nor can the court locate, a decision that defines the term. Absent case law or even a dictionary definition, the court must rely on its common sense to recognize something as manifestly unreasonable.”).

• In the context of statutes permitting stock transfer restrictions unless “manifestly unreasonable,” courts have often ignored the word

"manifestly." *See, e.g., Brandt v. Somerville*, 692 N.W.2d 144, 152 (N.D. 2005) (stating that "in close corporations, a majority of courts have sustained restrictions that are determined to be reasonable in light of the relevant circumstances"); *Roof Depot, Inc. v. Ohman*, 638 N.W.2d 782, 786 (Minn. Ct. App. 2002) (stating that "the restrictions [on share transfer] are not 'manifestly unreasonable' because they are reasonable means to ensure that the management and control of the business remains in the group of investors or with people well known to them"); *Castriota v. Castriota*, 633 A.2d 1024, 1027-28 (App. Div. 1993) ("We are obliged to apply the statute in a manner consonant with its essential purpose to permit reasonable restrictions upon alienation.").

Subsection (e)(1) — The significance of the phrase "as of the time the term as challenged became part of the operating agreement" is best shown by example.

> EXAMPLE: When a particular manager-managed LLC comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the LLC's sole manager. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the LLC's start-up. In order to induce the individual to accept the position of sole manager, the members are willing to have the operating agreement significantly limit the manager's fiduciary duties. Several years later, when the LLC's operations have turned prosaic and the manager's talents and background are not nearly so crucial, a member challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under Subsection (e)(1) is when the LLC began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

> EXAMPLE: As initially adopted, an operating agreement identifies a category of decisions ordinarily subject to the duty of loyalty and provides that "the manager's sole, reasonable discretion" satisfies the duty. A year later, the agreement is amended to delete the word "reasonable." Later, a member claims that, without the word "reasonable," the provision is manifestly unreasonable. The relevant time under Subsection (e)(1) is when the agreement was amended, not when the agreement was initially adopted.

Subsection (e)(2) — If a person claims that a term of the operating agreement is manifestly unreasonable under Subsections (c)(6) or (d)(3), as a matter of ordinary procedural law the person making the claim has the burden of proof.

§ 30-25-106. Operating agreement — Effect on limited liability company and person becoming member — Preformation agreement. — (a) A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement.

(b) A person that becomes a member is deemed to assent to the operating agreement.

(c) Two (2) or more persons intending to become the initial members may make an agreement providing that upon the formation of the company the agreement will become the operating agreement. One person intending to become the initial member of a limited liability company may assent to terms providing that upon the formation of the company the terms will become the operating agreement.

History.

I.C., § 30-25-106, as added by 2015, ch. 243, § 43, p. 758.

Official Comment

Subsection (a) — This subsection resolves twin questions that have troubled some courts — namely, whether an unincorporated entity that has not signed its foundational agreement nonetheless is bound by and may enforce the agreement. The questions have been particularly troubling in the context of agreements to arbitrate. *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 3:13-CV-1655-K, 8 F. Supp. 3d 845, 2014 WL 1255844 at *5-6 (N.D. Tex. Mar. 27, 2014) (concluding that a limited liability partnership "is a party to the Partnership Agreement," even though the partnership itself never signed or otherwise assented to the agreement; enforcing arbitration provision to the benefit of the LLP). *Contra Trover v. 419 OCR, Inc.*, 397 Ill. App. 3d 403, 409, 921 N.E.2d 1249, 1255 (2010) (finding that "neither FODG [an LLC] nor the Golf Club [a related LLC] was a party to the operating agreements and that they are therefore not bound by the arbitration clauses therein").

Developments pertaining to the Virginia LLC Act further illustrate the difficulties. In *Mission Residential, L.L.C. v. Triple Net Properties, L.L.C.*, 654 S.E.2d 888, 891 (2008), the Virginia Supreme Court held that a member's derivative claim was not subject to the arbitration provision in the operating agreement, because: (i) the LLC was "the real party in interest"; (ii) the LLC had not signed the operating agreement; and (iii) requiring the claim to be arbitrated would "ignore[] the separate existence of Holdings [the LLC]." The Virginia legislature promptly disagreed and amended the LLC act to state: "A limited liability company is bound by its operating agreement whether or not the limited liability company executes the operating agreement." Va. Code Ann. § 13.1-1023.A.1 (2012). The legislature left open the question of a limited liability company's power to enforce an operating agreement that the company has not executed.

This subsection answers the twin questions, categorically and in the affirmative.

This subsection does not consider whether a limited liability company is an indispensable party to a suit concerning the operating agreement. That question is one of procedural law, and the answer can determine whether federal diversity jurisdiction exists.

Subsection (b) — Given the possibility of oral and implied-in-fact terms in the operating agreement, a person becoming a member of an existing limited liability company should take precautions to ascertain fully the contents of the operating agreement. *See* the comment to Section 5-105(a)(4).

Subsection (c) — The second sentence refers to "assent to terms" rather than "make an agreement" because, under venerable principles of contract law, an agreement presupposes at least two parties, and Section 5-102(a)(9) specifically contemplates an operating agreement in a single member LLC.

A pre-formation arrangement is not an operating agreement. An operating agreement presupposes at least one member, and, under this article, the earliest a person can become a member is upon the formation of the limited liability company. *See* Section 5-401.

§ 30-25-107. Operating agreement — Effect on third parties and relationship to records effective on behalf of limited liability company. — (a) An operating agreement may specify that its amendment requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) The obligations of a limited liability company and its members to a person in the person's capacity as a transferee or a person dissociated as a member are governed by the operating agreement. Subject only to a court order issued under section 30-25-503(b)(2), Idaho Code, to effectuate a charging order, an amendment to the operating agreement made after a person becomes a transferee or is dissociated as a member:

(1) Is effective with regard to any debt, obligation, or other liability of the limited liability company or its members to the person in the person's capacity as a transferee or person dissociated as a member; and

(2) Is not effective to the extent the amendment imposes a new debt, obligation, or other liability on the transferee or person dissociated as a member.

(c) If a record delivered by a limited liability company to the secretary of state for filing becomes effective and contains a provision that would be ineffective under section 30-25-105(c) or (d)(3), Idaho Code, if contained in the operating agreement, the provision is ineffective in the record.

(d) Subject to subsection (c) of this section, if a record delivered by a limited liability company to the secretary of state for filing becomes effective and conflicts with a provision of the operating agreement:

(1) The agreement prevails as to members, persons dissociated as members, transferees, and managers; and

(2) The record prevails as to other persons to the extent they reasonably rely on the record.

History.

I.C., § 30-25-107, as added by 2015, ch. 243, § 43, p. 758.

CASE NOTES

Breach of fiduciary duty.

Fiduciary duties.

Willful misconduct.

Breach of Fiduciary Duty.

Former member's claim of breach of a limited liability company operating agreement was improperly dismissed on summary judgment in part because there were disputed facts as to whether the remaining members acted in bad faith or in breach of fiduciary duties in terminating the former member. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

Fiduciary Duties.

Members of an LLC owe one another the fiduciary duties of trust and loyalty. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

Whether a fiduciary has breached his duties of trust and loyalty is a question of fact. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

Willful Misconduct.

Where a member of a limited liability company in the construction business actively solicited business away from the company for his own personal benefit, there was sufficient evidence showing that his actions amounted to willful misconduct for purposes of establishing his liability. The district court erred in granting a directed verdict with respect to the company's willful misconduct claim. Todd v. Sullivan Constr. LLC, 146 Idaho 118, 191 P.3d 196 (2008).

Official Comment

Subsection (a) — This subsection, derived from Del. Code Ann. tit. 6, § 18-302(e), permits the operating agreement to: (i) accord a non-member veto rights over amendments to the agreement; and (ii) establish other

preconditions for amendments. An amendment made in derogation of a veto right or precondition is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-member managers.

> EXAMPLE: A non-member manager enters into a management contract with an LLC, and that agreement provides in part that the LLC may remove the manager without cause only with the consent of members holding 2/3 of the profits interests. The operating agreement contains a parallel provision (the "operating agreement's quantum provision"), but the non-member manager is not a party to the operating agreement. Later, the LLC members amend the operating agreement's quantum provision to reduce the quantum to a simple majority of profits interests and thereafter purport to remove the manager without cause. Although the LLC has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the LLC has the *power* under Section 5-105(a)(2) to effect the removal — unless the operating agreement provides the manager a veto right over changes in the operating agreement's quantum provision.

This subsection does not refer to member veto rights because, unless otherwise provided in the operating agreement, the consent of each member is necessary to effect an amendment. *See* Section 5-407(b)(4)(B), (c)(3)(B).

Because "[a]n operating agreement may specify that its amendment requires . . . the satisfaction of a condition," an operating agreement can require that any amendment be made through a writing or a record signed by each member. See Section 5-105(a)(4) (empowering the operating agreement to determine "the means and conditions for amending the operating agreement").

Subsection (b) — The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization's economic interests. Such transferees can include the heirs of business founders as well as former owners who are "locked in" as transferees of their own interests. *See* Section 5-603(a)(3).

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can "freeze the deal" as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

There is little case law in this area, and almost all of it pertains to limited partnerships rather than LLCs. The partnership case law clearly favors the remaining owners over former owners and other transferees. *See, e.g., Bauer v. Blomfield Co./Holden Joint Venture*, 849 P.2d 1365, 1367, n.2 (Alaska 1993) (holding that a mere assignee "was not entitled to complain about a decision made with the consent of all the partners" and stating "[w]e are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest"); *Bynum v. Frisby*, 73 Nev. 145, 149-50, 311 P.2d 972, 975 (1957) ("[A]n assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners nor require them to resort to dissolution in order to prevent such a relationship from arising. The stranger remains a stranger entitled only to share in the partnership's worth and to demand an accounting upon dissolution.") (applying UPA (1914) § 27, pertaining to rights of an assignee). *See generally* Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 Suffolk L. Rev. 587 (2009).

This subsection follows *Bauer* and other cases by expressly subjecting transferees (including a person dissociated as a member) to operating agreement amendments made after the transfer or dissociation, except amendments that increase obligations on transferees. For example, an amendment might extend the duration of a limited liability company but may not institute a new capital call obligation on transferees.

The question of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation awaits development in the case law. An unreported LLC case suggests the answer might be yes, but the decision rests primarily on the wording of the LLC's operating agreement. In *Kohannim v. Katoli*, 08-11-00155-CV, 2013 WL 3943078, at *10-11 (Tex. App. July 24, 2013), the court: (i) noted that the LLC's "Regulations provide[] for the distribution of 'available cash' to members quarterly provided that the available cash is not needed for a reasonable working capital reserve"; (ii)

also noted that “Jacob [the defendant member] paid himself $100,000 for management services that were not performed and failed to make any profit distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-spouse of Mike, who became Mike’s transferee as part of their divorce proceeding] even though more than $250,000 in undistributed profit had accumulated in the company’s accounts since the mortgage on the property had been paid off in February 2007”; and (iii) concluded that “more than a scintilla of evidence supports the trial court’s finding that Jacob failed to make profit distributions to Parvaneh.” In essence, the court upheld a finding that Jacob had breached (or caused the LLC to breach) a contractual obligation to make distributions. But the court went further: “We also agree with the trial court’s conclusion that the established facts demonstrated Jacob engaged in wrongful conduct and exhibited a lack of fair dealing in the company’s affairs to the prejudice of Parvaneh.” *Id*. at *11.

For the very limited rights of transferees, see Section 5-502.

Subsection (b)(1) — This provision is inapposite when “a member or transferee becomes entitled to receive a distribution.” Section 5-404(d). In that circumstance:

• “the member or transferee has the status of . . . a creditor of the limited liability company with respect to the distribution,” *Id*. ; and

• the relevant obligation is not owed to “a person in the person’s capacity as a transferee or person dissociated as a member,” Subsection (b), but rather to the person in the person’s capacity as a creditor.

Subsection (c) — This provision precludes using the certificate of organization to make an end run around the strictures of Section 5-105(c) and (d)(3).

Subsection (d) — It will be possible, albeit improvident, for a limited liability company’s operating agreement to be inconsistent with the certificate of organization or other public filings pertaining to the company. For those circumstances, this subsection provides rules for determining which source of information prevails:

• For members, managers and transferees, the operating agreement is paramount.

• Third parties may invoke the public record upon a showing of reasonable reliance, which presupposes actual knowledge — *i.e.*, deemed knowledge under Section 5-103(d) does not suffice.

The mere fact that a term is present in a publicly filed record and not in the operating agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not expressly cover a situation in which: (i) one of the specified filed records contains information in addition to, but not inconsistent with, the operating agreement; and (ii) a person, other than a member or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation. Moreover, to argue that the operating agreement prevails over the filed record is to argue that the additional term does conflict with the operating agreement, at least in effect.

Section 5-105(a)(4) might also be relevant to the subject matter of this subsection. Absent a contrary provision in the operating agreement, language in an LLC's certificate of organization or other record delivered to the filing office for filing on behalf of the LLC might be evidence of the members' agreement and might thereby constitute or at least imply a term of the operating agreement.

This subsection does not apply to records delivered to the filing office for filing on behalf of a person other than a limited liability company.

§ 30-25-108. Nature, purpose and duration of limited liability company. — (a) A limited liability company is an entity distinct from its member or members.

(b) A limited liability company may have any lawful purpose.

(c) A limited liability company has perpetual duration.

History.

I.C., § 30-25-108, as added by 2015, ch. 243, § 43, p. 758.

CASE NOTES

Entity Distinct.

As a separate legal entity, affirmative defenses regarding the misconduct of a limited liability company's member are inapplicable against the company, unless the claimant demonstrates that the company is actually the alter ego of the member. To prove that a company is the alter ego of a member of the company, a claimant must demonstrate (1) a unity of interest and ownership to a degree that the separate personalities of the company and individual no longer exist and (2) if the acts are treated as acts of the company, an inequitable result would follow. Sirius LC v. Erickson, 150 Idaho 80, 244 P.3d 224 (2010).

Cited Drug Testing Compliance Grp., LLC v. DOT Compliance Service, 161 Idaho 93, 383 P.3d 1263 (2016).

Official Comment

Subsection (a) — The "separate entity" characteristic is fundamental to a limited liability company and is inextricably connected to both the liability shield, Section 5-304, and the inability of creditors of a member or transferee to reach the assets of the limited liability company absent a "reverse pierce" or a claim of fraudulent transfer. *See, e.g., Litchfield Asset Mgmt Corp. v. Howell*, 799 A2d 298 (Conn. Ct. App. 2002) (applying an "outside reverse pierce" to allow judgment creditor of member to reach assets of LLC) (overruled on other grounds by *Robinson v. Coughlin*, 830

A2d 1114 (Conn. 2003)); *Egle v. Egle*, 817 So. 2d 136, 140 (La. Ct. App. 2002) (allowing plaintiff to proceed with claims that transfers made by her ex-spouse inter alia to an LLC were sham transactions).

Subsection (b) — Although some LLC statutes continue to require a business purpose, this article follows the current trend and takes a more expansive approach. The phrase "any lawful purpose, regardless of whether for profit" encompasses even charitable activities, but this article does not include any comprehensive protections pertaining to charitable assets and purposes. Section 2-104(b) does contain a "nondiversion" provision, but the provision applies only to the organic transactions contemplated by Article 2. Comprehensive protections must be (and typically are) found in other law, although sometimes that "other law" appears within a state's non-profit corporation statute. *See, e.g.*, Minn. Stat. § 317A.811 (2012) (providing restrictions on charitable organizations that seek to "dissolve, merge, or consolidate, or to transfer all or substantially all of their assets" but imposing those restrictions only on "corporations," which are elsewhere defined as corporations incorporated under the non-profit corporation act).

Subsection (c) — The word "perpetual" is a misnomer, albeit one commonplace in LLC statutes. In this context, "perpetual" means merely that the article: (i) does not require a definite term; and (ii) creates no nexus between the dissociation of a member and the dissolution of the entity.

Moreover, the public record pertaining to a limited liability company will not necessarily reveal whether the company actually has a perpetual duration or has in fact dissolved, because: (i) this article, like all LLC statutes, provides several consent-based methods to dissolve a limited liability company; and (ii) none of those methods involve a public filing. For example, dissolution and winding up of a limited liability company may result from a term specified in the operating agreement or the affirmative vote or consent of all members. *See* Sections 5-701 (events causing dissolution) and 5-702 (winding up required upon dissolution). An operating agreement is not a publicly filed document, and a member vote to dissolve a limited liability company is not a public event. A dissolved limited partnership may deliver to the filing office for filing a statement of dissolution, Section 5-702(b)(2)(A), and later a statement of termination, Section 5-702(b)(2)(F), or both, but the filing of such statements is permissive rather than mandatory, *id*.

Likewise, the public record will not reveal when (or even whether) a limited liability company has come into existence. *See* Section 5-201(d) ("A limited liability company is formed when the company's certificate of becomes effective and at least one person becomes a member.").

§ 30-25-109. Powers. — A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs.

History.

I.C., § 30-25-109, as added by 2015, ch. 243, § 43, p. 758.

Official Comment

Continuing the approach initiated in ULPA (2001) § 105, this article omits as unnecessary any detailed list of specific powers.

The operating agreement cannot vary a limited liability company's capacity to sue and be sued. Section 5-105(c)(2). An LLC's standing to enforce the operating agreement is a separate matter, which is covered by Section 5-106(a) (stating, as a default rule, that the limited liability company "may enforce the operating agreement").

§ 30-25-110. Application to existing relationships. — (a) Before July 1, 2017, this chapter governs only:

(1) A limited liability company formed on or after July 1, 2015; and

(2) Except as otherwise provided in subsection (c) of this section, a limited liability company formed before July 1, 2015, that elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this chapter.

(b) Except as otherwise provided in subsection (c) of this section, on and after July 1, 2017, this chapter governs all limited liability companies.

(c) For purposes of applying this chapter to a limited liability company formed before July 1, 2008:

(1) The company's articles of organization are deemed to be the company's certificate of organization; and

(2) For purposes of applying section 30-25-102(10) [30-25-102(a)(6)], Idaho Code, and subject to section 30-25-107(d), Idaho Code, language in the company's articles of organization designating the company's management structure operates as if that language were in the operating agreement.

History.

I.C., § 30-25-110, as added by 2015, ch. 243, § 43, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion near the beginning of paragraph (c)(2) was added by the compiler to correct the reference and to conform to the uniform act.

Official Comment

Subsection (c) — When a pre-existing limited liability company becomes subject to this article, the company ceases to be governed by the

predecessor article, including whatever requirements that act might have imposed for the contents of the articles of organization.

§ 30-25-111. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Delivery of record — section 30-21-104, Idaho Code.

(2) Permitted names — section 30-21-301, Idaho Code.

(3) Reservation of name — section 30-21-303, Idaho Code.

(4) Registration of name — section 30-21-304, Idaho Code.

(5) Registered agent — section 30-21-404, Idaho Code.

(6) Change of registered agent or address for registered agent by limited liability company — section 30-21-407, Idaho Code.

(7) Resignation of registered agent — section 30-21-410, Idaho Code.

(8) Change of name or address by registered agent — sections 30-21-408 and 30-21-409, Idaho Code.

(9) Service of process, notice or demand — section 30-21-412, Idaho Code.

(10) Reservation of power to amend or repeal — section 30-21-701, Idaho Code.

(11) Supplemental principles of law — section 30-21-702, Idaho Code.

History.

I.C., § 30-25-111, as added by 2015, ch. 243, § 43, p. 758.

Part 2
Formation — Certificate of Organization and Other Filings

Idaho Code § 30-25-201

§ 30-25-201. Formation of limited liability company — Certificate of organization. — (a) One (1) or more persons may act as organizers to form a limited liability company by delivering to the secretary of state for filing a certificate of organization.

(b) A certificate of organization must state:

(1) The name of the limited liability company that must comply with sections 30-21-301 and 30-21-302(d), Idaho Code;

(2) The street and mailing addresses of the company's principal office;

(3) The information required by section 30-21-404(a), Idaho Code;

(4) The name and mailing address of at least one (1) governor of the company; and

(5) If the company is a professional entity, a statement that the company is a professional limited liability company and the principal profession or professions for which the company's members are duly licensed or otherwise legally authorized to render professional services.

(c) A certificate of organization may contain statements as to matters other than those required by subsection (b) of this section, but may not vary or otherwise affect the provisions specified in section 30-25-105(c) and (d), Idaho Code, in a manner inconsistent with that section. However, a statement in a certificate of organization is not effective as a statement of authority. The secretary of state shall not accept operating agreements for filing.

(d) A limited liability company is formed when the certificate of organization becomes effective.

History.

I.C., § 30-25-201, as added by 2015, ch. 243, § 44, p. 758.

Official Comment

For a limited liability company to be formed (*i.e.*, to come into existence), two conditions must be met: (i) a certificate of organization must become effective; and (ii) at least one person must become a member.

By definition, the earliest a person can become a member is when the certificate of organization takes effect. *See* Section 5-102(a)(7) (defining "member" as a person that "has become a member of a limited liability company"). However, a certificate of organization can take effect long before any person becomes a member, and this article does not require any public filing to indicate that a person has become a member. Therefore, the public record will not reflect when (and even whether) a limited liability company has come into existence.

Subsection (b) — Consistent with the modern trend, this article requires only the most "bare bones" of disclosure.

Unlike many LLC statutes, this article does not require that the certificate of organization state whether the limited liability company is manager-managed or member-managed. Placing that information in a public record pertains primarily to "statutory apparent authority," which this article has eschewed. *See* the comment to Section 5-301(a). Under this article, the manager-managed and member-managed characterizations pertain principally to *inter se* relations, and this article therefore looks to the operating agreement to make the characterization. *See* Sections 5-102(a)(6) and (a)(8); Section 5-407(a).

Subsection (c) — This provision permits the certificate of organization to contain information beyond that required in Subsection (b). An LLC should have good reason, however, before choosing to include additional information. Such information: (i) is available to the public (including competitors); (ii) increases the chances of a conflict between the certificate of organization and the operating agreement, *see* Section 5-107(d); (iii) permits the argument that the additional information is part of the operating agreement, see the comment to Section 5-102(a)(9) (stating that "[u]nless the operating agreement itself provides otherwise . . . an operating agreement may comprise a number of separate documents (or records), however denominated"); and (iv) can be confusing to the extent the

information appears to delineate the power of persons to act for the LLC. (Subsection (c) states explicitly that information in a certificate of formation "is not effective as a statement of authority."). In any event, placing additional information in the certificate of formation does not enable an LLC to "end run" the provisions of Section 5-105(c) (limiting the power of the operating agreement to vary specified provisions of this article).

Subsection (d) — ULLCA (2006) flirted with the concept of a "shelf" LLC — *i.e.*, a limited liability company duly formed without having at least one member upon formation. As the Prefatory Note to ULLCA (2006) explains:

> [T]he Act: (i) permits an organizer to file a certificate of organization without a person "waiting in the wings" to become a member upon formation; but (ii) provides that the LLC is not formed until and unless at least one person becomes a member and the organizer makes a second filing stating that the LLC has at least one member.

Prefatory Note, *The Ability to "Pre-File" a Certificate of Organization*.

Subsection (d) clearly precludes a "shelf" LLC, which is consistent with Section 4-201(d) (providing that a limited partnership is formed when the certificate of limited partnership becomes effective, at least two persons have become partners, at least one person has become a general partner, and at least one person has become a limited partner).

§ 30-25-202. Amendment or restatement of certificate of organization. — (a) A certificate of organization may be amended or restated at any time.

(b) To amend its certificate of organization, a limited liability company must deliver to the secretary of state for filing an amendment stating:

(1) The name of the company;

(2) The date of filing of its initial certificate of organization; and

(3) The text of the amendment.

(c) To restate its certificate of organization, a limited liability company must deliver to the secretary of state for filing a restatement designated as such in its heading.

(d) If a member of a member-managed limited liability company, or a manager of a manager-managed limited liability company, knows that any information in a filed certificate of organization was inaccurate when the certificate was filed or has become inaccurate due to changed circumstances, the member or manager shall promptly:

(1) Cause the certificate to be amended; or

(2) If appropriate, deliver to the secretary of state for filing a statement of change under section 30-21-407, Idaho Code, or a statement of correction under section 30-21-205, Idaho Code.

History.

I.C., § 30-25-202, as added by 2015, ch. 243, § 44, p. 758.

CASE NOTES

Normal Business or Affairs.

Manager of LLC had apparent authority to bind LLC when he sold real estate lots, as this was part of the normal business or affairs of the company. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

Official Comment

Like other provisions of this article requiring records to be delivered to the filing officer for filing, this section is not subject to change by the operating agreement. See Section 5-105(c)(3). Except for Subsection (d), this section is essentially mechanical.

Subsection (d) — This subsection imposes an obligation directly on the members and managers rather than on the limited liability company. A member's or manager's failure to meet the obligation exposes the member or manager to liability to third parties under Section 5-205(a)(2) and might constitute a breach of the member or manager's duties under Section 5-409(c) and (i). In addition, an aggrieved person may seek a remedy under Sections 1-210 (Signing and Filing Pursuant to Judicial Order) and 1-205 (Liability for Inaccurate Information in Filed Record), and 5-204 (Liability of Members and Managers for Inaccurate Information in Filed Record).

Like other provisions of the Code requiring records to be delivered to the filing officer for filing, this section is not subject to change by the operating agreement. *See* Section 5-105(c)(3).

§ 30-25-203. Signing of records to be delivered for filing to secretary of state. — (a) A record delivered to the secretary of state for filing pursuant to this act must be signed as follows:

(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, a record signed by a limited liability company must be signed by a person authorized by the company.

(2) A company's initial certificate of organization must be signed by at least one (1) person acting as an organizer.

(3) A record delivered on behalf of a dissolved company that has no member must be signed by the person winding up the company's activities and affairs under section 30-25-702(c), Idaho Code, or a person appointed under section 30-25-702(d), Idaho Code, to wind up the activities and affairs.

(4) A statement of denial by a person under section 30-25-303, Idaho Code, must be signed by that person.

(5) Any other record delivered on behalf of a person to the secretary of state for filing must be signed by that person.

(b) A record delivered for filing under this chapter may be signed by an agent. Whenever this chapter requires a particular individual to sign a record and the individual is deceased or incompetent, the record may be signed by a legal representative of the individual.

(c) A person that signs a record as an agent or legal representative affirms as a fact that the person is authorized to sign the record.

History.

I.C., § 30-25-203, as added by 2015, ch. 243, § 44, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Section 5-102(21) defines "sign" broadly, including "an electronic symbol, sound, or process."

From the perspective of the filing office, it is not necessary that a record delivered for filing on behalf of a limited liability company be signed by a member or, in the case of a manager-managed LLC, a manager. The operating agreement can impose such a requirement as an *inter se* matter, but the requirement would not affect this provision. See Section 5-105(c)(3)(B) (stating that the operating agreement may not "vary any requirement, procedure, or other provision of this [Code] pertaining to . . . the [Secretary of State], including provisions pertaining to records authorized or required to be delivered to the [Secretary of State] for filing under this [Code]").

The filing office will not check whether a person who purports to be authorized to sign a record on behalf of an LLC actually has that authority, even if a statement of authority pertaining to the matter is in effect. Indeed, even if the filing office somehow "knows" of a statement limiting authority, the office lacks the authority to reject a record on that basis. *See* the comment to Section 1-206 (stating the requirements for filing and noting that the filing office's review is ministerial and limited to information pertaining to the stated requirements) and the comment to Section 5-302(c) (explaining why such a statement of authority does not affect the filing office).

§ 30-25-204. Liability for inaccurate information in filed record. — (a) If a record delivered to the secretary of state for filing under this act and filed by the secretary of state contains inaccurate information, a person that suffers loss by reliance on the information may recover damages for the loss from:

(1) A person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be inaccurate at the time the record was signed; and

(2) Subject to subsection (b) of this section, a member of a member-managed limited liability company or the manager of a manager-managed limited liability company, if:

(A) The record was delivered for filing on behalf of the company; and

(B) The member or manager knew or had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the member or manager reasonably could have:

(i) Effected an amendment under section 30-25-202, Idaho Code;

(ii) Filed a petition under section 30-25-204, Idaho Code; or

(iii) Delivered to the secretary of state for filing a statement of change under section 30-21-407, Idaho Code, or a statement of correction under section 30-21-205, Idaho Code.

(b) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of responsibility for maintaining the accuracy of information contained in records delivered on behalf of the company to the secretary of state for filing under this act and imposes that responsibility on one (1) or more other members, the liability stated in subsection (a) (2) of this section applies to those other members and not to the member that the operating agreement relieves of the responsibility.

(c) An individual who signs a record authorized or required to be filed under this act affirms under penalty of perjury that the information stated in

the record is accurate.

History.

I.C., § 30-25-204, as added by 2015, ch. 243, § 44, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Official Comment

Subsection (a) — This subsection relates to liability to third parties for inaccurate information in a filed record. Paragraph 1 requires actual knowledge because the paragraph can inculpate a person who is neither a member of a member-managed limited liability company nor a manager of a manager-managed limited liability company. Under Paragraph 2(B), notice suffices, because: (i)the provision applies only to members of a member-managed LLC and managers of a manager-managed LLC; (ii) by status these persons have overall management authority; and (iii) therefore it is reasonable to impose liability when a person either knows or "has reason to know . . . from all the facts known to the person at the time in question." Section 5-103(b)(1) (defining notice). For the same reason, Paragraph 1 applies only to "information [known] to be inaccurate at the time the record was signed," while Paragraph 2 applies whenever a "member or manager knew or had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the member or manager reasonably could have [taken corrective action]." Paragraph (2)(B).

Subsection (a)(2) — Although this article establishes the avoidance of gross negligence as the standard of care for those who manage a limited liability company, this provision encompasses liability to third parties. Accordingly, the standard here is more demanding. The phrases "reasonably sufficient time" and "reasonably could have" indicate a standard of ordinary care. "[N]otice of the inaccuracy" involves "reason to know." Section 5-103(b)(1).

Subsection (b) — Section 5-105(d)(2) authorizes the operating agreement to establish an analogous rule inter se the members. This

subsection goes where the operating agreement cannot reach and affects the rights of third parties.

§ 30-25-205. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Signing and filing pursuant to judicial order — section 30-21-210, Idaho Code.

(2) Filing requirements — section 30-21-201, Idaho Code.

(3) Effective date and time — section 30-21-203, Idaho Code.

(4) Withdrawal of filed record before effectiveness — section 30-21-204, Idaho Code.

(5) Correcting filed record — section 30-21-205, Idaho Code.

(6) Duty of secretary of state to file; review of refusal to file; delivery of record by secretary of state — sections 30-21-206 and 30-21-211 [30-21-212], Idaho Code.

(7) Certificate of good standing or registration — section 30-21-208, Idaho Code.

(8) Annual report for secretary of state — section 30-21-213, Idaho Code.

History.

I.C., § 30-25-205, as added by 2015, ch. 243, § 44, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in subsection (6) was added by the compiler to correct the reference and to conform to the uniform act.

Part 3
Relations of Members and Managers to Persons Dealing With Limited Liability Company

Idaho Code § 30-25-301

§ 30-25-301. No agency power of member as member. — (a) A member is not an agent of a limited liability company solely by reason of being a member.

(b) A person's status as a member does not prevent or restrict law other than this chapter from imposing liability on a limited liability company because of the person's conduct.

History.

I.C., § 30-25-301, as added by 2015, ch. 243, § 45, p. 758.

Official Comment

Subsection (a) — Most LLC statutes, including the original ULLCA (1996), provide for what might be termed "statutory apparent authority" for members in a member-managed limited liability company and managers in a manager-managed limited liability company. This approach codifies the common law notion of apparent authority by position and dates back at least to the original Uniform Partnership Act. UPA (1914) § 9 provided that "the act of every partner . . . for apparently carrying on in the usual way the business of the partnership . . . binds the partnership," and that formulation has been essentially followed by UPA (1997) § 301, ULLCA (1996) § 301, ULPA (2001) § 402, and myriad state LLC statutes.

This article rejects the statutory apparent authority approach, for reasons summarized in a "Progress Report on the Revised Uniform Limited Liability Company Act," published in the March 2006 issue of the newsletter of the ABA Committee on Partnerships and Unincorporated Business Organizations:

> The concept [of statutory apparent authority] still makes sense both for general and limited partnerships. A third party dealing with either type of

> partnership can know by the formal name of the entity and by a person's status as general or limited partner whether the person has the power to bind the entity.
>
> Most LLC statutes have attempted to use the same approach but with a fundamentally important (and problematic) distinction. An LLC's status as member-managed or manager-managed determines whether members or managers have the statutory power to bind. But an LLC's status as member-or manager-managed is not apparent from the LLC's name. A third party must check the public record, which may reveal that the LLC is manager-managed, which in turn means a member as member has no power to bind the LLC. As a result, a provision that originated in 1914 as a protection for third parties can, in the LLC context, easily function as a trap for the unwary. The problem is exacerbated by the almost infinite variety of management structures permissible in and used by LLCs.
>
> The new Act cuts through this problem by simply eliminating statutory apparent authority.

Pubogram, Vol. XXIII, no. 2 at 9-10.

Codifying power to bind according to position makes sense only for organizations that have well-defined, well-known, and almost paradigmatic management structures. Because:

• flexibility of management structure is a hallmark of the limited liability company; and

• an LLC's name gives no signal as to the organization's structure,

it makes no sense to:

• require each LLC to publicly select between two statutorily preordained structures (i.e., manager-managed/member-managed); and then

• link a "statutory power to bind" to each of those two structures.

Under this article, other law — most especially the law of agency — will handle power-to-bind questions. Thus, LLCs formed under this article and corporations are subject to the same principles for attributing to the entity the conduct of those who act or purport to act on the entity's behalf. *See* Restatement (Third) Agency §§ 1.03, cmt. c (manifestations of authority by organizations); 2.01, cmt. e (actual authority); 2.03, cmts. (c) — (e)

(apparent authority). Section 5-407 provides the default rules on the actual authority of those who manage an LLC.

This subsection does not address the power to bind of a manager in a manager-managed LLC, although this article does consider a manager's management responsibilities. *See* Section 5-407(c) (allocating management authority, subject to the operating agreement). For a discussion of how agency law will approach the actual and apparent authority of managers, see Section 5-407(c), comment.

Subsection (b) — As the "flip side" to Subsection (a), this subsection expressly preserves the power of other law to hold an LLC directly or vicariously liable on account of conduct by a person who happens to be a member. For example, given the proper set of circumstances: (i) a member might have actual or apparent authority to bind an LLC to a contract; (ii) the doctrine of *respondeat superior* might make an LLC liable for the tortious conduct of a member (*i.e.*, in some circumstances a member acts analogously to a "servant" or "employee" of the LLC); and (iii) an LLC might be liable for negligently supervising a member who is acting on behalf of the LLC. A person's status as a member does not weigh against these or any other relevant theories of law.

Moreover, subsection (a) does not prevent member status from being relevant to one or more elements of an "other law" theory. See Section 1-702 (Supplemental Principles of Law). The most likely "other law" theory is the agency doctrine of apparent authority. Of course, if a member lacking actual authority binds an LLC through conduct within the member's apparent authority, the LLC has a claim against the member. Restatement (Third) of Agency § 8.09 (2006) (Duty to Act Only Within Scope of Actual Authority and to Comply with Principal's Lawful Instructions). In contrast, if the member lacked even the power to bind the LLC, the member him, her, or itself will be liable to the vendor as a matter of agency law. Restatement (Third) of Agency § 6.10 (2006) (Agent's Implied Warranty of Authority).

For example, the common law of agency will determine the apparent authority of a member to bind a member-managed LLC. In that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular LLC will always be relevant. Restatement (Third) of Agency § 3.03, cmt. b (2006)

(“A principal may also make a manifestation by placing an agent in a defined position in an organization. . . . Third parties who interact with the principal through the agent will naturally and reasonably assume that the agent has authority to do acts consistent with the agent’s position . . . unless they have notice of facts suggesting that this may not be so.”)

Under Section 5-301(a), however, the mere fact that a person is a member of a member-managed limited liability company cannot *by itself* establish apparent authority by position. A course of dealing, however, may easily change the analysis:

> EXAMPLE: David is a one of two members of DS, LLC, a member-managed LLC. David orders paper clips on behalf of the LLC, signing the purchase agreement, “David, as a member of DS, LLC.” Absent further facts, David has no apparent authority to bind the LLC.
>
> However, the vendor accepts the order, sends an invoice to the LLC’s address, and in due course receives a check drawn on the LLC’s bank account. When David next places an order with the vendor, the LLC’s payment of the first order is a manifestation that the vendor may use in asserting that David had apparent authority to place the second order. A successful apparent authority claim also presupposes that: (i) the vendor believed that David was authorized; and (ii) the belief was reasonable. Restatement (Third) of Agency § 3.03 (2006) (Creation of Apparent Authority).

In general, a member’s actual authority to act for an LLC will depend fundamentally on the operating agreement. See the comment to Section 5-407(b).

§ 30-25-302. Statement of authority. — (a) A limited liability company may deliver to the secretary of state for filing a statement of authority. The statement:

(1) Must include the name of the company and the information required by section 30-21-404(a), Idaho Code;

(2) With respect to any position that exists in or with respect to the company, may state the authority, or limitations on the authority, of all persons holding the position to:

(A) Execute an instrument transferring real property held in the name of the company; or

(B) Enter into other transactions on behalf of, or otherwise act for or bind, the company; and

(3) May state the authority, or limitations on the authority, of a specific person to:

(A) Execute an instrument transferring real property held in the name of the company; or

(B) Enter into other transactions on behalf of, or otherwise act for or bind, the company.

(b) To amend or cancel a statement of authority filed by the secretary of state, a limited liability company must deliver to the secretary of state for filing an amendment or cancellation stating:

(1) The name of the company;

(2) The information required by section 30-21-404(a), Idaho Code;

(3) The date the statement being affected became effective; and

(4) The contents of the amendment or a declaration that the statement is canceled.

(c) A statement of authority affects only the power of a person to bind a limited liability company to persons that are not members.

(d) Subject to subsection (c) of this section and section 30-25-103(d), Idaho Code, and except as otherwise provided in subsections (f), (g) and (h) of this section, a limitation on the authority of a person or a position contained in an effective statement of authority is not by itself evidence of any person's knowledge or notice of the limitation.

(e) Subject to subsection (c) of this section, a grant of authority not pertaining to transfers of real property and contained in an effective statement of authority is conclusive in favor of a person that gives value in reliance on the grant, except to the extent that when the person gives value:

(1) The person has knowledge to the contrary;

(2) The statement has been canceled or restrictively amended under subsection (b) of this section; or

(3) A limitation on the grant is contained in another statement of authority that became effective after the statement containing the grant became effective.

(f) Subject to subsection (c) of this section, an effective statement of authority that grants authority to transfer real property held in the name of the limited liability company is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

(1) The statement has been canceled or restrictively amended under subsection (b) of this section; or

(2) A limitation on the grant is contained in another statement of authority that became effective after the statement containing the grant became effective.

(g) Subject to subsection (c) of this section, if an effective statement of authority contains a limitation on the authority to transfer real property held in the name of a limited liability company, all persons are deemed to know of the limitation.

(h) Subject to subsection (i) of this section, an effective statement of dissolution or termination is a cancellation of any filed statement of authority for the purposes of subsection (f) of this section and is a limitation on authority for the purposes of subsection (g) of this section.

(i) After a statement of dissolution becomes effective, a limited liability company may deliver to the secretary of state for filing a statement of authority that is designated as a post-dissolution statement of authority. The statement operates as provided in subsections (f) and (g) of this section.

(j) Unless earlier canceled, an effective statement of authority is canceled by operation of law five (5) years after the date on which the statement, or its most recent amendment, becomes effective.

(k) An effective statement of denial operates as a restrictive amendment under this section.

History.

I.C., § 30-25-302, as added by 2015, ch. 243, § 45, p. 758.

Official Comment

This section is derived from and builds on UPA (1997) § 303, which was refined in ULLCA (2006) and further refined in the Harmonization Project. This section is conceptually divided into two realms: statements pertaining to the power to transfer interests in the LLC's real property and statements pertaining to other matters. In the latter realm, statements are filed only in the records of the filing office and operate only to the extent the statements are actually known and relied on by a third party. Section 5-302(d) and (e).

As to interests in real property, in contrast, this section: (i) requires double-filing — with the filing office and in the appropriate land records; and (ii) provides for constructive knowledge of statements limiting authority. Thus, a properly filed and recorded statement can protect the limited liability company, Section 5-302(g), and, in order for a statement pertaining to real property to be a sword in the hands of a third party, the statement must have been both filed and properly recorded. Section 5-302(f). Experience suggests that statements of authority will most often be used in connection with transactions in real estate.

The requirements for filing records with the filing office are found in Part 2 of Article 1 *See also* Section 1-104 (Delivery of Record).

By its terms, this section applies only to domestic limited liability companies. A foreign LLC cannot make use of this section even as to real

property located in this state. The section refers throughout to "limited liability company," which this article defines as a domestic limited liability company. See Section 5-102(8) ("'Limited liability company' . . . means an entity formed under this [article] or which becomes subject to this [article]"). *Cf. Fannie Mae v. Heather Apartments Ltd. P'ship*, A13-0562, 2013 WL 6223564 at *6 (Minn. Ct. App. Dec. 2, 2013) (considering the remedies available to a judgment creditor with respect to the judgment debtor's interest in a Cook Islands LLC; rejecting the debtor's argument that the creditor's "only remedy is to obtain a charging order under" [the Minnesota LLC statute]; explaining that "this argument fails because that statute only applies to Minnesota limited liability companies" which the Minnesota LLC statute "defines . . . as 'a limited liability company, other than a foreign limited liability company, *organized or governed by this chapter* '") (emphasis added; statutory citations omitted).

Subsection (a)(2) — This paragraph permits a statement to designate authority by position (or office) rather than by specific person, thus avoiding the need to file anew whenever a new person assumes the position or the office. This type of a statement will enable LLCs to provide evidence of ongoing power to enter into transactions without having to disclose to third parties the entirety of the operating agreement.

Subsection (a)(2)(A) and (a)(3)(A) — The authority to "sign" an instrument includes the authority to commit the partnership to the transfer reflected in the agreement. See Subsection (f) (referring not merely to signing but also to "an effective statement of authority that grants authority to transfer real property").

Here and elsewhere in the section, the phrase "real property" includes all interests in real property, such as mortgages, easements, *etc*.

Subsection (c) — This subsection expresses a very important limitation — *i.e.*, that this section's rules do not operate viz-a-viz members. For members, the operating agreement is controlling. Section 5-107(d). However, like any other record delivered for filing on behalf of an LLC, a statement of authority might be some evidence of the contents of the operating agreement. *See* the comment to Section 5-107(d).

Another important limitation exists. The filing office is not affected by a statement of authority that purports to delineate the authority of persons to

sign documents to be delivered for filing of behalf of a limited liability company. The Code does define "[p]erson" to include a "government or governmental subdivision, agency, or instrumentality," Section 5-102(35), but "a limitation on the authority of a person or a position contained in an effective statement of authority is not by itself evidence of knowledge or notice of the limitation by any person." Subsection (d).

Moreover, even if an employee of the filing office happened to see that a statement of authority purported to delineate the authority of persons to sign records to be delivered on behalf of an LLC, that information would not pertain to a "fact [that] is material to the agent's duties to the principal" and therefore would not be attributed to the filing office. Restatement (Third) of Agency § 5.03 (2006).

Subsection (d) — The phrase "by itself" is important, because the existence of a limitation of authority could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

Subsection (e)(1) — What happens if a statement of authority conflicts with the contents of an LLC's certificate of organization? The contents of the certificate are not statements of authority, Section 5-201(c), so the information in the certificate does not directly figure into the operation of this section. However, if the person claiming to rely on a statement of authority had read the certificate's conflicting information before giving value, that fact might be evidence that person gave value with "knowledge to the contrary" of the statement.

Subsection (e)(2) — This paragraph by its terms does not affect a claim of lingering apparent authority. A person could: (i) assert knowledge of a statement of authority as the statement existed before a cancellation or restrictive amendment; and (ii) characterize the original statement as a manifestation of authority traceable to the limited liability company. Restatement (Third) of Agency § 3.03, cmt. b (2006) ("Apparent authority is present only when a third party's belief is traceable to manifestations of the principal.").

However, for apparent authority to exist, the purported agent must *reasonably* appear to be authorized. Restatement (Third) of Agency § 2.03 (2006) (stating that apparent authority can only exist when "a third party

reasonably believes the actor has authority to act on behalf of the principal"). Given the possibility of cancellation or restrictive amendment, it might not be reasonable for a person to know of a statement of authority, let time pass, and then rely on the statement without re-checking the public record.

Subsections (f) through (h) — These subsections: (i) pertain to transactions in real property; (ii) provide a mechanism by which authority to transfer an LLC's real property can be made to appear in the real estate records; and (iii) thus address the principal concerns (raised by real estate lawyers) that led the drafters of UPA (1997) to provide for statements of authority.

Subsection (f) — This subsection provides a sword for a vendee of real property. If the vendee has "give[n] value in reliance on the grant without knowledge to the contrary," the statement of authority protects the vendee against claims that contradict the grant.

Subsection (f)(1) and (2) — As a claim of lingering apparent authority, see the comment to Subsection (e)(2). The analysis stated there applies even more strongly in the context of customary practices involving land transfers.

Subsection (g) — This subsection provides a shield for the limited liability company as alleged vendor. If a vendee's claim contradicts the stated limitation, constructive knowledge ("deemed to know") defeats the claim even if the vendee gave value and lacked actual knowledge.

Subsection (h) — This subsection integrates statements of dissolution and termination, Section 5-702, into the operation of this section.

The effect of a statement of dissolution depends on the circumstances.

> EXAMPLE: ABC, LLC has in effect a properly filed and recorded statement of authority authorizing ABC's CEO to transfer real estate owned by the LLC. The proper filing and recording by ABC of a statement of dissolution cancels the statement of authority. Subsequently, Buyer gives value in return for a deed signed by the CEO on behalf of ABC. Due to Subsections (h) and (f)(1), Subsection (f) does not protect Buyer. Moreover, under Subsections (g) and (h), Buyer is "deemed to know" of the dissolution. Whether that deemed knowledge functions to

deprive the CEO of authority to bind ABC depends on agency law and additional facts. For example, the CEO might have had actual or apparent authority to transfer the real estate despite the dissolution of the LLC.

If properly filed with the filing office and properly recorded in the office for land records, a statement of termination eliminates the power of any person to transfer real property owned in the name of the LLC. No one can have the authority to act for a non-existent entity. *Cf.* Restatement (Third) of Agency § 4.04(1)(a) (2006) (precluding ratification by a principal that did not exist at the time of the unauthorized act).

Subsection (i) — This provision permits an LLC to use statements of authority during winding up. As an additional protection for third parties, a statement must be "designated as a post-dissolution statement of authority" to be effective under this provision.

Subsection (k) — Presumably, when real property is involved, a person who obtains the filing of a statement of denial under Section 5-303 will cause a certified copy of the statement to be "recorded by certified copy for purposes of subsection (f)(1)" [undercutting constructive notice as to authority to transfer real property]. However, nothing in this subsection prevents the limited liability company from causing a certified copy to appear in the land records; due the section's use of the passive voice ("may be recorded"), this article does not delimit who has the authority to act under this subsection.

§ 30-25-303. Statement of denial. — A person named in a filed statement of authority granting that person authority may deliver to the secretary of state for filing a statement of denial that:

(1) Provides the name of the limited liability company and the caption of the statement of authority to which the statement of denial pertains; and (2) Denies the grant of authority.

History.

I.C., § 30-25-303, as added by 2015, ch. 243, § 45, p. 758.

Official Comment A person whose powers are delineated in the public record by another person should have the right to dissent from that delineation. This section takes an "all or nothing" approach; a person may not deny in part and confirm in part. For the effect of a statement of denial, see Section 5-302(k).

§ 30-25-304. Liability of members and managers. — (a) A debt, obligation, or other liability of a limited liability company is solely the debt, obligation, or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the company solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the company.

(b) The failure of a limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member or manager for a debt, obligation, or other liability of the company.

History.

I.C., § 30-25-304, as added by 2015, ch. 243, § 45, p. 758.

CASE NOTES

Liability.

Generally, members of an LLC are not liable for the misconduct of the company, unless it is proven that the company is the alter ego of the member. Drug Testing Compliance Grp., LLC v. DOT Compliance Service, 161 Idaho 93, 383 P.3d 1263 (2016).

Official Comment

Derivation — ULLCA (2006) derived this section from UPA (1997) § 306, which was also the source for ULPA (2001) § 404. The Harmonization Project brought the two partnership acts and the limited liability company act into accord to the extent the three acts overlap.

Subsection (a) — This subsection provides a corporate-like liability shield members and managers, protecting them against (and only against) the debts, obligations and liabilities of the limited liability company — *i.e.*, against a member's or manager's alleged vicarious liability for the obligations of the entity. The shield "applies regardless of the dissolution of

the company" and thus continues in effect through the completion of winding up (*i.e.*, termination). The shield applies regardless of the law giving rise to a claim against a limited liability company.

Shield Applicable Regardless of the Identity of the Plaintiff What makes the shield relevant is the nature of the claim. If the complaint seeks to hold a member vicariously liability for the LLC's obligations, the shield applies. If not, not. Thus, there is no distinction between a claim arising from an LLC's debt to a commercial creditor, a member's claim that the LLC has failed to return a contribution as required by the operating agreement, and a claim by a former member that the LLC has failed to follow through on a buy-out agreement. *See Rappaport v. Gelfand*, 197 Cal. App. 4th 1213, 1230-1232, 129 Cal. Rptr. 3d 670, 682-84 (Cal. App. 2 Dist. 2011) (involving a claim by a former partner). *Accord Ederer v. Gursky*, 9 N.Y.3d 514, 526, 881 N.E.2d 204, 212-213 (N.Y. 2007) (Smith, J., dissenting).

Shield Inapposite for Claims Arising from a Member's or Manager's Own Conduct Because the member or manager liability at issue is solely vicarious, the shield is irrelevant to claims seeking to hold a member or manager directly liable on account of the member's or manager's own conduct. Put another way, "[t]here is no question" that "the member-manager of a limited liability company who causes his business to breach common law and statutory duties may be held independently liable for his personal torts." *Dep't of Agric. v. Appletree Mktg., L.L.C.*, 485 Mich. 1, 4, 18, 779 N.W.2d 237, 239, 247 (2010).

A few judges have failed to understand this point. *See Puleo v. Topel*, 368 Ill. App. 3d 63, 68-69, 856 N.E.2d 1152, 1157 (Ill. App. Ct. 2006) (basing its holding on a legislative amendment that "removed . . . language which explicitly provided that a member or manager of an LLC could be held personally liable for his or her own actions or for the actions of the LLC to the same extent as a shareholder or director of a corporation could be held personally liable").

This mistaken view: (i) ignores the actual words of LLC shield provisions (which protect members and managers only against liability for obligations of an LLC and make no reference to direct obligations *of* a member or manager); and (ii) flouts public policy (which recoils from the idea of immunizing a person's misconduct solely because the person acts on

behalf of an organization). Moreover, the mistaken view is contrary to the overwhelming weight of the case law. *See, e.g., Mbahaba v. Morgan*, 163 N.H. 561, 565, 44 A.3d 472, 476 (2012) ("When . . . a member or manager commits or participates in the commission of a tort, whether or not he acts on behalf of his LLC, he is liable to third persons injured thereby."); *Sturm v. Harb Dev., LLC*, 298 Conn. 124, 138, 2 A.3d 859, 870 (2010) (holding that the liability shield of an LLC is subject to "the common-law tort exception . . . [for] individual claims against LLC members"); *Allen v. Dackman*, 413 Md. 132, 154, 991 A.2d 1216, 1229 (2010) ("An LLC member is liable for torts he or she personally commits, inspires, or participates in because he or she personally committed a wrong, not 'solely' because he or she is a member of the LLC."); *Weber v. U.S. Sterling Sec., Inc.*, 282 Conn. 722, 732-34, 924 A2d 816, 824-25 (2007) (stating that the Delaware LLC Act "does not preclude individual liability for members of a limited liability company if that liability is not based simply on the member's affiliation with the company" and holding, in particular, that the Act "does not bar the defendants' liability for tortious conduct").

> EXAMPLE: A manager personally guarantees a debt of a limited liability company. Subsection (a) is irrelevant to the manager's liability as guarantor.

> EXAMPLE: A member purports to bind a limited liability company while lacking any agency law power to do so. The limited liability company is not bound, but the member is liable for having breached the "warranty of authority" (an agency law doctrine). Subsection (a) does not apply. The liability is not *for* a debt, obligation, or other liability of the [limited liability] company, but rather is the member's own, direct liability. Indeed, the liability exists because the limited liability company is *not* indebted, obligated or liable. Restatement (Third) of Agency § 6.10 (2006).

> EXAMPLE: A manager of a limited liability company defames a third party in circumstances that render the limited liability company vicariously liable under agency law. Under Subsection (a), the third party cannot hold the manager accountable for the company's liability, but that protection is immaterial. The manager is the tortfeasor and in that role is directly liable to the third party.

EXAMPLE: A limited liability company provides professional services, and one of its members commits malpractice. The liability shield is irrelevant to the member's direct liability in tort. However, if the member's malpractice liability is attributed to the LLC under agency law principles, the liability shield will protect the other members of the LLC against a claim that they must make good on the LLC's liability.

EXAMPLE: A single member limited liability company enters into a contract to build a home, and the member performs substantial amounts of the work. The homeowner sues both the LLC and the member for allegedly defective work, but the complaint sounds in contract rather than in tort. The LLC may be liable, but the member is not. *See Ogea v. Merritt*, 130 So.3d 888, 2013 WL 6439355 at *24-25 (La. 2013).

Subsection (a) pertains only to claims based on the LLC's liability and is irrelevant to claims by a limited liability company against a member or manager and *vice versa*. *E.g.,* Sections 5-408 (pertaining to a limited liability company's obligation to indemnify a member or manager), 5-409 (pertaining to management duties) and 5-801 (pertaining to a member's rights to bring a direct claim against a limited liability company).

Shield Inapposite to Role Liability Claims Provisions of regulatory law may impose liability on a member or manager due to a role the person plays in the LLC. *See, e.g., Food Team Intern., Ltd. v. Unilink, LLC*, 872 F. Supp. 2d 405, 424 (E.D Pa. 2012) (holding several individuals "subject to secondary individual liability under PACA [Perishable Agricultural Commodities Act]" because their roles within the LLC enabled them to control the relevant assets) (citing *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 172 (3d Cir. 2010).

The Shield and Dissolution The rule stated here is inherent in the nature of LLC dissolution. "[D]issolution does not end a limited liability company's existence but rather changes the purpose of that existence." Comment to Section 701. "A dissolved limited liability company shall wind up its activities and affairs and . . . continues after dissolution . . . for the purpose of winding up." Section 5-702(a). Put another way: dissolution and winding up are part of the life cycle of a limited liability company — sometimes the most complicated part. There is no logical reason to remove the shield during the last part of an LLC's life cycle.

This subsection makes this point expressly, because it is possible to misinterpret some outlying LLP cases as holding to the contrary. *See, e.g., Carolina Cas. Ins. Co. v. L.M. Ross Law Grp., LLP*, 151 Cal. Rptr. 3d 628, 635 (2012) (affirming the trial court's decision to hold an LLP's named partner liable for a judgment against his limited ability partnership; noting that "[c]entral to the decision to amend the judgment to add Ross [the named partner] as a judgment debtor . . . is the trial court's finding that Ross Law Group dissolved"; recognizing, however, that, before the partnership incurred the liability, Ross had signed and filed with the California Secretary of State a form stating that the law firm had "cease[d] to be a registered limited liability partnership and is hereby filing this notice with the California Secretary of State that [it] is no longer a registered limited partnership") (quotation marks omitted).

The Shield and Termination This subsection does not expressly provide that, when a limited liability company's existence terminates, the liability shield remains in place as to any debt, obligation, or other liability of the LLC incurred before the termination. However, the point follows ineluctably from Section 5-304(a), which provides that the shield applies to any "debt, obligation, or other liability of a limited liability company." A debt, obligation or other liability of an LLC does not disappear merely because the LLC has terminated.

Moreover, any other result would: (i) create huge holes in the shield; (ii) put the law of unincorporated businesses at odds with the law of corporations; (iii) render surplus this article's distribution recapture provision, Section 5-406; and (iv) render nonsensical the otherwise logical extension of the equitable trust fund theory to limited liability companies. *Cf. Velasquez v. Franz*, 589 A.2d 143, 146 (N.J. 1991) (explaining that "the trust-fund doctrine . . . renders shareholders who receive distributed assets of the corporation liable as 'trustees' for claims of the corporation's creditors").

Dangers of Indemnification Provisions Inter Se the Members Despite the phrase "by way of contribution or otherwise," the LLC shield has no effect on contribution or indemnification requirements running directly from member to member or from members to a manager. These obligations are not obligations of the LLC but rather personal to each member. Indirectly

they pose a risk to the shield as to liability arising from the misconduct of a member or manager.

EXAMPLE: A law firm operates as a professional limited liability company. One practice area (the "Practice Area") brings in large fees but also exposes its practitioners (the "Practitioners") to liability risks substantially higher than the risks faced by other lawyers in the firm. Fees in the Practice Area are episodic, so it makes sense for the Practitioners to share profits with the rest of the firm, where returns are lower but more regular.

The firm carries liability insurance, and the operating agreement provides broad indemnification rights to all the firm's lawyers. However, the Practitioners are mindful that the LLC liability shield sets a practical limit to the firm's indemnification obligations and that policies of insurance have limits. The Practitioners obtain a provision in the operating agreement by which each member of the LLC makes a personal promise of indemnification (subject to a cap).

The tortious conduct of one of the Practitioners (the "Tortfeasor") results in a substantial judgment against the Tortfeasor and, per Section 5-305(a), against the LLC. For unrelated reasons, the LLC has become insolvent and its liability coverage is "maxed out." The Tortfeasor's right to indemnification from fellow members is an asset of the Tortfeasor. The judgment creditor can levy on that asset, thereby defeating the liability shield in effect if not in form.

Subsection (b) — This subsection pertains to the equitable doctrine of "piercing the veil" — *i.e.*, conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of "piercing the corporate veil" is well-established, and courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies. In the corporate realm, "disregard of corporate formalities" is a key factor in the piercing analysis. In the realm of LLCs, that factor is inappropriate, because informality of organization and operation is both common and desired. *See, e.g.*, *In re Packer*, Bankruptcy No. 13-41304, 2014 WL 5100095 (Bankr. E.D. Tex. Oct. 10, 2014) (noting the informality of LLC governance, recognizing that "the disregard of corporate formalities . . . [is] one of the key factors in [corporate] veil-piercing determinations"; but holding that

"'it makes no sense to imperil the shield simply because the members do not undergo meaningless formalities such as formal meetings'") (citing Carter G. Bishop & Daniel S. Kleinberger, Limited Liability Companies: Tax and Business Law ¶ 6.03 at *3 (Thomson Reuters Tax and Accounting 2014)).

The formalities at issue are the process formalities of governance — both those few created by this article and however few or many might be created by the operating agreement.

> EXAMPLE: The operating agreement of a three-member, member-managed limited liability company requires formal monthly meetings of the members. Each of the members works in the LLC's business, and they consult each other regularly. They have forgotten or ignore the requirement of monthly meetings. Under Subsection (b), that fact is irrelevant to a piercing claim.

In contrast, this subsection is inapposite to another key piercing factor — disregard of the separateness between entity and owner. *E.g., Vanderford Co. v. Knudson*, 165 P.3d 261, 271 (Idaho 2007) (noting that managing member and "his accountant testified that the LLC's checking account was so confusing that the accountant could not be sure whose money was in the account at what times"); *Utzler v. Braca*, 972 A.2d 743 (Conn. App. 2009) (holding that veil piercing was appropriate under alter-ego theory when owner deposited LLC funds into a commingled bank account from which he made withdrawals for personal needs and unrelated projects).

> EXAMPLE: The sole owner of a limited liability company uses a car titled in the company's name for personal purposes and writes checks on the company's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not Subsection (b) formalities.

This subsection also is inapposite to a member's claim of oppression under Section 5-701(a)(4)(C)(ii). In some circumstances, disregard of agreed-upon formalities can be a "freeze out" mechanism. Likewise, this subsection has no relevance to a member's claim that the disregard of agreed-upon formalities is a breach of the operating agreement.

This subsection addresses claims to "impos[e] liability on a member or manager for a debt, obligation, or other liability of the company" — *i.e.*, for what is sometimes termed a "direct pierce." Whether the same approach should apply to claims for a "reverse pierce" is a question for the courts. *See Comm'r of Envtl. Prot. v. State Five Indus. Park, Inc.*, 304 Conn. 128, 140, 37 A.3d 724, 732-33 (2012) (stating that "[a]lthough some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because the two share the same equitable goals, others wisely have recognized important differences between them").

Idaho Code Pt. 4

Part 4
Relations of Members to Each Other and to Limited Liability Company

Idaho Code § 30-25-401

§ 30-25-401. Becoming member. — (a) If a limited liability company is to have only one (1) member upon formation, the person becomes a member as agreed by that person and the organizer of the company. That person and the organizer may be, but need not be, different persons. If different, the organizer acts on behalf of the initial member.

(b) If a limited liability company is to have more than one (1) member upon formation, those persons become members as agreed by the persons before the formation of the company. The organizer acts on behalf of the persons in forming the company and may be, but need not be, one (1) of the persons.

(c) After formation of a limited liability company, a person becomes a member: (1) As provided in the operating agreement;

(2) As the result of a transaction effective under chapter 22, title 30, Idaho Code; (3) With the affirmative vote or consent of all the members; or (4) As provided in section 30-25-701(a)(3), Idaho Code.

(d) A person may become a member without:

(1) Acquiring a transferable interest; or

(2) Making or being obligated to make a contribution to the limited liability company.

History.

I.C., § 30-25-401, as added by 2015, ch. 243, § 46, p. 758.

CASE NOTES

Written Agreement.

Where oral operating agreement of LLC stated that, once a written agreement was ready to be signed, individuals could only become members by signing that agreement, individuals who at times acted as members were not in fact members without signing the written agreement. Johnson v. Crossett, 163 Idaho 200, 408 P.3d 1272 (2018).

Decisions Under Prior Law

Operating Agreement.

Since manager was the only member of predecessor LLC, there was an implicit operating agreement that he was the manager of the company. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

Written Consent.

Where there is only one person involved in a limited liability company, that person is not prevented from becoming a member because he or she did not give written consent. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

Official Comment

Most LLC statutes address in separate provisions: (i) how an LLC obtains its initial member or members; and (ii) how additional persons might later become members. This article follows that approach.

Subsections (a) and (b) — These subsections make explicit the agency relationship between the person acting as organizer and the initial member or members.

Subsection (c)(3) — A limited liability company being in part a creature of contract, consent is determined on an objective basis (*i.e.*, contract law's "reasonable person" standard). Depending on the terms of an LLC's operating agreement, the members' manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the operating agreement might reduce the quantum of consent necessary or shift the consent right to a manager.

A limited liability company being a voluntary association, a person cannot become a member without manifesting consent to do so. That consent also is judged objectively.

Under Section 5-106(b), "[a] person that becomes a member of a limited liability company is deemed to assent to the operating agreement," and the agreement binds the member regardless of whether the member has actually indicated assent in any way.

Subsection (d)(1) — To accommodate business practices and also because a limited liability company need not have a business purpose, this provision permits so-called "non-economic members."

§ 30-25-402. Form of contribution. — A contribution may consist of property transferred to, services performed for, or another benefit provided to the limited liability company or an agreement to transfer property to, perform services for, or provide another benefit to the company.

History.

I.C., § 30-25-402, as added by 2015, ch. 243, § 46, p. 758.

CASE NOTES

Decisions Under Prior Law Credit.

Use of manager's credit to obtain construction loans was sufficient consideration for an interest in a limited liability company. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

Official Comment

This section is intentionally quite broad, encompassing past, present, and promised benefits. Comparable language exists in most, if not all, LLC statutes, and case law recognizes the intended broadness of this approach. *See, e.g., Belgard v. Manchac Technologies, LLC*, 92 So.3d 660, 664 (La. App. 3 Cir. 2012) (stating that "the creation of an obligation to establish a $1.8 million line of credit was valid consideration for the transfer of 24% of the membership interest in Manchac"); *In re Eight of Swords, LLC*, 96 A.D.3d 839, 840, 946 N.Y.S. 2d 248, 249 (N.Y.A.D. 2 Dept. 2012) (referring to "the petitioner's contributions to the LLC, which overwhelmingly consisted of services rendered to the LLC in the form of preparing and filing start-up documentation and performing activities associated with the renovation of the business's premises").

This article does not contain a statute of frauds specifically applicable to promised contributions. Generally applicable statutes of fraud might apply, however. For example, a promise to contribute land to the LLC would be subject to the statute of frauds pertaining to land transfers. Likewise, a promise that by its terms requires performance that extends beyond one

year from the making of the contract would be subject to the one-year provision of the statute of frauds. *See* the comment to Section 5-102(a)(9).

§ 30-25-403. Liability for contributions. — (a) A person's obligation to make a contribution to a limited liability company is not excused by the person's death, disability, termination, or other inability to perform personally.

(b) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited liability company to contribute money equal to the value of the part of the contribution which has not been made.

(c) The obligation of a person to make a contribution may be compromised only by the affirmative vote of [or] consent of all the members. If a creditor of a limited liability company extends credit or otherwise acts in reliance on an obligation described in subsection (a) of this section without knowledge or notice of a compromise under this subsection, the creditor may enforce the obligation.

History.

I.C., § 30-25-403, as added by 2015, ch. 243, § 46, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in the first sentence in subsection (c) was added by the compiler to conform to the uniform act.

Official Comment

Subsection (a) — Under common law principles of impracticability, an individual's death or incapacity will sometimes discharge a duty to render performance. Restatement (Second) of Contracts §§ 261 (Discharge by Supervening Impracticability), 262 (Death or Incapacity of Person Necessary For Performance). This subsection overrides those principles. Moreover, the reference to "perform personally" is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

Subsection (b) — This subsection is a statutory liquidated damage provision, exercisable at the option of the limited liability company, with the damage amount set according to the value of the promised, non-monetary contribution.

EXAMPLE: In order to become a member, a person promises to contribute to the limited liability company various assets "free and clear," which the operating agreement values at $150,000. In return for the person's promise, and in light of the agreed value, the limited liability company admits the person as a member with a right to receive 25% of the LLC's distributions.

However, the promised assets are subject to a security agreement, and, before the member can contribute the assets, the secured party forecloses on the security interest and sells the assets at a public sale for $75,000. Even if the $75,000 reflects the actual fair market value of the assets, under this subsection the limited liability company has a claim against the member for "money equal to the value of the part of the contribution which has not been made" — *i.e.*, $150,000.

EXAMPLE: Same facts as the previous example, except that the public sale brings $225,000. The limited liability company is neither obliged to invoke this subsection nor limited to the $150,000. The LLC may instead sue for breach of the promise to make the contribution, asserting the $225,000 figure as evidence of the actual loss suffered as a result of the breach.

Subsection (c) — The unanimity requirement expressed in the first sentence might indirectly benefit creditors, but the requirement is nonetheless a default rule and therefore may be varied by operating agreement. The right of each member to consent is not a "right[] under this [Code] of a person other than a member or manager." *See* Section 5-105(c)(15) (preventing the operating agreement from affecting such rights). In contrast, the creditor right stated in the second sentence fits squarely within Section 5-105(c)(15) and therefore may not be varied by the operating agreement.

§ 30-25-404. Sharing of and right to distributions before dissolution. — (a) Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares among members and persons dissociated as members, except to the extent necessary to comply with a transfer effective under section 30-25-502, Idaho Code, or charging order in effect under section 30-25-503, Idaho Code.

(b) A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.

(c) A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in section 30-25-707(d), Idaho Code, a company may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(d) If a member or transferee becomes entitled to receive a distribution, the member or transferee is entitled to all remedies available to a creditor of the limited liability company with respect to the distribution. However, the company's obligation to make a distribution is subject to offset for any amount owed to the company by the member or a person dissociated as a member on whose account the distribution is made.

History.

I.C., § 30-25-404, as added by 2015, ch. 243, § 46, p. 758.

Official Comment Past uniform unincorporated entity acts and many current LLC acts provide default rules for allocation of profits, and UPA (1997) even provided a default structure for maintaining capital accounts. For the following reasons, this article, incorporating changes made by the Harmonization Project, provides a default rule only for rights to share in distributions: • Capital accounts are maintained for one purpose, to determine how distributions will be made to members. The rules for maintenance of capital accounts can be very complex.

Generally, however, profits increase capital account balances (and increase the amounts that will be distributed to the members) and losses reduce capital account balances (and reduce the amounts that will be distributed to the members). If the statute has a simple default rule for how distributions are to be made to the members, providing an additional set of default profit and loss allocation provisions and capital account rules will be, at best, duplicative and, at worse, inconsistent with the distribution rules.

• Some argue that capital account rules and profit and loss allocation provisions are necessary to comply with tax requirements. Tax income or loss is allocated to "partners" (including members of an LLC taxed as a partnership) according to the partners' economic interests in the LLC, and these interests are based on distributions that would be made to partners on liquidation of the LLC. By including default distribution provisions, this article includes the information necessary to make these tax determinations. To the extent the tax law allows partners to make further tax elections or satisfy alternative safe harbors, the partners may look to the tax law for guidance and include necessary provisions in their agreements.

Subsection (a) — The rule stated applies to redemptions as well as operating distributions but is a default rule in both contexts. *See* the comment to Section 5-102(a)(3)(A).

Subsection (b) — The second sentence of this subsection accords with Section 5-603(a)(3) — upon dissociation a person is treated as a mere transferee of its own transferable interest. Like most *inter se* rules in this article, this one is subject change by the operating agreement. *See* the comment to Section 5-603(a)(3).

Subsection (d) — *See also* Section 5-405(d) (pertaining to the rights of members and transferees that receive a distribution in the form of indebtedness) and 5-405(e) (pertaining to solvency testing for payments on indebtedness issued to redeem an interest).

§ 30-25-405. Limitations on distributions. — (a) A limited liability company may not make a distribution, including a distribution under section 30-25-707, Idaho Code, if after the distribution:

(1) The company would not be able to pay its debts as they become due in the ordinary course of the company's activities and affairs; or

(2) The company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of members and transferees whose preferential rights are superior to the rights of persons receiving the distribution.

(b) A limited liability company may base a determination that a distribution is not prohibited under subsection (a) of this section on:

(1) Financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(2) A fair valuation or other method that is reasonable under the circumstances.

(c) Except as otherwise provided in subsection (e) of this section, the effect of a distribution under subsection (a) of this section is measured:

(1) In the case of a distribution as defined in section 30-25-102(3)(A), Idaho Code, as of the earlier of:

(A) The date money or other property is transferred or debt is incurred by the limited liability company; or

(B) The date the person entitled to the distribution ceases to own the interest or right being acquired by the company in return for the distribution;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) In all other cases, as of the date:

(A) The distribution is authorized, if the payment occurs not later than one hundred twenty (120) days after that date; or

(B) The payment is made, if the payment occurs more than one hundred twenty (120) days after the distribution is authorized.

(d) A limited liability company's indebtedness to a member or transferee incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

(e) A limited liability company's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of subsection (a) of this section if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that payment of a distribution could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

(f) In measuring the effect of a distribution under section 30-25-707, Idaho Code, the liabilities of a dissolved limited liability company do not include any claim that has been disposed of under section 30-25-704, 30-25-705 or 30-25-706, Idaho Code.

History.

I.C., § 30-25-405, as added by 2015, ch. 243, § 46, p. 758.

Official Comment

Both this section and Section 5-406 were derived essentially from the Model Business Corporation § 6.40. Both sections are necessary and appropriate because a limited liability company provides its members and managers a corporate-like liability shield. With the exception noted in the comment to Subsection (a)(2), the provisions of this section are non-waivable. Section 5-105(c)(15).

"Distribution" does not include "amounts constituting reasonable compensation for present or past service or payments made in the ordinary

course of business under a bona fide retirement plan or other bona fide benefits program." Section 5-102(a)(3)(B).

Subsection (a) — Insolvency is a fundamental issue under this section, and this subsection provides two tests of insolvency. The tests are disjunctive; a distribution violates this section if after the distribution the LLC fails either of the tests. The subsection applies both to interim and liquidating distributions.

Solvency is also a fundamental issue under bankruptcy and fraudulent transfer law, which provide their own respective definitions of the concept.

Subsection (a)(2) — The reference to "preferential rights upon dissolution and winding up" is a default rule, because removing this protection for preferred members or transferees is an *inter se* matter. *See* Section 5-105(d)(1)(B). The rest of the section is not subject to change in the operating agreement. Section 5-105(c)(9).

Subsection (b) — This subsection states a standard of ordinary care, in contrast with the generally-applicable standard stated in Section 5-409(c) (gross negligence).

Subsection (b)(2) — This alternative valuation provision is likely to be both useful and fair when the limited liability company has appreciated assets but for accounting purposes these assets are valued at book value less depreciation.

Subsection (c) — This subsection provides three alternative rules for determining the point(s) in time of as which to apply the Subsection (a) solvency tests. The timing depends on which of three categories encompasses a distribution: (i) a distribution in the nature of a redemption (regardless of whether the distribution includes a distribution of indebtedness); (ii) any distribution of indebtedness other than a distribution in the nature of a redemption; and (iii) any distribution that involves neither a redemption nor a distribution of indebtedness. A requirement for additional solvency testing pertaining to distributions of indebtedness appears in Subsection (e).

Subsection (c)(1) — Section 5-102(a)(3)(A) encompasses distributions in the nature of a redemption.

Subsection (c)(1)(A) and (B) — Under Subparagraph (A), any beginning of payment activity triggers the rule and sets the date as of when to apply the solvency tests. Under Subparagraph (B), the LLC's complete acquisition of the rights is necessary to trigger the rule.

Subsection (c)(2) — This provision states the general rule for distributions in the form of debt which are not connected with a redemption.

Subsection (c)(3) — This provision states alternative rules for all distributions of money or property (*i.e.*, not debt). The measuring date depends on the length of time between the authorization and payment of the distribution.

Subsection (d) — *Compare* Subsection (d), *with* Section 5-404(d) (characterizing as a creditor a person who has become entitled to receive a distribution).

Subsection (e) — This subsection contains two rules pertaining to indebtedness issued as part of a distribution and the solvency tests of Subsection (a). The first sentence states the sensible rule that indebtedness that is essentially subordinated to the solvency requirement — *i.e.*, not payable if making payment would transgress that requirement — is not counted in determining liabilities for purposes of the solvency tests. The second sentence applies the solvency tests to each payment of principal and interest on any indebtedness issued as a distribution, in addition to any previous testing required by Subsection (c)(1)(A) or (c)(2).

> EXAMPLE: An LLC and one of its members agree that the LLC will buy out the member's entire ownership interest in the LLC in return for a promissory note from the LLC, payable in installments. Under the redemption agreement, the member surrenders all its interests and rights on January 15 and the LLC signs and delivers the note to the person dissociated as a member on February 15. Under the note, payment of interest is due monthly beginning March 15, with a balloon payment of the principal due December 30.
>
> Under Subsection (c)(1)(B), the solvency tests are applied as of January 15. Under Subsection (e), the solvency tests are again applied on the March 15, April 15, etc., and again on December 30.

Subsection (f) — The cited sections provide methods for extinguishing or limiting the debts of an LLC that is winding up its affairs and activities and thus any debt affected by any of the cited sections is irrelevant for purposes of solvency testing.

§ 30-25-406. Liability for improper distributions. — (a) Except as otherwise provided in subsection (b) of this section, if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of section 30-25-405, Idaho Code, and in consenting to the distribution fails to comply with section 30-25-409, Idaho Code, the member or manager is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without the violation of section 30-25-405, Idaho Code.

(b) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one (1) or more other members, the liability stated in subsection (a) of this section applies to the other members and not the member that the operating agreement relieves of the authority and responsibility.

(c) A person that receives a distribution knowing that the distribution violated section 30-25-405, Idaho Code, is personally liable to the limited liability company, but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under section 30-25-405, Idaho Code.

(d) A person against which an action is commenced because the person is liable under subsection (a) of this section may: (1) Implead any other person that is liable under subsection (a) of this section and seek to enforce a right of contribution from the person; and (2) Implead any person that received a distribution in violation of subsection (c) of this section and seek to enforce a right of contribution from the person in the amount the person received in violation of subsection (c) of this section.

(e) An action under this section is barred unless commenced not later than two (2) years after the distribution.

History.

I.C., § 30-25-406, as added by 2015, ch. 243, § 46, p. 758.

Official Comment This section and Section 5-405 were derived essentially from Model Business Corporation Act § 6.40. As with Section 5-405, this section is appropriate and necessary due to the liability shield of a limited liability company. The provisions of this section are non-waivable. Section 5-105(c)(15).

This section contemplates two categories of liability: liability of those who have authorized improper distributions, Subsection (a), and the liability of those who have received improper distributions, Subsection (c). Liability that has accrued under this section is not affected by a person subsequently ceasing to be a member, manager or transferee.

The liability is to the LLC, not to the creditors of an insolvent LLC. *Weinstein v. Colborne Foodbotics, LLC*, 302 P.3d 263, 268 (2013); *Rev O, Inc. v. Woo*, 725 S.E.2d 45, 52 (N.C. Ct. App. 2012).

This section does not preclude or interfere with claims for fraudulent transfer. See the comment to Subsection (e).

Subsection (a) — The liability is not strict liability but rather attaches only to the extent a decision maker has failed to comply with the duties stated in Section 5-409. To the extent those duties have been permissibly revised by the operating agreement, the revised standards apply to this subsection. *See also* Section 5-405(b)(1) (permitting reasonable reliance on specified financial information).

Subsection (b) — *Compare* Subsection (b), *with* Section 5-105(d)(2) (generally permitting provisions of this type).

Subsection (c) — Actual knowledge is necessary to impose liability. Reason to know does not suffice. *Compare* Subsection (c), *with* Section 5-103(a)-(b).

Subsections (c) and (d)(2) — Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a member or manager.

Subsection (e) — When the distribution is in the form of indebtedness, the distribution may occur on several different dates. *See* the comment to Section 5-405(e).

This statute of limitations applies only to actions "under this section" and does not affect claims under other applicable law, which most often is fraudulent transfer law. For a different approach, see Del. Code Ann. tit. 6, § 17-607(c) (West 2013) (applying a 3-year statute of limitations to claims "under this chapter or other applicable law"); NY Ltd. Liab. Co. § 508(c) (McKinney 2013) (same). *But see, e.g., In re The Heritage Org., LLC*, 413 BR 438, 461 (Bankr. ND Tex. 2009) (invoking the Texas Uniform Fraudulent Act [TUFTA] to recover distributions made by a Delaware LLC headquartered in Texas; rejecting Del. Code Ann. tit. 6, § 18-607(c) on choice of law grounds; stating that "the Delaware legislature cannot limit the reach of TUFTA").

§ 30-25-407. Management of limited liability company. — (a) A limited liability company is a member-managed limited liability company unless the operating agreement:

(1) Expressly provides that:

(A) The company is or will be "manager-managed";

(B) The company is or will be "managed by managers"; or

(C) Management of the company is or will be "vested in managers"; or

(2) Includes words of similar import.

(b) In a member-managed limited liability company, as among the members, the following rules apply:

(1) Except as expressly provided in this chapter, the management and conduct of the company are vested in the members.

(2) Each member has equal rights in the management and conduct of the company's activities and affairs.

(3) A difference arising among members as to a matter in the ordinary course of the activities and affairs of the company may be decided by a majority of the members.

(4) The affirmative vote or consent of all the members is required to:

(A) Undertake an act outside the ordinary course of the activities and affairs of the company; or

(B) Amend the operating agreement.

(c) In a manager-managed limited liability company, as among the members and the managers, the following rules apply:

(1) Except as expressly provided in this chapter, any matter relating to the activities and affairs of the company is decided exclusively by the manager, or, if there is more than one (1) manager, by a majority of the managers.

(2) Each manager has equal rights in the management and conduct of the company's activities and affairs.

(3) The affirmative vote or consent of all members is required to:

(A) Undertake an act outside the ordinary course of the company's activities and affairs; or

(B) Amend the operating agreement.

(4) A manager may be chosen at any time by the consent of a majority of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed, or dies, or, in the case of a manager that is not an individual, terminates. A manager may be removed at any time by the consent of a majority of the members without notice or cause.

(5) A person need not be a member to be a manager, but the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.

(6) A person's ceasing to be a manager does not discharge any debt, obligation, or other liability to the limited liability company or members which the person incurred while a manager.

(d) An action requiring the vote or consent of members under this chapter may be taken without a meeting, and a member may appoint a proxy or other agent to vote, consent, or otherwise act for the member by signing an appointing record, personally or by the member's agent.

(e) The dissolution of a limited liability company does not affect the applicability of this section. However, a person that wrongfully causes dissolution of the company loses the right to participate in management as a member and a manager.

(f) A limited liability company shall reimburse a member for an advance to the company beyond the amount of capital the member agreed to contribute.

(g) A payment or advance made by a member which gives rise to an obligation of the limited liability company under subsection (f) of this

section or section 30-25-408(a), Idaho Code, constitutes a loan to the company which accrues interest from the date of the payment or advance.

(h) A member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities of the company.

History.

I.C., § 30-25-407, as added by 2015, ch. 243, § 46, p. 758.

CASE NOTES

Decisions Under Prior Law

Member Not Agent.

Fact that, as a member of the limited liability company, a podiatrist had the right to participate in the management of the surgical center did not make him an agent of the center in the conduct of his medical practice, including the decision to perform a surgery at the center and performance of that surgery. Shatto v. Syringa Surgical Ctr., LLC, 161 Idaho 127, 384 P.3d 374 (2016).

Official Comment

Subsection (a) — This subsection follows implicitly from the definitions of "manager-managed" and "member-managed" limited liability companies, Section 5-102(a)(6) and (a)(8), but is included here for the sake of clarity. Although this article has eliminated the link between management structure and statutory apparent authority, the article retains the manager-managed and member-managed constructs as options for members to use to structure their *inter se* relationship. *See also* the comments to Sections 5-301 (No Agency Power of Member as Member), and 5-409 (Standards of Conduct).

Subsection (b) — The subsection follows essentially the long-standing default paradigm for management rights of general partners. *See UPA* (1914) § 18; UPA (1997) (Last Amended 2013) § 401. The stated rules are subject to change by the operating agreement. Section 5-105.

In general, a member's actual authority to act for an LLC will depend fundamentally on the operating agreement.

EXAMPLE: Rachael and Sam, who have known each other for years, decide to go into business arranging musical tours. They fill out and electronically sign a one page form available on the website of the filing office and become the organizers of MMT, LLC. They are the only members of the LLC, and their understanding of who will do what in managing the enterprise is based on several lengthy, late-night conversations that preceded the LLC's formation. Sam is to "get the acts," and Rachael is to manage the tour logistics. There is no written operating agreement.

In the terminology of this article, MMT, LLC is member-managed, Section 5-407(a), and the understanding reached in the late night conversations has become part of the LLC's operating agreement, Section 5-102(a)(9). In the terminology of agency law, the operating agreement constitutes a manifestation by the LLC to Rachael and Sam concerning the scope of their respective authority to act on behalf of the LLC. Restatement (Third) of Agency § 2.01, cmt. c (2006) (explaining that a person's actual authority depends first on some manifestation attributable to the principal and stating: "[a]ctual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation").

Circumstances outside the operating agreement can also be relevant to determining the scope of a member's actual authority.

EXAMPLE: Homeworks, LLC is a manager-managed LLC with three members. The LLC's written operating agreement:

- specifies in considerable detail the management responsibilities of Margaret, the LLC's manager-member, and also states that Margaret is responsible for "the day-to-day operations" of the company;

- puts Garrett, a non-manager member, in charge of the LLC's transportation department; and

- specifies no management role for Brooksley, the third member.

When the LLC's chief financial officer quits suddenly, Margaret asks Brooksley, a CPA, to "step in until we can hire a replacement."

Under the operating agreement, Margaret's request to Brooksley is within Margaret's actual authority and is a manifestation attributable to the LLC. If Brooksley manifests assent to Margaret's request, Brooksley will have the actual authority to act as the LLC's chief financial officer.

In the unlikely event that two or more people form a member-managed LLC without any understanding of how to allocate management responsibility, agency law, operating in the context the act's "gap fillers" on management responsibility, will produce the following result:

A single member of a multi-member, member-managed LLC:

☐• has no actual authority to bind the LLC to any matter "outside the ordinary course of the activities of the company," Section 5-407(b)(3); and

☐• has the actual authority to bind the LLC to any matter "in the management and conduct of the company's [ordinary course of] activities and affairs," Section 5-407(b)(2), unless the member has reason to know that other members might disagree or the member has some other reason to know that consultation with fellow members is appropriate.

For an explanation of this result, see the comment to Section 5-407(c), which provides a detailed analysis in the context of a multi-manager LLC whose operating agreement is silent on the analogous question.

For a discussion of the apparent authority of a member to bind an LLC, see the comment to Section 5-301(b).

Subsection (b)(4) — This list is not exhaustive. Other approval rights appear in the context of the provisions to which the rights apply. *E.g.*, Section 5-401(c)(3) (providing that "[a]fter formation of a limited liability company, a person becomes a member . . . with the affirmative vote or consent of all the members"); Section 5-703(b)(1) requiring "the affirmative vote or consent of each member" to rescind dissolution); Sections 2-203, 2-303, 2-403, 2-503 (same with regard to Article 2 transactions).

Subsection (c) — Like Subsection (b), this subsection states default rules that, under Section 5-105, are subject to the operating agreement. For example, a limited liability company's operating agreement might state

"This company is manager-managed," Sections 5-102(a)(6) and 5-407(a), while providing that managers must submit specified ordinary matters for review by the members.

The actual authority of an LLC's manager or managers is a question of agency law and depends fundamentally on the contents of the operating agreement and any separate management contract between the LLC and its manager or managers. These agreements are the primary source of the manifestations of the LLC (as principal) from which a manager (as agent) will form the reasonable beliefs that delimit the scope of the manager's actual authority. Restatement (Third) of Agency § 3.01 (2006). *See also* Restatement (Second) of Agency §§ 15, 26 (1958).

Other information may be relevant as well, such as the course of dealing within the LLC, unless the operating agreement effectively precludes consideration of that information. *See* the comment to Section 5-105(a)(4) (stating that the operating agreement governs "the means and conditions for amending the operating agreement").

If the operating agreement and a management contract conflict, the reasonable manager will know that the operating agreement controls the extent of the manager's rightful authority to act for the LLC — despite any contract claims the manager might have. *See* the comment to Section 5-105(a)(2) (stating that the operating agreement governs "the rights and duties under this [Code] of a person in the capacity of manager"). *See also* Restatement (Third) of Agency § 8.13, cmt. b (2006) and Restatement (Second) of Agency § 432, cmt. b (1958) (stating that, when a principal's instructions to an agent contravene a contract between the principal and agent, the agent may have a breach of contract claim but has no right to act contrary to the principal's instructions).

If: (i) an LLC's operating agreement merely states that the LLC is manager-managed and does not further specify the managerial responsibilities; and (ii) the LLC has only one manager, the actual authority analysis is simple. In that situation, this subsection:

□• serves as "gap filler" to the operating agreement; and thereby

□• constitutes the LLC's manifestation to the manager as to the scope of the manager's authority; and thereby

□• delimits the manager's actual authority, subject to whatever subsequent manifestations the LLC may make to the manager (*e.g.*, by a vote of the members, or an amendment of the operating agreement).

If the operating agreement states only that the LLC is manager-managed and the LLC has more than one manager, the question of actual authority has an additional aspect. It is necessary to determine what actual authority any one manager has to act alone.

Paragraphs (c)(1)-(3), combine to provide the answer. A single manager of a multi-manager LLC:

□• has no actual authority to commit the LLC to any matter encompassed in Paragraph (c)(3) or for which the Code elsewhere requires unanimity;

□• has the actual authority to commit the LLC to usual and customary matters, unless the manager has reason to know that: (i) other managers might disagree; or (ii) for some other reason consultation with fellow managers is appropriate; and

□• has no actual authority to take unusual or non-customary actions that will have a substantial effect on the LLC.

The first point follows self-evidently from the language of Paragraph (c)(3) and other provisions requiring the affirmative vote or consent of the members, which reserves specified matters to the members. Given that language, no manager could reasonably believe to the contrary (unless the operating agreement provided otherwise).

The second point follows because:

> Subsection (c) serves as the gap-filler manifestation from the LLC to its managers and does *not* require managers of a multi-manager LLC to act *only* in concert or after consultation. To the contrary, subject to the operating agreement Subsection (c)(2) expressly provides that "each manager has equal rights in the management and conduct of the company's activities and affairs."

□• It would be impractical to require collective action on even the smallest of decisions.

☐• However, to the extent a manager has reason to know of a possible difference of opinion among the managers, Paragraph (c)(1) requires decision by "a majority of the managers."

The third point is a matter of common sense. The more serious the matter, the less likely it is that a manager has actual authority to act unilaterally. *Cf*. Restatement (Third) of Agency § 3.03, cmt. c (2006) (noting the unreasonableness of believing, without more facts, that an individual has "an unusual degree of unilateral authority over a matter fraught with enduring consequences for the institution" and stating that "[t]he gravity of the matter from the standpoint of the organization is relevant to whether a third party could reasonably believe that the manager has authority to proceed unilaterally").

The common law of agency will also determine the apparent authority of an LLC's manager or managers, and in that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular LLC will always be relevant. Restatement (Third) of Agency § 3.03, cmt. d (2006) ("The nature of an organization's business or activity is relevant to whether a third party could reasonably believe that a [manager] is authorized to commit the organization to a particular transaction.").

As a general matter, absent countervailing facts, courts may see the position of manager as clothing its occupants with the apparent authority to take actions that reasonably appear within the ordinary course of the company's business. The actual authority analysis stated above supports that proposition; absent a reason to believe to the contrary, a third party could reasonably believe that a manager possesses the authority contemplated by the gap-fillers of this act. But see the comment to Section 5-102(a)(5) (stating that "confusion around the term 'manager' is common to almost all LLC statutes").

Subsection (c)(1) — For limited liability companies that have more than one manager, this article provides that in most circumstances a "matter relating to the activities and affairs of the company is decided . . . by a majority of the managers." However, unlike corporate statutes, this article does not provide a rule for the quantum of participation necessary to constitute "a majority." *Cf., e.g.*, Minn. Stat. § 302A.237 (2014) (providing

rules for determining the votes need to constitute "an act of the board"). If a manager-managed LLC has more than one manager, the operating agreement should consider what "a majority" means in the event a manager position is vacant.

Subsection (c)(3) — This list is not exhaustive. *See* the comment to Subsection (b)(4).

Subsection (c)(4) — Under the default rule stated in this paragraph, dissolution of an entity that is a manager of an LLC does not end the entity's status as manager. Likewise, dissolution of entity that is a member does not cause the entity to dissociate. *See* Section 5-602(11) (providing that termination of such an entity causes dissociation).

An LLC does not cease to be "manager-managed" simply because no managers are in place. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Subsection (c)(6) — For example, the obligation to safeguard trade secrets and other confidential or propriety information learned when the person is a manager remains in force after the person ceases to be a manager.

Subsection (d) — In this context, the doctrine of *noscitur a sociis* limits the authorized extent of a proxy holder or other agent. (The doctrine of *noscitur a sociis* holds "that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." Black's Law Dictionary (9th ed. 2009).

In particular, unless the operating agreement so provides, neither a proxy nor other agent may be used to circumvent the transfer restrictions that are fundamental to the law of limited liability companies. *See* Article 5 and Restatement (Second) of Contracts § 318(2) (1981) (stating that "a promise requires performance by a particular person . . . to the extent that the obligee has a substantial interest in having that person perform or control the acts promised").

Subsection (e), second sentence — The default rules of this article do not contemplate a person wrongfully causing dissolution, as distinguished from wrongfully dissociating. *Compare* Section 5-701, *with* Section 5-601(b). However, the operating agreement might contemplate wrongful dissolution, and then the second sentence of this subsection would apply unless the operating agreement provided otherwise.

Subsection (h) — This provision traces back to the UPA (1914) § 18(f) and is included to avoid its absence being misinterpreted as implying a contrary rule.

This article does not provide for remuneration to a manager of a manager-managed LLC. That issue is for the operating agreement, or a separate agreement between the LLC and the manager. A manager may also have a common law right to compensation. Restatement (Third) Agency § 8.13, cmt. d ("Unless an agreement between a principal and an agent indicates otherwise, a principal has a duty to pay compensation to an agent for services that the agent provides.") (2006).

§ 30-25-408. Reimbursement — Indemnification — Advancement and insurance. — (a) A limited liability company shall reimburse a member of a member-managed company or the manager of a manager-managed company for any payment made by the member or manager in the course of the member's or manager's activities on behalf of the company, if the member or manager complied with sections 30-25-405, 30-25-407 and 30-25-409, Idaho Code, in making the payment.

(b) A limited liability company shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a member or manager, if the claim, demand, debt, obligation, or other liability does not arise from the person's breach of section 30-25-405, 30-25-407 or 30-25-409, Idaho Code.

(c) In the ordinary course of its activities and affairs, a limited liability company may advance reasonable expenses, including attorney's fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a member or manager, if the person promises to repay the company if the person ultimately is determined not to be entitled to be indemnified under subsection (b) of this section.

(d) A limited liability company may purchase and maintain insurance on behalf of a member or manager against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, under section 30-25-105(c)(7), Idaho Code, the operating agreement could not eliminate or limit the person's liability to the company for the conduct giving rise to the liability.

History.

I.C., § 30-25-408, as added by 2015, ch. 243, § 46, p. 758.

Official Comment

Subsections (a) and (b) — A limited liability company's obligation, if any, to reimburse or indemnify others (*e.g.*, employees, independent

contractors, other agents) is a question for other law, including the law of agency, contract and restitution. The fact a person has dissociated as a member or ceased to be a manager does not affect any obligations incurred by the limited liability company under these subsections for conduct occurring before the dissociation or cessation.

Subsection (a) — The reimbursement obligation stated here is a default rule and roughly parallels a rule of agency law. Restatement (Third) of Agency § 8.14(2)(a) (2006) (stating that "[a] principal has a duty to indemnify an agent . . . when the agent makes a payment (i) within the scope of the agent's actual authority, or (ii) that is beneficial to the principal, unless the agent acts officiously in making the payment").

This subsection applies only to managers of manager-managed limited liability companies and members of member-managed companies. The definite article in the phrase "the member or manager'" and "the member's" refers back to the original phrase: "A limited liability company shall reimburse a member of a member-managed company or the manager of a manger-managed company. . . ."

A limited liability company's obligation, if any, to reimburse others (including LLC employees and non-managing members of a manager-managed LLC) is a question for other law, including the law of agency and restitution. The fact a person has ceased to be a member of a member-managed LLC or a manager of a manager-managed LLC does not affect any obligations incurred by the LLC under this subsection for payments made before the cessation.

To the extent an operating agreement modifies or displaces the default rules stated in Sections 5-407 and 5-409, the agreement should also address this section. For example, if the operating agreement establishes a duty of ordinary care (modifying Section 5-409(c)), the agreement should specify which level of care is necessary to satisfy this subsection. It is not necessary that the levels of care be the same, only that the operating agreement make the situation clear and thereby avoid difficult issues of interpretation.

Subsection (b) — This subsection provides for indemnification but only as a default rule. Subject only to Section 5-105(c)(7), the operating agreement can relax these preconditions substantially. The agreement can also impose stricter preconditions.

The rule's eligibility requirements correspond to the default rules on management duties, which is appropriate because otherwise the statutory default rule on indemnification could undercut or even vitiate the statutory default rules on duty. To the extent an operating agreement modifies or displaces the default rules stated in Sections 5-405, 5-407, or 5-409, the agreement should also address this section. *See* the comment to Subsection (a).

Although referring broadly to any "person," this subsection is actually limited to present and former members or managers. The indemnification obligation applies only to a "debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a member or manager." Thus, by its terms this subsection does not apply to a person in the capacity of an "officer," unless being an officer constitutes being a manager. For a discussion of the vagaries of the term "manager," see the comment to Section 5-102(a)(5).

Of course, the operating agreement may mandate indemnification to officers, employees, and other persons providing services to or acting for the limited liability company. Within the limitations stated in Section 5-105(c)(7), the operating agreement may obligate an LLC to indemnify a person even when the person has breached a managerial duty or the operating agreement itself.

Subsection (c) — This subsection authorizes but does not require a limited liability company to provide advances to cover expenses. *Cf. Majkowski v. American Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 589 (Del. Ch. 2006) ("Because rights to indemnification and advancement differ in important ways, our courts have refused to recognize claims for advancement not granted in specific language clearly suggesting such rights."). The phrase "hold harmless" likewise does not encompass advances. *Id*. The authorization applies only to those persons eligible for indemnification under Subsection (b), but the operating agreement certainly can authorize a broader scope and also make advances obligatory.

The reference to "ordinary course" pertains to Section 5-407(b)(3) (stating that any "difference arising among members [in a member-managed LLC] as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members"). As for a manager-managed

LLC, see Section 5-407(c)(1) ("Except as expressly provided in this [act], *any* matter relating to the activities and affairs of the [manager-managed] company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers.") (emphasis added).

Subsection (d) — This subsection's language is very broad and authorizes an LLC to purchase insurance to cover, *e.g.*, a manager's intentional misconduct. It is unlikely that such insurance would be available. In contrast to Subsection (a), this subsection encompasses all members, not just members in a member-managed LLC. This authorization comes from this article, not the operating agreement, and therefore is not subject to Section 5-105(c)(7).

§ 30-25-409. Standards of conduct for members and managers. — (a) A member of a member-managed limited liability company owes to the company and, subject to section 30-25-801, Idaho Code, the other members the duties of loyalty and care stated in subsections (b) and (c) of this section.

(b) The fiduciary duty of loyalty of a member in a member-managed limited liability company includes the duties:

(1) To account to the company and to hold as trustee for it any property, profit, or benefit derived by the member:

(A) In the conduct or winding up of the company's activities and affairs;

(B) From a use by the member of the company's property; or

(C) From the appropriation of a company opportunity;

(2) To refrain from dealing with the company in the conduct or winding up of the company's activities and affairs as or on behalf of a person having an interest adverse to the company; and

(3) To refrain from competing with the company in the conduct of the company's activities and affairs before the dissolution of the company.

(c) The duty of care of a member of a member-managed limited liability company in the conduct or winding up of the company's activities and affairs is to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.

(d) A member shall discharge the duties and obligations under this chapter or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(e) A member does not violate a duty or obligation under this chapter or under the operating agreement solely because the member's conduct furthers the member's own interest.

(f) All the members of a member-managed limited liability company or a manager-managed limited liability company may authorize or ratify, after

full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

(g) It is a defense to a claim under subsection (b)(2) of this section and any comparable claim in equity or at common law that the transaction was fair to the limited liability company.

(h) If, as permitted by subsection (f) or (i)(6) of this section or the operating agreement, a member enters into a transaction with the limited liability company that otherwise would be prohibited by subsection (b)(2) of this section, the member's rights and obligations arising from the transaction are the same as those of a person that is not a member.

(i) In a manager-managed limited liability company, the following rules apply:

(1) Subsections (a), (b), (c) and (g) of this section apply to the manager or managers and not the members.

(2) The duty stated under subsection (b)(3) of this section continues until winding up is completed.

(3) Subsection (d) of this section applies to managers and members.

(4) Subsection (e) of this section applies only to members.

(5) The power to ratify under subsection (f) of this section applies only to the members.

(6) Subject to subsection (d) of this section, a member does not have any duty to the company or to any other member solely by reason of being a member.

History.

I.C., § 30-25-409, as added by 2015, ch. 243, § 46, p. 758.

CASE NOTES

Fiduciary Duties.

Whether a fiduciary has breached his duties of trust and loyalty is a question of fact. Bushi v. Sage Health Care, PLLC, 146 Idaho 764, 203 P.3d 694 (2009).

Cited Wadsworth & Reese, PLLC v. Siddoway & Co., PC, 165 Idaho 364, 445 P.3d 1090 (2019).

Official Comment

This section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the contractual obligation of good faith and fair dealing. The section follows the structure of many LLC acts, first stating the duties of members in a member-managed limited liability company and then using that statement and a "switching" mechanism, Subsection (i), to allocate duties in a manager-managed company. The duties stated in this section are subject to the operating agreement, but Section 5-105(c) and (d) contain important limitations on the power of the operating agreement to affect fiduciary and other duties and the obligation of good faith and fair dealing.

For the effect of dissociation on a person's duties under this section, see Section 5-603(a)(2).

Subsection (a) — This subsection recognizes two core managerial duties but, unlike some earlier uniform acts, does not purport to state all managerial duties. Indeed, many cases characterize a manager's duty to disclose as a fiduciary duty. *E.g., Salm v. Feldstein*, 20 A.D.3d 469, 470, 799 N.Y.S.2d 104, 105 (N.Y. App. Div. 2005) (stating that, "[a]s the managing member of the [limited liability] company and as a co-member with the plaintiff, the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts"); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Technologies Inc.*, 854 A.2d 121, 156 n. 78 (Del. Ch. 2004) (referring to "certain standards governing the disclosure-related duties of the fiduciaries of Delaware business entities;" noting that "[t]hese standards have been mostly articulated in the corporate context but the corporate standards often serve as the default rule in the alternative entity context").

Subsection (b) — This subsection states three core aspects of the fiduciary duty of loyalty: (i) not "usurping" company opportunities or otherwise wrongly benefiting from the company's operations or property; (ii) avoiding conflict of interests in dealing with the company (whether directly or on behalf of another); and (iii) refraining from competing with

the company. Essentially the same duties exist in agency law and under the law of all types of business organizations.

The subsection applies beginning with "the conduct of the company's activities and affairs," which by definition cannot exist before the company exists; thus the stated duties do not apply to pre-formation activities. In some circumstances, comparable duties might arise from other law, particular the law of agency. *See, e.g.*, Section 5-401(a) and (b) (stating that the organizer acts "on behalf of others").

The stated duties comprise a default rule. Under Section 5-105(d)(3)(A): "If not manifestly unreasonable, the operating agreement may . . . alter or eliminate the aspects of the duty of loyalty stated in Section 5-409(b)."

Subsection (b)(1) — The phrase "hold as trustee" dates back to UPA (1914) § 21 and reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the governing instrument and other sources of information. *Cf.* Section 8-506 ("A trustee . . . is not liable to the trust or to a beneficial owner for breach of any duty, *including a fiduciary duty*, to the extent the breach results from reasonable reliance on: (i) a term of the governing instrument; (ii) a record of the statutory trust; or (iii) an opinion, report, or statement of another person that the person to which the opinion, report, or statement is made or delivered reasonably believes is within the other person's professional or expert competence and is made or delivered to the trustee. . . .") (emphasis added).

Subsection (b)(1)(A) — This provision is consistent with a basic principle of agency law — namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. Restatement (Third) of Agency § 8.06, cmt. c (2006). Typically, however, the operating agreement will legitimize particular benefits — *e.g.*, a management fee paid to a managing member in addition to that member's share of distributions. Also, an agreed allocation of distributions takes those benefits outside the reach of this provision.

Subsection (b)(1)(B) — For the expansive meaning of "property," see Section 1-102(41). The term includes confidential information.

Subsection (b)(1)(C) — This article does not specify what constitutes "a company opportunity," but ample case law exists. *See, e.g., Ebenezer United Methodist Church v. Riverwalk Development Phase, II, LLC*, 45 A.3d 883, 887 (Md. App. 2012) (discussing the "interest or reasonable expectancy test"); *In re McCook Metals, L.L.C* ., 319 B.R. 570, 596 (Bkrtcy. N.D. Ill. 2005) (discussing the "line of business test").

This duty continues through winding up, although in that context the scope of company opportunities inevitably narrows.

In most, if not all, situations, usurping a company opportunity also breaches the duty not to compete. Paragraph (b)(3), but not *vice versa*.

Subsection (b)(2) — In this context, the phrase "adverse interest" is a term of art, meaning "to be on the other side of the table" in some dealing with the limited liability company. Absent informed consent by the LLC, this duty is breached by the mere existence of the conflict of interest; the LLC need not prove that the outcome of the dealing was adverse to the LLC. *But see* Subsection (g) (permitting the defense of fairness). This duty continues through winding up.

Subsection (b)(3) — Although competition is often thought of in terms of potential customers, this duty applies equally to competition for resources, including employees. The duty not to compete continues longer in a manager-managed LLC. *See* Subsection (i)(2).

Subsection (c) — ULLCA (2006) § 409(c) stated a different rule: "Subject to the business judgment rule, the duty of care of a member of a member-managed limited liability company in the conduct and winding up of the company's activities is to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company." As part of the Harmonization Project, the ULLCA duty of care was conformed to the duty of care stated in ULPA (2001) and UPA (1997).

Neither this article nor the two harmonized partnership acts refer to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable only in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission. *See*

ULPA (2001) (Last Amended 2013) § 409(c) and UPA (1997) (Last Amended 2013) § 409(c).

The change in label is consistent with the Restatement (Third) of Agency § 8.02 (2006), which refers to the agent's "fiduciary duty to act loyally", but eschews the word "fiduciary" when stating the agent's duties of "care, competence, and diligence." *Id*. § 8.08. However, the change in label is merely semantics; no change in the law is intended.

The operating agreement can raise the standard of care, or subject to Sections 5-105(c)(7) and (d)(3)(C), lower it. A person's practical exposure for breaching the duty of care involves not only the standard of care but also any operating agreement provision that: (i) exonerates the person from liability for breach of the duty of care, Section 5-105(c)(7); or (ii) entitles the person to indemnification despite such breach, comment to Section 5-408(b).

Subsection (d) — This subsection refers to the "*contractual* obligation of good faith and fair dealing" (emphasis added) and thereby invokes the implied obligation that exists in every contract. *See* Restatement (Second) Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). The adjective ("contractual") should help avoid decisions like *Phelps v. Frampton*, 2007 MT 263, 339 Mont. 330, 342-43, 170 P.3d 474, 483 (2007) (holding that Montana's version of UPA (1997) creates a statutory obligation of good faith and fair dealing separate from the implied contractual covenant).

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights — *i.e*., duties and rights "under this [Code]." However, for the most part those duties and rights apply to relationships *inter se* the members and the LLC and function only to the extent not displaced by the operating agreement. These statutory default rules are intended in essence to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.

The contractual obligation of "good faith" has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware's famous corporate law exoneration provision; and (ii) that provision's exception "for acts or omissions not in

good faith." Del. Code Ann. tit. 8, § 102(b)(7) (2012). In that context, good faith is an aspect of the duty of loyalty. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the "utmost good faith" sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other. *See, e.g., Meinhard v. Salmon*, 249 N.Y. 458, 477, 164 N.E. 545, 551 (1928) ("[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost good faith in all that relates to their common venture. Within its scope they stand in a fiduciary relationship."); *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 593, 328 N.E.2d 505, 515 (1975) ("[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the utmost good faith and loyalty." (footnotes omitted) (citations omitted) (internal quotations omitted).

To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a member from acting in the member's own self-interest:

> "Fair dealing" is not akin to the fair process component of entire fairness, *i.e.*, whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care. . . . It is rather a commitment to deal "fairly" in the sense of consistently with the terms of the parties' agreement and its purpose. Likewise "good faith" does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.

Gerber v. Enter. Products Holdings, LLC, 67 A.3d 400, 418-19 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)) (footnotes omitted) (citations omitted) (internal quotations omitted without ellipsis by *Gerber*). *See also* Subsection (e).

Courts should not use the contractual obligation to change *ex post facto* the parties' or this article's allocation of risk and power. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.

The operating agreement or this article may grant discretion to a member or manager, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a member or manager may properly exercise discretion even though another member suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur.

The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly-held purpose that legitimately comports with the parties' agreed-upon arrangements:

> An implied covenant claim . . . looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but *rather what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting*.

Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 418 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)) (emphasis added) (footnotes omitted) (citations omitted) (internal quotations omitted without ellipsis by *Gerber*).

In sum, the purpose of the contractual obligation of good faith and fair dealing is to protect the arrangement the members have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

As to the power of the operating agreement to affect the contractual obligation of good faith and fair dealing, see Section 5-105(c)(6)

(prohibiting elimination but allowing the agreement to "prescribe standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured"). For examples, see Section 5-105(c)(6), comment. As to whether the obligation stated in this subsection applies to transferees, see the comment to Section 5-107(b).

Subsection (e) — A member in a member-managed LLC has at least two different roles: (i) as a party to the operating agreement, with rights and obligations under that agreement; and (ii) as manager or co-manager of the enterprise. This provision pertains to the first role. A member's exercise of rights under the operating agreement is subject to the obligation of good faith and fair dealing, Subsection (d), but a person does not breach that contractual obligation "solely because the [person's exercise of rights] furthers the [person's] own interest." In contrast, this provision is ineffective with regard to a member's duties as manager or co-manager. For example, a member's liability under Section 5-409(b)(3) (prohibiting competition) is not "solely because the member's conduct furthers the member's own interest." Rather, the liability results from the breach of a specific obligation — *i.e.*, the codified aspect of the duty of loyalty that prohibits competition.

With regard to a manager-managed LLC: (i) the same analysis applies to a member that is a manager; and (ii) with regard to a non-managing member the analysis as to contractual rights applies and the analysis as to managerial duties is inapposite.

Subsection (f) — Here and elsewhere in this article, information "is material if there is a substantial likelihood that a reasonable [decision maker] would consider it important in deciding how to vote" or take other action under this Code or the operating agreements. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132 (1976).

The operating agreement can provide additional or different methods of authorization or ratification, subject to the strictures of Section 5-105(c)(5), (d)(1), and (d)(3)(A)(B) and (D).

Subsection (g) — This subsection codifies judge-made law applicable to all business entities. *See, e.g., Gottsacker v. Monnier*, 281 Wis. 2d 361, 379, 697 N.W.2d 436, 444 (Wisc. 2005) (referring to "a willful failure to deal fairly with the LLC or its other members"); *Lonergan v. EPE Holdings,*

LLC, 5 A.3d 1008, 1019 (Del. Ch. 2010) (discussing “entire fairness” in the context of a limited partnership); *Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994) (discussing “entire fairness” in the context of a corporation’s merger with an affiliate); *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1019 (Del. Ch. 2010) (discussing “entire fairness” in the context of a limited partnership).

Subsection (h) — This subsection is the modern, reformulated version of a language that sought to overturn the now-defunct notion that debts to owners were categorically inferior to debts to non-owner creditors. *See, e.g.*, ULPA (2001) § 112 (“A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner.”). The reformulation makes clear that this provision has nothing to do with the fiduciary duty pertaining to conflict of interests. *See BT-I v. Equitable Life Assurance Soc’y of the United States*, 75 Cal. App. 4th 1406, 1415, 89 Cal. Rptr. 2d 811 (1999) (examining the prior formulation, explaining its history and stating “[w]e cannot discern anything in the purpose of [the prior formulation] that suggests an intent to affect a general partner’s fiduciary duty to limited partners”).

This subsection states a default rule. The operating agreement may provide that debt to a member (or members generally) is subordinate to other limited liability company obligations. The agreement that creates the debt may do likewise.

Subsection (i) — This is the “switching” mechanism, referred to in the introduction to this comment. The list does not include Subsection (h).

Subsection (i)(1) — This provision switches most managerial duties to the managers and away from members. Of course, if a member is a manager, the duties apply to the member-manager in the person’s capacity of manager.

Subsection (i)(2) — On the assumption that the members of a manager-managed LLC are dependent on the manager, this paragraph extends the duty not to compete longer than in a member-managed LLC.

Subsection (i)(3) — The contractual obligation of good faith and fair dealing applies to members regardless of whether they are managers; non-

managing members have rights and perhaps duties under the operating agreement and under this article. As to non-member managers, the operating agreement (and the corresponding obligation of good faith and fair dealing) are relevant regardless of whether the manager is party to the agreement. *See* Section 5-105(a)(2) (stating that the operating agreement "governs . . . the rights and duties under this [Code] of a person in the capacity of manager"). Also, non-member managers will have rights and obligations under this article, which per Subsection (d) are also subject to the obligation of good faith and fair dealing.

Subsection (i)(4) — As explained in the comment to Subsection (e), that provision does not apply to the managerial function.

Subsection (i)(5) — The power to ratify belongs to the entity's owners; thus Subsection (f) does not switch from members to managers.

Subsection (i)(6) — This paragraph merely negates a claim of fiduciary duty that is exclusively status-based and does not immunize misconduct.

> EXAMPLE: Although a limited liability company is manager-managed, one member who is not a manager owns a controlling interest and effectively, albeit indirectly, controls the company's activities. A member owning a minority interest brings an action for dissolution under Section 5-701(a)(4)(C)(ii) (oppression by "the managers or those members in control of the company"). This paragraph does not prevent the court from construing the claim as alleging a breach of fiduciary duty by the controlling member.

§ 30-25-410. Rights to information of member, manager and person dissociated as member. — (a) In a member-managed limited liability company, the following rules apply:

(1) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, affairs, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or this act.

(2) The company shall furnish to each member:

(A) Without demand, any information concerning the company's activities, affairs, financial condition, and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this act, except to the extent the company can establish that it reasonably believes the member already knows the information; and

(B) On demand, any other information concerning the company's activities, affairs, financial condition, and other circumstances, except to the extent the demand for the information demanded is unreasonable or otherwise improper under the circumstances.

(3) The duty to furnish information under paragraph (2) of this subsection also applies to each member to the extent the member knows any of the information described in paragraph (2) of this subsection.

(b) In a manager-managed limited liability company, the following rules apply:

(1) The informational rights stated in subsection (a) of this section and the duty stated in subsection (a)(3) of this section apply to the managers and not the members.

(2) During regular business hours and at a reasonable location specified by the company, a member may inspect and copy information regarding

the activities, affairs, financial condition, and other circumstances of the company as is just and reasonable if:

(A) The member seeks the information for a purpose reasonably related to the member's interest as a member;

(B) The member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(C) The information sought is directly connected to the member's purpose.

(3) Not later than ten (10) days after receiving a demand pursuant to paragraph (2)(B) of this subsection, the company shall inform in a record the member that made the demand of:

(A) What information the company will provide in response to the demand and when and where the company will provide the information; and

(B) The company's reasons for declining, if the company declines to provide any demanded information.

(4) Whenever this act or an operating agreement provides for a member to vote on or give or withhold consent to a matter, before the vote is cast or consent is given or withheld, the company shall, without demand, provide the member with all information that is known to the company and is material to the member's decision.

(c) Subject to subsection (h) of this section, on ten (10) days' demand made in a record received by a limited liability company, a person dissociated as a member may have access to the information to which the person was entitled while a member if:

(1) The information pertains to the period during which the person was a member;

(2) The person seeks the information in good faith; and

(3) The person satisfies the requirements imposed on a member by subsection (b)(2) of this section.

(d) A limited liability company shall respond to a demand made pursuant to subsection (c) of this section in the manner provided in subsection (b)(3) of this section.

(e) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(f) A member or person dissociated as a member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under subsection (h) of this section applies both to the agent or legal representative and to the member or person dissociated as a member.

(g) Subject to section 30-25-504, Idaho Code, the rights under this section do not extend to a person as transferee.

(h) In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

History.

I.C., § 30-25-410, as added by 2015, ch. 243, § 46, p. 758.

STATUTORY NOTES

Meaning of “this act”. See heading in notes to § 30-21-101.

Official Comment

This section is derived from the Uniform Limited Partnership Act (2001) §§ 304 (rights to information of limited partners and former limited partners) and 407 (rights to information of general partners and former general partners). The rules stated here are what might be termed “quasi-

default rules" — subject to some change by the operating agreement. *See* Section 5-105(c)(8) (prohibiting unreasonable restrictions on the information rights stated in this section).

Although the rights and duties stated in this section are extensive, they are not necessarily all-inclusive. This article's statement of fiduciary duties is not exhaustive, *see* the comment to Section 5-409(a), and some cases characterize owners' information rights as reflecting a fiduciary duty of those with management power. *E.g., Bakerman v. Sidney Frank Importing Co., Inc.*, No. Civ.A. 1844-N, 2006 WL 3927242 at *14 (Del. Ch. Oct. 16, 2006) (holding that an LLC manager owed "certain duties to members of the LLC" and stating that "[w]hen fiduciaries communicate with their beneficiaries in the context of asking the beneficiary to make a discretionary decision — such as whether to consent to a sale of substantially all the assets of an LLC — the fiduciary has a duty to disclose all material facts bearing on the decision at issue") (citing *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 137 (Del. 1997)). Also, the rights stated in this section are in addition to whatever discovery rights a party has in a civil suit.

Subsection (a) — Paragraph 1 states the rule pertaining to information memorialized in "any record maintained by the company." Paragraph 2 applies to information not in such a record. Appropriately, Paragraph (2) sets a more demanding standard for those seeking such information.

Subsection (a)(2) and (3) — In appropriate circumstances, violation of either or both of these provisions might cause a court to enjoin or even rescind action taken by the LLC, especially when the violation has interfered with an approval or veto mechanism involving member consent. *E.g., Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 279-80 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that "[a]bsent such full disclosure, the transaction is voidable").

Subsection (a)(2) — This paragraph imposes a duty on the limited liability company, not the members who manage the LLC. However, a member could be liable in damages if the member were to: (i) breach a duty under Section 5-409 or the operating agreement; and (ii) in doing so cause or suffer the LLC to breach the duty stated in this paragraph.

Subsection (a)(2)(A) — For the meaning of "material" as applied to information, see the comment to Section 5-409(f).

Subsection (a)(3) — This paragraph imposes a duty directly on each member. Therefore, a member's violation of this paragraph is actionable in damages without need to show a violation of a duty stated in Section 5-409.

Subsection (b)(1) — This is a switching provision. The comments to Paragraph (a)(2) and (3) apply here by analogy.

Subsection (b)(2) — This paragraph refers to "information" rather than "records maintained by the company" so in some circumstances the company might have an obligation to memorialize information. *Compare* Subsection (b)(2), *with* Subsection (a). Such circumstances will likely be rare or at least unusual. This section generally concerns providing existing information, not creating it. In any event, a member does not trigger the company's obligation under this paragraph merely by satisfying Subparagraphs (A) through (C). The member must also satisfy the "just and reasonable" requirement.

Subsection (b)(4) — For the meaning of "material" as applied to information, see the comment to Section 5-409(f).

Subsection (c) — When a member dies, Section 5-504 provides information rights to the legal representative of the deceased member.

Subsection (c)(1) — A person dissociated as a member has information rights in that capacity only as to the period during which the person was a member. To the extent that further information is accessible under Section 5-504(2) (providing access to the legal representative of a deceased partner), that access is limited both in purpose ("for purposes of settling the estate") and in scope ("the rights the deceased partner had under Section 5-410").

Subsection (f) — Some old cases involved conflicts over whether a shareholder could exercise inspection rights through another person. *White v. Coeur D'Alene Big Creek Mining Co.*, 55 P.2d 720, 723 (Idaho 1936) (stating that "[t]he refusal to permit respondent [shareholder] to appoint his own attorney or agent to make the examination [of the corporation's books] was in effect a denial of his right" of inspection); *State v. Monida & Yellowstone Stage Co.*, 124 N.W. 971, 972 (Minn. 1910) (upholding a trial

court's mandamus order, "which shall provide that [the shareholder complainant], or such attorney or agent as he may select, . . . shall be allowed to inspect the books, records, and papers of the defendant [corporation]"). In light of that history, for the avoidance of doubt, this subsection expressly authorizes taking action through an agent. No negative inference should be drawn about using agents to take other action under this article.

Subsection (h) — This provision provides fallback protection for gaps in the operating agreement. For example, those managing an LLC may protect trade secrets from disclosure prohibit various misuses of confidential information even if the operating agreement omits to do so.

The reference to "ordinary course" pertains to Section 5-407(b)(3) (stating that any "difference arising among members [in a member-managed LLC] as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members"). As for a manager-managed LLC, see Section 5-407(c)(1) ("Except as expressly provided in this [act], *any* matter relating to the activities and affairs of the [manager-managed] company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers.") (emphasis added). This approach is necessary, lest a requesting member (or manager-member) have the power to block imposition of a reasonable restriction or condition needed to prevent the requestor from abusing the LLC.

The burden of persuasion under this subsection contrasts with the burden of persuasion under Section 5-105(c)(8) (prohibiting unreasonable limitations on the information rights provided by this section). Under that subsection, as a matter of ordinary procedural law the burden is on the person making the claim.

Part 5
Transferable Interests and Rights of Transferees and Creditors

« Title 30 •, « Ch. 25 », « Pt. 5 », • § 30-25-501 »

Idaho Code § 30-25-501

§ 30-25-501. Nature of transferable interest. — A transferable interest is personal property.

History.

I.C., § 30-25-501, as added by 2015, ch. 243, § 47, p. 758.

Official Comment

For the definition of transferable interest, see Section 5-102(a)(11). Absent a contrary provision in the operating agreement or the consent of the members, a "transferable interest" is the only interest in an LLC which can be transferred to a person who is not already a member. *See* Section 5-502. As to whether a member may transfer governance rights to a fellow member, the question is moot absent a provision in the operating agreement changing the default rule, see Section 5-407(b)(2), (allocating governance rights *per capita*). In the default mode, a member's transfer of governance rights to another member: (i) does not increase the transferee's governance rights; (ii) eliminates the transferor's governance rights; and (iii) thereby changes that denominator but not the numerator in calculating governance rights.

EXAMPLE: LCN Company, LLC is a member-managed limited liability company with three members, Laura, Charles, and Nora. The operating agreement does not displace this article's default rule on the allocation of governance rights among members. Thus, each member has 1/3 of those rights. Laura transfers her entire ownership interest to Charles. The transfer does not increase Charles's governance rights but does eliminate Laura's. After the transfer, Laura has no governance rights (regardless of whether Charles and Nora agree to expel Laura under Section 5-602(5)(B)). As a result, Charles and Nora each have ½ of the governance rights.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the rules stated in

those articles.

§ 30-25-502. Transfer of transferable interest. — (a) Subject to section 30-25-503(f), Idaho Code, a transfer, in whole or in part, of a transferable interest:

(1) Is permissible, except the transfer of a transferable interest in a professional entity is not permissible without compliance with section 30-21-901(i), Idaho Code;

(2) Does not by itself cause a member's dissociation or a dissolution and winding up of the limited liability company's activities and affairs; and

(3) Subject to section 30-25-504, Idaho Code, does not entitle the transferee to:

(A) Participate in the management or conduct of the company's activities and affairs; or

(B) Except as otherwise provided in subsection (c) of this section, have access to records or other information concerning the company's activities and affairs.

(b) A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(c) In a dissolution and winding up of a limited liability company, a transferee is entitled to an account of the company's transactions only from the date of dissolution.

(d) A transferable interest may be evidenced by a certificate of the interest issued by a limited liability company in a record, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(e) A limited liability company need not give effect to a transferee's rights under this section until the company knows or has notice of the transfer.

(f) A transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person having knowledge or notice of the restriction at the time of transfer.

(g) Except as otherwise provided in section 30-25-602(5)(B), Idaho Code, if a member transfers a transferable interest, the transferor retains the rights of a member other than the transferable interest transferred and retains all the duties and obligations of a member.

(h) If a member transfers a transferable interest to a person that becomes a member with respect to the transferred interest, the transferee is liable for the member's obligations under sections 30-25-403 and 30-25-406, Idaho Code, known to the transferee when the transferee becomes a member.

History.

I.C., § 30-25-502, as added by 2015, ch. 243, § 47, p. 758.

CASE NOTES

Decisions Under Prior Law

Authority of Manager.

Manager of LLC had apparent authority to bind LLC when he sold real estate lots, as this was part of the normal business or affairs of the company. Estate of E.A. Collins v. Geist, 143 Idaho 821, 153 P.3d 1167 (2007).

Official Comment

One of the most fundamental characteristics of LLC law is its fidelity to the "pick your partner" principle. *See, e.g., Bynum v. Frisby*, 73 Nev. 145, 149-50, 311 P.2d 972, 975 (1957) (stating that (i) "the assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners" and (ii) absent consent by the remaining partners "[t]he stranger remains a stranger" with no rights to management or even information).

This section is the core of this article's provisions reflecting and protecting that principle. A member's rights in a limited liability company are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the operating agreement otherwise provides, a member acting without the consent of all other members lacks both the power and the right to: (i) bestow

membership on a non-member, Section 5-401(d); or (ii) transfer to a non-member anything other than some or all of the member's transferable interest, Section 5-502(a)(3). The rights of a mere transferee are quite limited — *i.e.*, to receive distributions, Section 5-502(b), and, if the LLC dissolves and winds up, to receive specified information pertaining to the LLC from the date of dissolution. Section 5-502(c).

This section applies regardless of whether the transferor is a member, a transferee of a member, a transferee of a transferee, *etc*. See Section 5-102(a)(11) (defining "transferable interest" in terms of a right "initially owned by a person in the person's capacity as a member" regardless of "whether or not the person remains a member or continues to own any part of the right").

This section does not directly consider whether a member may transfer governance rights to another member without obtaining consent from all the other members. As noted above in the comments to Section 5-501, the question is moot under this article's default rule for allocating governance rights.

However, the question can be pivotal when the operating agreement displaces the default rule on governance rights but does not determine whether transfer restrictions (whether contractual, statutory, or both) apply to transfers of governance rights from one member to another. Case law is scant but suggests that this article does not protect members from control shifts that result from transfers among members (as distinguished from transfers to non-members who seek thereby to become members). *Blythe v. Bell*, No. 11 CVS 933. 2012 WL 7807800, at ¶ 6 (N.C. Dist. Dec. 10, 2012) (holding in a case of "first impression in North Carolina" that "in the absence of articles of incorporation or an operating agreement to the contrary . . . the assignment of control (i.e., governance) interests between members is effective without unanimous member consent;" *Achaian, Inc. v. Leemon Family L.L.C.*, 25 A.3d 800, 810 (Del. Ch. 2011) (Strine, Ch.) (holding that the terms of the LLC agreement did not preclude one member of a three-member LLC from transferring the member's entire interest (including governance rights) to a second member without first having the consent of the third member; stating that the third member's "argument relies on a very thinly sliced version of [the 'pick-your-partner principle', the strained version being] . . . that once one chooses his initial co-

members, one continues to hold a veto over how much additional voting power they may acquire;" explaining that "[t]he problem for [the third member] is that nothing in the LLC Agreement supports [that member's] reading of it that would require an already admitted Member, like [the acquirer — *i.e.*, the second member], to be become once, twice (or even three times) a Member each and every time that Member acquires an additional block of Interests").

Other law may affect the applicability of this section. *See* 11 U.S.C. § 541(c)(1) (providing that, initially at least, all property of a debtor becomes part of the bankruptcy estate regardless of restrictions on transfer); U.C.C. §§ 9-406, 9-408 (overriding specified restrictions on assignment in specified circumstances, regardless of whether state law or a contract imposes the restrictions).

In any event, this section does not apply to the transfer of ownership interests in a member that is an entity.

> EXAMPLE: ABC, LLC has three members: Ralph (an individual), Alice, Inc. ("Alice"), and Norton, LLC ("Norton"). Section 5-502 applies to any attempt by Ralph, Alice, or Norton to transfer their respective membership interest in ABC. Section 5-502 is inapplicable, however, to a change in control of Alice or Norton or even a complete change in their respective membership.

Subsection (a) — The definition of "transfer," Section 1-102(50), and this subsection's reference to "in whole or in part" combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones. Thus, for example, a charging order under Section 5-503 effects a transfer of part of the judgment debtor's transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a member's rights to distribution.

Subsection (a)(2) — The phrase "by itself" contemplates Section 5-602(5)(B), which creates a risk of dissociation via expulsion when a member transfers all of the member's transferable interest.

Subsection (a)(3) — Mere transferees have no right to participate in management or otherwise intrude as the members carry on the affairs of the

limited liability company and their activities as members.

Because Section 1-102(50)(G) defines "transfer" to include "a transfer by operation of law," this section affects the power of other law to effect transfers of a member's ownership interest. For example, a divorce court lacks the power to award a member's spouse anything beyond the member's transferable interest. Nor does the member have the power to enter into a property settlement purporting to effect any greater transfer.

For the divorce court, the best solution is to value the member's complete ownership interest (*i.e.*, the transferable interest as enhanced by the management and information rights and the standing to sue) and: (i) if possible, award the member's spouse marital property of equal value; or (ii) if not possible, award the member's spouse a money judgment and a charging order to enforce the judgment.

Granting the non-member any part of member's transferable interest is almost always imprudent; marital discord will almost inevitably carry over into the business relationship. Granting the member's ex-spouse the entire transferable interest is rarely a viable alternative. If the member is an active participant in the limited liability company, the approach is impossible. The member's transferable interest will typically constitute much or all of the member's remuneration for the partner's activity. Even if the member is essentially passive, granting the transferable interest to the ex-spouse puts him or her at great risk as a "bare naked assignee." *See* the comment to Section 5-107(b).

When a member dies, subject to the operating agreement other law may effect a transfer of the member's transferable interest to the member's estate or personal representative. However, for the reasons just stated, other law lacks the power to transfer anything more than a transferable interest. (Section (5-504) does provide extra information rights for the purposes of settling the estate of the deceased member.)

Subsection (a)(3)(B) — *See* Section 5-410(g) (providing that that section's information rights do not apply to transferees).

Subsection (b) — Amounts due under this subsection are of course subject to offset for any amount owed to the limited liability company by the member or person dissociated as a member on whose account the

distribution is made. Section 5-404(d). As to whether an LLC may properly offset for claims against a transferor that was never a member is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (c) — This very limited grant of information rights encompasses only transactions occurring at or after the date of the LLC's dissolution. The transferee has only the right to information as to the allocation of net assets among the LLC's creditors, members, and transferees — and only from the date of dissolution.

This subsection does not prevent a transferee from contracting with a member-transferor to require the member-transferor to disclose further information to the transferee. Whether such an agreement would breach the operating agreement, the implied contractual obligation of good faith and fair dealing, Section 5-409(d), or a fiduciary duty depends on the circumstances.

If a dissolved LLC rescinds its dissolution, Section 5-703, this subsection no longer applies.

Subsection (d) — The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform Commercial Code.

Subsection (f) — This provision originated as UPA (1997) § 503(e), was then consistent with UCC section 9-318(3), and is now consistent with UCC section 9-406(a) (stating that "an account debtor . . . may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee").

The term "notice" includes "reason to know," Section 5-103(b)(1), and ordinarily a potential transferee has reason to inquire about transfer restrictions that might be contained in the operating agreement.

Subsection (g) — Under this subsection, a member remains a member (with all attendant rights and obligations) even after permanently transferring the entirety of the transferable interest, unless: (i) the other members opt for expulsion under Section 5-602(5)(B); or (ii) as otherwise provided in the operating agreement.

§ 30-25-503. Charging order. — (a) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. Except as otherwise provided in subsection (f) of this section, a charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that otherwise would be paid to the judgment debtor.

(b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a) of this section, the court may:

(1) Appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

(2) Make all other orders necessary to give effect to the charging order.

(c) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. Except as otherwise provided in subsection (f) of this section, the purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a member, and is subject to section 30-25-502, Idaho Code.

(d) At any time before foreclosure under subsection (c) of this section, the member or transferee whose transferable interest is subject to a charging order under subsection (a) of this section may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(e) At any time before foreclosure under subsection (c) of this section, a limited liability company or one (1) or more members whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

(f) If a court orders foreclosure of a charging order lien against the sole member of a limited liability company:

(1) The court shall confirm the sale;

(2) The purchaser at the sale obtains the member's entire interest, not only the member's transferable interest;

(3) The purchaser thereby becomes a member; and

(4) The person whose interest was subject to the foreclosed charging order is dissociated as a member.

(g) This chapter does not deprive any member or transferee of the benefit of any exemption laws applicable to the transferable interest of the member or transferee.

(h) This section provides the exclusive remedy by which a person seeking in the capacity of judgment creditor to enforce a judgment against a member or transferee may satisfy the judgment from the judgment debtor's transferable interest.

History.

I.C., § 30-25-503, as added by 2015, ch. 243, § 47, p. 758.

Official Comment

The charging order concept dates back to the English Partnership Act of 1890 and in the United States has been a fundamental part of law of unincorporated business organizations since 1914. See UPA (1914) § 28. As much a remedy limitation as a remedy, the charging order is the sole method by which a person acting as judgment creditor of a member or transferee can extract value from the member's or transferee's ownership interest in a limited liability company. *See* the comment to Subsection (h).

Under this section, the judgment creditor of a member or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the member or transferee whose interest is subject to the order. However, the judgment creditor has no say in the timing or amount of those distributions. The charging order does not entitle

the judgment creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited liability company.

By its terms, this section does not apply to foreign limited liability companies. See Section 5-102(a)(4) (defining "[l]imited liability company" to mean "an entity *formed under this [article] or which becomes subject to this [act]* ") (emphasis added); *see also Fannie Mae v. Heather Apartments Ltd. P'ship*, A13-0562, 2013 WL 6223564, at *6 (Minn. Ct. App. Dec. 2, 2013) (considering the remedies available to a judgment creditor with respect to the judgment debtor's interest in a Cook Islands LLC; rejecting the debtor's argument that the creditor's "only remedy is to obtain a charging order under" [the Minnesota LLC statute]; explaining that "this argument fails because that statute only applies to Minnesota limited liability companies" which that statute "defines . . . as 'a limited liability company, other than a foreign limited liability company, *organized or governed by this chapter* '") (emphasis added) (statutory citations omitted).

The operating agreement has no power to alter the provisions of this section to the prejudice of third parties. Section 5-105(c)(15).

Subsection (a) — The phrase "judgment debtor" encompasses both members and transferees. The lien pertains only to a distribution, which excludes "amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program." Section 5-102(a)(3)(B). A judgment creditor that wishes to levy on such amounts should use the appropriate creditor's remedy, such as garnishment (which may be subject to exemptions or exclusions not relevant to a charging order). *Cf. PB Real Estate, Inc. v. Dem II Props.*, 719 A.2d 73, 76 (Conn. 1998) (rejecting the contention of an LLC's two member that "payments of $28,000 to each of them" should be treated "as expenses for wages" rather than as distributions).

Whether an application for a charging order must be served on the limited liability company, the judgment debtor, or both is a matter for other law, principally the law of remedies and civil procedure. The order itself must be served on the limited liability company. Whether the order must also be served on the judgment debtor is a matter for other law.

If a distribution consists of rights to acquire interests in a limited liability company, the charging order applies only to those rights within the definition of transferable interest. *See* Section 5-102(a)(11) (defining transferable interest).

Subsection (b) — Paragraph (2) refers to "other orders" rather than "additional orders." Therefore, given appropriate circumstances, a court may invoke Paragraph (1), Paragraph (2), or both.

Subsection (b)(1) — The receiver contemplated here is emphatically not a receiver for the limited liability company, but rather a receiver for the distributions subject to the charging order. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than "the extent necessary to effectuate the collections of distributions pursuant to a charging order." For a correctly narrow reading of this provision, see *Wells Fargo Bank, Nat. Ass'n v. Continuous Control Solutions, Inc.*, No. 11-1285, 2012 WL 3195759 (Iowa Ct. App. Aug. 8, 2012).

Subsection (b)(2) — This paragraph must be understood in the context of: (i) the very limited nature of the charging order; and (ii) the importance of preventing overreaching on behalf of a person that is not a judgment creditor of the LLC, has no claim on the LLC's assets, and has no right to interfere in the activities, affairs, and management of the LLC. In particular, the court's power to make "all other orders" is limited to "orders necessary to give effect to the charging order."

> EXAMPLE: A judgment creditor with a charging order believes that the limited liability company should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the limited liability company to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

> EXAMPLE: A judgment creditor with a judgment for $10,000 against a member obtains a charging order against the member's transferable interest. Having been properly served with the order, the limited liability company nonetheless fails to comply and makes a $3000 distribution to the member. The court has the power to order the limited liability company to pay $3000 to the judgment creditor to "give effect to the charging order."

Under Subsection (b)(2), the court has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order.

EXAMPLE: Member A of ABC, LLC has for some years received distributions form the LLC. However, when a judgment creditor of Member A obtains a charging order against Member A's transferable interest, the LLC ceases to make distributions to Member A and instead provides a salary to Member A equivalent to former distributions. A court might deem this salary a disguised distribution. (In any event, however, the salary will be subject to garnishment.)

This article has no specific rules for determining the fate or effect of a charging order when the limited liability company undergoes a merger, conversion, interest exchange, or domestication under [Article] 2. In the proper circumstances, such an organic change might trigger an order under Subsection (b)(2).

Subsection (c) — The phrase "that distributions under the charging order will not pay the judgment debt within a reasonable period of time" comes from case law. *See, e.g., Stewart v. Lanier Park Med. Office Bldg., Ltd.*, 578 S.E.2d 572, 574 (Ga. Ct. App. 2003) ("Judicial sale may be appropriate where . . . it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable amount of time."); *Nigri v. Lotz*, 453 S.E.2d 780, 783 (Ga. Ct. App. 1995).). A purchaser at a foreclosure sale obtains only the very limited rights of a transferee under Section 5-502 and is in some ways more vulnerable and less powerful than the holder of a charging order. After foreclosure and sale, Subsection (b) no longer applies. More generally, the court is no longer involved in the matter. For the vulnerability of a transferee, see Section 5-107(b), comment.

Subsection (d) — This provision allows the judgment debtor to end the charging order without need for a hearing.

Subsection (e) — Traditionally, charging order provisions referred to the possibility of "redeeming" an interest subject to a charging order. That usage was confusing, leaving several important questions unanswered. This article substitutes a far simpler approach, contemplating the limited partnership or its members buying the underlying judgment and thereby

dispensing with any interference the judgment creditor might seek to inflict on the partnership.

In many circumstances, buying the judgment is superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment; and (ii) the LLC or the other members might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor's consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the LLC.

Whether a member-managed LLC's decision to invoke this subsection is "ordinary course" or "outside the ordinary course," Section 5-407(b)(3) and (4)(A), depends on the circumstances. However, the involvement of this subsection does not by itself make the decision "outside the ordinary course." For a manager-managed LLC, the distinction is irrelevant. Section 5-407(c)(1).

Subsection (f) — The charging order remedy — and, more particularly, the exclusiveness of the remedy — protect the "pick your partner" principle. That principle is inapposite when a limited liability company has only one member. The exclusivity of the charging order remedy was never intended to protect a judgment debtor, but rather only to protect the interests of the judgment debtor's co-owners.

Put another way, the charging order remedy was never intended as an "asset protection" device for judgment debtors. *See Olmstead v. F.T.C.*, 44 So. 3d 76, 83 (Fla. 2010) (recognizing "the full scope of a judgment creditor's rights with respect to a judgment debtor's freely alienable membership interest in a single-member LLC"); *In re Albright*, 291 B.R. 538, 540 (Bankr. D. Colo. 2003) (holding that, "[b]ecause there are no other members in the LLC, . . . the Debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC"). Accordingly, when a charging order against an LLC's sole member is foreclosed, the member's entire ownership interest is sold and the buyer replaces the judgment debtor as the LLC's sole member.

This subsection was added during the Harmonization Project but not for the purposes of harmonization. The subsection addresses an issue that does not exist with partnerships; neither a general nor a limited partnership can continue perpetually in existence with only one partner. See Section 4-801(a)(5) (stating that dissolution is caused upon "the passage of 90 consecutive days during which the partnership has only one partner"); Section 3-801(6) (stating that dissolution is caused upon "the passage of 90 consecutive days during which the partnership does not have at least two partners").

Subsection (g) — This subsection preserves otherwise applicable exemptions but does not create any. *In re Foos*, 405 B.R. 604, 609 (Bankr. N.D. Ohio 2009) (interpreting the comparable provision in UPA (1997) and stating, "it is clear that [the provision] does not create an exemption").

Subsection (h) — This subsection does not override Uniform Commercial Code, Article 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a "reverse pierce" where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 312 (Conn. App. Ct. 2002) (approving a reverse pierce where a judgment debtor had established a limited liability company in a patent attempt to frustrate the judgment creditor), *overruled on other grounds by, Robinson v. Coughlin*, 830 A.2d 1114 (Conn. 2003). Likewise, this subsection does not supplant fraudulent transfer law.

§ 30-25-504. Power of legal representative of deceased member. — If a member dies, the deceased member's legal representative may exercise:

(1) The rights of a transferee provided in section 30-25-502(c), Idaho Code; and (2) For the purposes of settling the estate, the rights the deceased member had under section 30-25-410, Idaho Code.

History.

I.C., § 30-25-504, as added by 2015, ch. 243, § 47, p. 758.

Official Comment

The estate and those claiming through the estate are transferees, and as such they have very limited rights to information. This section provides temporary, additional information rights to the legal representative of the estate. Sections 5-410 and 5-502(c) pertain only to information rights.

Part 6
Dissociation

Idaho Code § 30-25-601

§ 30-25-601. Power to dissociate as member — Wrongful dissociation. — (a) A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under section 30-25-602(1), Idaho Code.

(b) A person's dissociation as a member is wrongful only if the dissociation: (1) Is in breach of an express provision of the operating agreement; or (2) Occurs before the completion of the winding up of the limited liability company and: (A) The person withdraws as a member by express will; (B) The person is expelled as a member by judicial order under section 30-25-602(6), Idaho Code; (C) The person is dissociated under section 30-25-602(8), Idaho Code; or (D) In the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated as a member because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to section 30-25-801, Idaho Code, to the other members for damages caused by the dissociation. The liability is in addition to any debt, obligation, or other liability of the member to the company or the other members.

History.

I.C., § 30-25-601, as added by 2015, ch. 243, § 48, p. 758.

Official Comment This article deals with the dissociation of a person as a member. Part 7 deals with the dissolution of a limited liability company.

Subsection (a) — The operating agreement can vary this provision, even to the extent of negating a member's power to dissociate. Doing so, however, is fundamentally at odds with the concept of a limited liability company as a creature of contract. *See* the comment to Section 5-105 (Role

and Inevitability of Operating Agreement). Only in exceptional circumstances does a party to a contract lack the power to breach, and courts will not enjoin a person to remain in an ongoing contractual relationship that involves trust and confidence. E. Allen Farnsworth, Contracts § 12.7, at 781 (3d ed.) ("A court will not grant specific performance of a contract to provide a service that is personal in nature. This refusal . . . is based [in part] of the undesirability of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken and the undesirability, in some instances, of imposing what might seem like involuntary servitude.") (footnote omitted). Moreover, eliminating or even substantially restricting a member's power to dissociate may have dreadful practical consequences.

Subsection (b) — This subsection list exhaustively ("only if") the dissociations that are "wrongful," but the list is a default rule. The operating agreement can expand the list; *e.g.*, by making wrongful a dissociation that beaches the implied contractual covenant of good faith and fair dealing. In theory, the operating agreement can provide for liquidated damages (subject to the requirements of contract law) and, in theory, can also contract or even eliminate the list of wrongful dissociations.

Subsection (b)(1) — The reference to "an express provision of the operating agreement" means that a person's dissociation as a member in breach of the obligation of good faith and fair dealing is not wrongful dissociation for the purposes of this section. The breach might be actionable on other grounds.

Subsection (b)(2)(C) — This subsection refers to Section 5-602(8), which involves *inter alia* dissociation on account of bankruptcy, which in turn is subject to bankruptcy law. *See, e.g.*, 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Subsection (c) — A person who prematurely dissociates as a member risks liability for any resulting damages. For example, the limited liability company might incur substantial expenses in replacing the member's expertise, reputation, or creditworthiness.

In effect, this subsection equates wrongful dissociation with breach of contract. Accordingly, courts should look to contract law to determine what consequential damages are recoverable. *See Hadley v. Baxendale*, 9 Exch.

341 (1854); Restatement (Second) of Contracts § 351 (1981); *see also Williams v. Hildebrand*, 247 S.W.2d 356, 358 (Ark. 1952) (interpreting UPA (1914) § 38(2)(a)(II), pertaining to wrongful dissolution, and stating that "the measure of damages, when the partnership was to have continued for a fixed term, is the profits that the injured partner would have received").

§ 30-25-602. Events causing dissociation. — A person is dissociated as a member when:

(1) The limited liability company knows or has notice of the person's express will to withdraw as a member, but, if the person has specified a withdrawal date later than the date the company had known or had notice, on that later date;

(2) An event stated in the operating agreement as causing the person's dissociation occurs;

(3) The person's entire interest is transferred in a foreclosure sale under section 30-25-503(f), Idaho Code;

(4) The person is expelled as a member pursuant to the operating agreement;

(5) The person is expelled as a member by the affirmative vote or consent of all the other members if:

(A) It is unlawful to carry on the limited liability company's activities and affairs with the person as a member;

(B) There has been a transfer of all the person's transferable interest in the company, other than:

(i) A transfer for security purposes; or

(ii) A charging order in effect under section 30-25-503, Idaho Code, that has not been foreclosed;

(C) The person is an entity and:

(i) The company notifies the person that it will be expelled as a member because the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, the person's charter or the equivalent has been revoked, or the person's right to conduct business has been suspended by the person's jurisdiction of formation; and

(ii) Not later than ninety (90) days after the notification, the statement of dissolution or the equivalent has not been withdrawn, rescinded, or revoked, the person has not been reinstated, or the person's charter or the equivalent or right to conduct business has not been reinstated; or

(D) The person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up;

(6) On application by the limited liability company or a member in a direct action under section 30-25-801, Idaho Code, the person is expelled as a member by judicial order because the person:

(A) Has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the company's activities and affairs;

(B) Has committed willfully or persistently, or is committing willfully or persistently, a material breach of the operating agreement or a duty or obligation under section 30-25-409, Idaho Code; or

(C) Has engaged or is engaging in conduct relating to the company's activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with the person as a member;

(7) In the case of an individual:

(A) The individual dies; or

(B) In a member-managed limited liability company:

(i) A guardian or general conservator for the individual is appointed; or

(ii) A court orders that the individual has otherwise become incapable of performing the individual's duties as a member under this chapter or the operating agreement;

(8) In a member-managed limited liability company, the person:

(A) Becomes a debtor in bankruptcy;

(B) Executes an assignment for the benefit of creditors; or

(C) Seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all the person's property;

(9) In the case of a person that is a testamentary or inter vivos trust or is acting as a member by virtue of being a trustee of such a trust, the trust's entire transferable interest in the limited liability company is distributed;

(10) In the case of a person who is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate's entire transferable interest in the limited liability company is distributed;

(11) In the case of a person that is not an individual, the existence of the person terminates;

(12) The limited liability company participates in a merger under chapter 22, title 30, Idaho Code, and:

(A) The company is not the surviving entity; or

(B) Otherwise as a result of the merger, the person ceases to be a member;

(13) The limited liability company participates in an interest exchange under chapter 22, title 30, Idaho Code, and, as a result of the interest exchange, the person ceases to be a member;

(14) The limited liability company participates in a conversion under chapter 22, title 30, Idaho Code;

(15) The limited liability company participates in a domestication under chapter 22, title 30, Idaho Code, and, as a result of the domestication, the person ceases to be a member;

(16) The limited liability company dissolves and completes winding up; or

(17) In the case of a professional entity, restrictions or limitations are placed upon a member's ability to continue to render professional services.

History.

I.C., § 30-25-602, as added by 2015, ch. 243, § 48, p. 758.

Official Comment

This section mostly states default rules, which the operating agreement may vary. However, it would make no sense to vary some of the rules —

e.g., to provide that the death of a member who is an individual does not cause the individual's dissociation as a member, Paragraph (7)(A), or that an entity remains a member even *after* the existence of the person has terminated. Paragraph (11).

Paragraph (1) — Operating agreements often require notice of dissociation to be in writing and to specify the effective date of the dissociation.

Paragraph (3) — The cited section pertains to a charging order against the transferable interest of the sole member of a limited liability company.

Paragraph (4) — Many operating agreements provide for "no cause" expulsion, and courts considering such provisions will likely look to cases addressing the issue in the context of partnerships. In that context, courts have taken somewhat different approaches. *Compare Gelder Med. Grp. v. Webber*, 363 N.E.2d 573, 576 (N.Y. 1977), *with Winston & Strawn v. Nosal*, 664 N.E.2d 239, 245 (Ill. App. Ct. 1996). See also the comment to Section 5-409(d) (stating and explaining the implied contractual covenant of good faith and fair dealing).

Paragraph (5)(B) — This paragraph permits expulsion when a member no longer has any "skin in the game." Under this paragraph (unless the operating agreement provides otherwise), a member's transferee can protect itself from the vulnerability of "bare naked assignee" status, see comment to Section 5-107(b), by obligating the member/transferor to retain a one-percent interest and exercise the member's governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

Paragraph (6) — The reference to "a direct action under Section 5-801(b)" reflects the "separate entity" nature of a limited liability company. Section 5-801(b) limits a member's standing to bring a direct action to circumstances in which the member can "plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company." For example, a member might invoke Paragraph (6)(B) if another member's breach of the operating agreement harmed the first member directly. If a member has suffered only indirect harm, the Paragraph (6)(B) claim belongs to the LLC and not the member. If the LLC fails to bring suit, the member may assert the claim derivatively. *See* Sections 5-802 through 5-806.

Although the operating agreement can revise or eliminate the possibility of judicial expulsion, doing so requires careful planning. *Cf. Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898, at *1, n.2 (Del. Ch. Dec. 9, 2013) (stating that "the right to judicial dissolution is a default right which the parties may eschew by contract" while reserving the question of "[w]hether the parties may, by contract, divest this Court of its authority to order a dissolution in all circumstances, even where it appears manifest that equity so requires — leaving, for instance, irreconcilable members locked away together forever like some alternative entity version of Sartre's Huis Clos").

For examples of conduct warranting an expulsion order, see *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (discussing a pattern of conduct); *Sherwood Park Bus. Ctr., L.L.C. v. Taggart*, 323 P.3d 551, 561 (Or. Ct. App. 2014) (upholding expulsion of a member who "had stolen a large amount of money from [the limited liability company], had intentionally failed to provide financial information, and had made himself unavailable to carry on the business"); *CCD, L.C. v. Millsap*, 116 P.3d 366, 373 (Utah 2005) (holding that a member's "misappropriate[ion of] trust account funds totaling at least $11,540.06 for his personal use" warranted expulsion, where the member's "misconduct continued the pattern of behavior that [had previously] resulted in losses to the company of $625,000[, where the new misconduct] . . . took place after [the member's] prior wrongdoing had been discovered and after [the limited liability company] had assented to permit [the member] to atone for his misdeeds by fulfilling the terms of the amended operating agreement").

For an analysis that helps distinguish Paragraph (6)(C) from Paragraphs (6)(A) and (B), see *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510, at *15 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (interpreting predecessor law and noting that the "not reasonably practicable standard" does not require a showing of wrongful conduct). *Cf. Dunnagan v. Watson*, 204 S.W.3d 30, 40 (Tex. Ct. App. 2006) (same issue in the context of dissolution). Where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. *Robertson v. Jacobs Cattle Co.*, 830 N.W.2d 191, 201-02 (Neb. 2013) (discussing analogous provisions of UPA (1997)). "[T]here is no textual

basis for imposing a higher burden of proof for dissociation than dissolution." *Brennan v. Brennan Assocs*., 977 A.2d 107, 121 (Conn. 2009) (general partnership).

Paragraph (6)(C) — This provision has an analog among the causes for dissolution. *See* Section 5-701(a)(4)(B).

Paragraph (7)(B) — This provision does not apply to a manager-managed limited liability company because, given the limited rights of non-manager members, the stated occurrences do not necessarily justify dissociation. For a parallel provision approach with respect to limited partnerships, see Sections 4-601(b)(6) and 4-603(6)(B) and (C) (general partner). As for the effect of the stated occurrences on a person's role as a manager, see Section 5-407(c)(4) (permitting the removal of a manager "at any time by the affirmative vote or consent of a majority of the members without notice or cause").

Paragraph 8(A) — This provision is subject to bankruptcy law. *See, e.g*., 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Paragraphs (9) and (10) — A change in trustee or personal representation does not cause dissociation.

Paragraph (11) — This provision is the entity analog to Paragraph (7)(A) (death of an individual). Although in theory the operating agreement could change this rule, doing so would be nonsensical. See the comment to Section 5-703(a) (noting that a terminated limited liability company cannot rescind its dissolution because "a 'dead' entity lacks both the capacity and power to bring itself back from the dead").

Paragraph (12)(A) — If a limited liability company disappears as part of a merger, no person can continue as a member of the company. When the merger takes effect, the members of the disappearing company are perforce dissociated. Depending on the plan of merger, those persons may become members of a surviving limited liability company. In those circumstances, the merger will have dissociated them from one LLC and admitted them into membership in the surviving LLC. See Sections 5-401(c)(2), 2-206(c)(10).

Paragraph (12)(B) — It is possible for a plan of merger to "shuffle the equity" of the surviving entity, even to the extent of "taking out" some or all of the owners of the surviving entity. A reverse triangular merger involving a limited liability company as the surviving entity would dissociate all the members of the LLC.

Paragraph (14) — By definition, a limited liability company that converts ceases to be a limited liability company. *See* Section 2-406. Thus, when the plan of conversion takes effect, all the members of the converted entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will "shuffle the equity" and "take out" some of the members of the converting LLC.

Paragraph (15) — Domestication does not by itself dissociate a member, because the domesticated entity remains both a limited liability company and "the same entity without interruption as the domesticating company." Section 2-506(a)(1)(B). However, an "equity shuffle" could dissociate a member.

§ 30-25-603. Effect of dissociation. — (a) If a person is dissociated as a member:

(1) The person's right to participate as a member in the management and conduct of the limited liability company's activities and affairs terminates; (2) The person's duties and obligations under section 30-25-409, Idaho Code, as a member end with regard to matters arising and events occurring after the person's dissociation; and (3) Subject to section 30-25-504, Idaho Code, and chapter 22, title 30, Idaho Code, any transferable interest owned by the person in the person's capacity as a member immediately before dissociation is owned by the person solely as a transferee.

(b) A person's dissociation as a member does not of itself discharge the person from any debt, obligation, or other liability to the limited liability company or the other members which the person incurred while a member.

History.

I.C., § 30-25-603, as added by 2015, ch. 243, § 48, p. 758.

Official Comment Subsection (a) — This provision makes no reference to power-to-bind matters, because this article provides that a member *qua* member has no power to bind the LLC. Section 5-301.

Subsection (a)(2) — This provision establishes a dividing line, separating matters going forward from "matters arising and events occurring after the person's dissociation." If the limited liability company has continuing projects with clients, ongoing relationships with clients, or both, the dividing line requires special attention with regard to non-competition and partnership opportunities duties. See Section 5-409(b)(1), (3).

Disputes involving law firms have generated much of the relevant case law. *See, e.g., Jewel v. Boxer*, 156 Cal. App. 3d 171, 175 (Cal. Ct. App. 1984); *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1257 (Mass. 1989). To a large extent, a well-drawn operating agreement can delineate the parties' respective rights and responsibilities and thereby avoid problems. However,

if the company becomes insolvent, the bankruptcy court may well scrutinize the members' inter se arrangements. See *Geron v. Robinson & Cole L.L.P.*, 476 B.R. 732, 743 (S.D.N.Y. 2012) (considering whether a law firm had "fraudulently transferred . . . assets when its partners adopted the Jewel Waiver [releasing rights recognized by *Jewel v. Boxer*] on the eve of dissolution without consideration").

This provision applies regardless of whether the limited liability company is member-managed or manager-managed. However, in the latter case, the pre-dissociation duties will be much narrower, because in a manager-managed LLC a member *qua* member has no management duties. Section 5-409(i)(1). But each member remains subject to the obligation of good faith and fair dealing. Section 5-409(i)(3).

This provision does not determine the effect of a person's dissociation as a member on the person's future obligations or rights under the operating agreement. Some contractual obligations typically extend beyond dissociation — *e.g.*, non-competition provisions, buyout arrangements. To the extent provisions of the operating agreement continue to apply, the common law obligation of good faith continues to apply as well. See the comment to Section 5-409(d) (explaining that the subsection "invokes the implied obligation that exists in every contract" as a matter of common law).

Subsection (a)(3) — This paragraph accords with Section 5-404(b) — dissociation does not result in a distribution. In general, when a person dissociates as a member, the person's rights as a member disappear and the person's status degrades to that of a mere transferee — even when the dissociation takes the form of expulsion. *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510, at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2012).

Like most *inter se* rules in this article, this one is subject to the operating agreement. For example, the operating agreement has the power to provide for the buyout of a person's transferable interest in connection with the person's dissociation.

Section 5-504 provides additional information rights when an individual's death has caused dissociation. Article 2 covers organic transactions such as mergers and conversions.

Subsection (b) — In a member-managed limited liability company, a member's obligation to safeguard trade secrets and other confidential or proprietary information is incurred when the member learns or otherwise obtains the information. This subsection preserves the obligation post-dissociation. (In a manager-managed LLC, any obligations of a non-manager member viz-a-viz proprietary information would be a matter for the operating agreement, the obligation of good faith and fair dealing, or other law.)

Part 7
Dissolution and Winding Up

§ 30-25-701. Events causing dissolution. — (a) A limited liability company is dissolved, and its activities and affairs must be wound up, upon the occurrence of any of the following:

(1) An event or circumstance that the operating agreement states causes dissolution; (2) The affirmative vote or consent of all the members; (3) The passage of ninety (90) consecutive days during which the company has no members unless before the end of the period: (A) Consent to admit at least one (1) specified person as a member is given by transferees owning the rights to receive a majority of distributions as transferees at the time the consent is to be effective; and (B) At least one (1) person becomes a member in accordance with the consent; (4) On application by a member, the entry by the district court of an order dissolving the company on the grounds that: (A) The conduct of all or substantially all the company's activities and affairs is unlawful; or (B) It is not reasonably practicable to carry on the company's activities and affairs in conformity with the certificate of organization and the operating agreement; or (C) The managers or those members in control of the company: (i) Have acted, are acting, or will act in a manner that is illegal or fraudulent; or (ii) Have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant; or (5) The signing and filing of a statement of administrative dissolution by the secretary of state under section 30-25-708 [30-21-602], Idaho Code.

(b) In a proceeding brought under subsection (a)(4)(B) of this section, the court may order a remedy other than dissolution.

History.

I.C., § 30-25-701, as added by 2015, ch. 243, § 49, p. 758; am. 2017, ch. 100, § 1, p. 248.

STATUTORY NOTES

Amendments.

The 2017 amendment, by ch. 100, deleted former paragraphs (4)(B)(i) and (4)(B)(ii), which read: "(i) Have acted, are acting, or will act in a manner that is illegal or fraudulent; or (ii) Have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant."

Compiler's Notes.

The bracketed insertion near the end of paragraph (a)(5) was added by the compiler to correct the statutory references and to conform to the uniform act. See *http://www.uniformlaws.org/shared/docs/business%20organizations%20code/UBOCFinal20152015aug19.pdf*.

Official Comment

"Dissolution" has been a term of art in the law of unincorporated business organizations since at least the time of Roman law. Joseph Story, Commentaries on the Law of Partnership § 266, at 408 (2d ed. 1850) ("The Roman law . . . declared, that partnership might be dissolved in various ways. . . ."). Dissolution does not end a limited liability company's existence but rather changes the purpose of that existence: "A dissolved limited liability company shall wind up its activities and affairs and . . . the company continues after dissolution only for the purpose of winding up." Section 5-702(a). The company may, but need not, file a statement of dissolution. Section 5-702(b)(2)(A). The limited liability company terminates when winding up is complete. The company may, but need not, file a statement of termination. Section 5-702(b)(2)(F).

Except for Paragraphs (a)(4) and (5), this section comprises default rules. Paragraph 5 is fully mandatory, Section 5-105(c)(3)(B); Paragraph 4 is mandatory only with regard to the stated grounds for dissolution. See the comment to Section 5-105(c)(9). Moreover, an operating agreement can provide additional causes of dissolution. *See* Subsection (a)(1). Variations to the statutory causes of dissolution are commonplace.

Section 5-703 permits rescission of dissolution in some circumstances. In some circumstances, an amendment to the operating agreement might avert

dissolution (*e.g.*, by revising an agreed-upon deadline for selling the LLC's assets and winding up the business). A retroactive amendment may also be possible. *See Kindred Ltd. P'ship v. Screen Actors Guild, Inc.*, CV082220PSGPJWX, 2009 WL 279080, at *5-6 (C.D. Cal. Feb. 3, 2009) (giving effect to an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997) § 802(b) permitted a partnership to rescind dissolution).

Subsection (a)(4) — The operating agreement cannot vary the causes of dissolution stated in this provision. However, the operating agreement may contain a forum selection clause or change the forum from "the appropriate court" to binding arbitration. Comment to Section 5-105(c)(9).

As to whether the court of another jurisdiction can properly order dissolution of a limited liability company formed under this article, the majority rule is clearly no. "[T]he courts of several states have held that jurisdiction to dissolve a corporation rests only in the courts of the state of incorporation." *In re Blixseth*, 484 B.R. 360, 370 (B.A.P. 9th Cir. 2012) (citing cases, including a case involving an LLC). *But see In re Mercantile Guar. Co.*, 238 Cal. App. 2d 426, 430-33 (Cal. Ct. App. 1965) (explaining that "[w]e are . . . required to determine whether the courts of a state in which a foreign corporation has done business and in which its assets are there located have jurisdiction to wind up its affairs, even though the corporation was organized in another state," stating that "the question is not one of jurisdiction or power in the court of the state which is not the legal domicile of a foreign corporation, but it is a question . . . of the balance of convenience, of whether considerations of public policy, efficiency, expedience and justice to all parties interested demand that jurisdiction be retained in the foreign court, or that it be declined under the rule of forum *non conveniens* ," and holding that "[t]he circumstances of the case at bench require a holding that the California courts assume jurisdiction of the winding up of [a Delaware corporation's] affairs preparatory to a dissolution").

Subsection (a)(4)(B) — The standard stated here is conventional, deriving originally from the law of limited partnerships. *See, e.g., Kirksey v. Grohmann*, 754 N.W.2d 825, 828-30 (S.D 2008) (discussing cases and noting that "cases interpreting language similar to our statutory terminology, whether involving a partnership or a limited liability company,

are instructive”). For discussion of the meaning of the standard, see *Venture Sales, L.L.C. v. Perkins*, 86 So. 3d 910, 914-15 (Miss. 2012) (discussing cases); *In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 129-30 (N.Y. 2010) (same).

The court-ordered expulsion of a miscreant member can negate a claim for dissolution. *Dunbar Grp., LLC v. Tignor*, 267 Va. 361, 367-68, 593 S.E.2d 216, 219 (2004) (“Although Tignor’s actions in [the] capacities [of member and manager of Xpert] had created numerous problems in the operation of Xpert, his expulsion as a member changed his role from one of an active participant in the management of Xpert to the more passive role of an investor in the company. The record fails to show that after this change in the daily management of Xpert, it would not be reasonably practicable for Xpert to carry on its business pursuant to its operating authority.”).

However, where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. *Robertson v. Jacobs Cattle Co*., 830 N.W.2d 191 201-02 (Neb. 2013). “[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution.” *Brennan v. Brennan Assocs*., 977 A.2d 107, 121 (Conn. 2009) (general partnership).

This provision has an analog among the grounds for dissociation. *See* Section 5-602(6)(c).

Subsection (a)(4)(C) — The provision’s reference to “those members in control of the company” implies that such members have a duty to avoid acting oppressively toward fellow members.

The article does not define “oppressively,” but “oppression” is a concept well-grounded in the law of close corporations. *See, e.g., Kiriakides v. Atlas Food Sys. & Servs., Inc*., 541 S.E.2d 257, 264-66 (S.C. 2001); Robert B. Thompson, *The Shareholder’s Cause of Action for Oppression*, 48 Bus. Law. 69, 70 (1993) (referring to then “evolving cause of action of shareholder oppression”). In many jurisdictions the concept equates to or at least includes the frustration of the plaintiff’s reasonable expectations. *Baur v. Baur Farms, Inc*., 832 N.W.2d 663, 670 (Iowa 2013) (stating that “perhaps the most widely adopted [approach] links oppression to the frustration of the reasonable expectations of the corporation’s shareholders”). (This concept of reasonable expectations is entirely separate

from the "fruits of the bargain" and "reasonable expectations" language sometimes used in explaining the implied contractual obligation of good faith and fair dealing.) Courts have extrapolated close corporation doctrine to unincorporated organizations. *See, e.g., Alloy v. Wills Family Trust*, 944 A.2d 1234, 1262-64 (Md. Ct. Spec. App. 2008) (discussing cases). Indeed many cases simply conflate the two contexts. *E.g. Kohannim v. Katoli*, 08-11-00155-CV, 2013 WL 3943078, at *9 (Tex. Ct. App. July 24, 2013) ("A member oppression claim may exist when: (i) a majority shareholder's conduct substantially defeats the minority's expectations that objectively viewed, were both reasonable under the circumstances and central to the minority shareholder's decision to join the venture; or (ii) burdensome, harsh, or wrongful conduct, a lack of probity and fair dealing in the company's affairs to the prejudice of some members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."); *Pinnacle Data Servs., Inc. v. Gillen*, 104 S.W.3d 188, 196 (Tex. Ct. App. 2003) (explaining oppression of "members" in terms of shareholder oppression).

However, applying close corporation law to limited liability companies requires some caution. Close corporation law developed in part because the standard corporate governance structure exalts majority power and does not presuppose contractual relationships among the shareholders.

In contrast, while an LLC depends on the sovereign for legal existence and the all-important liability shield, LLC governance is fundamentally contractual. Therefore, in most situations, the operating agreement should reflect and comprise members' reasonable expectations. As a result, a court considering a claim of oppression by an LLC member should consider, with regard to each reasonable expectation invoked by the plaintiff, whether the expectation: (i) contradicts any term of the operating agreement or any reasonable implication of any term of that agreement; (ii) was central to the plaintiff's decision to become a member of the limited liability company or for a substantial time has been centrally important in the member's continuing membership; (iii) was known to other members, who expressly or impliedly acquiesced in it; (iv) is consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff's conduct; and (v) is otherwise reasonable under the circumstances.

See the comments to Section 5-102(a)(9) ("[T]he definition [of 'operating agreement'] puts no limits on the form of the operating agreement. To the contrary, the definition contains the phrase 'whether oral, implied, in a record, or in any combination thereof'", and Section 5-105(a)(4) (explaining how a written operating agreement, if properly drafted, can provide that amendments must be in writing and signed to be effective).

> EXAMPLE: From its formation, Work-Here, LLC has had three members, been member-managed, involved all three members in company operations, and allocated distributions in part in reference to the members' work for the company. The operating agreement is brief, informal, contains no integration clause, and makes no reference to a member's right to work for the company.
>
> After ten years, two of the members: (i) take a vote; (ii) purport to oust the third member from any continuing role in company operations; and (iii) announce that the third member's distributions will be substantially reduced.
>
> The ousted member has at least three theories of recovery: • breach of an implied-in-fact term of the operating agreement, under which each member is entitled to work for the company and be compensated for the work; • violation of Section 5-407(b)(4)(A) (requiring "[t]he affirmative vote or consent of all the members . . . to . . . undertake an act outside the ordinary course of the activities and affairs of the company"); and • oppression under Section 5-701(4)(C)(ii).

On the limited facts stated, these theories are undoubtedly plausible, although of course not necessarily persuasive. See Section 5-409(d) (incorporating "the contractual obligation of good faith and fair dealing").

Subsection (a)(5) — The operating agreement may not vary this provision.

Subsection (b) — In the close corporation context, many courts have reached this position without express statutory authority, most often with regard to court-ordered buyouts of oppressed shareholders. *See, e.g., Kirtz v. Grossman*, 463 S.W.2d 541, 545 (Mo. Ct. App. 1971) (per curiam); *Brenner v. Berkowitz*, 634 A.2d 1019, 1031 (N.J. 1993); *N.D. ex rel. Heitkamp v. Family Life Servs.*, 616 N.W.2d 826, 838 (N.D. 2000); *Baker v. Commercial*

Body Builders, Inc., 507 P.2d 387, 394-96 (Or. 1973); *Davis v. Sheerin*, 754 S.W.2d 375, 380 (Tex. Ct. App. 1988). *Contra White v. Perkins*, 189 S.E.2d 315, 320 (Va. 1972).

This subsection saves courts and litigants the trouble of re-inventing that wheel in the LLC context. However, unlike Subsection (a)(4), Subsection (b) can be overridden by the operating agreement. Thus, the members may agree to restrict or eliminate a court's power to craft a lesser remedy, even to the extent of confining the court (and themselves) to the all-or-nothing remedy of dissolution.

§ 30-25-702. Winding up. — (a) A dissolved limited liability company shall wind up its activities and affairs and, except as otherwise provided in section 30-25-703, Idaho Code, the company continues after dissolution only for the purpose of winding up.

(b) In winding up its activities and affairs, a limited liability company:

(1) Shall discharge the company's debts, obligations, and other liabilities, settle and close the company's activities and affairs, and marshal and distribute the assets of the company; and

(2) May:

(A) Deliver to the secretary of state for filing a statement of dissolution stating the name of the company and that the company is dissolved;

(B) Preserve the company activities, affairs, and property as a going concern for a reasonable time;

(C) Prosecute and defend actions and proceedings, whether civil, criminal, or administrative;

(D) Transfer the company's property;

(E) Settle disputes by mediation or arbitration;

(F) Deliver to the secretary of state for filing a statement of termination stating the name of the company and that the company is terminated; and

(G) Perform other acts necessary or appropriate to the winding up.

(c) If a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities and affairs of the company. If the person does so, the person has the powers of a sole manager under section 30-25-407(c), Idaho Code, and is deemed to be a manager for the purposes of section 30-25-304(a), Idaho Code.

(d) If the legal representative under subsection (c) of this section declines or fails to wind up the limited liability company's activities and affairs, a

person may be appointed to do so by the consent of transferees owning a majority of the rights to receive distributions as transferees at the time the consent is to be effective. A person appointed under this subsection:

(1) Has the powers of a sole manager under section 30-25-407(c), Idaho Code, and is deemed to be a manager for the purposes of section 30-25-304(a), Idaho Code; and

(2) Shall deliver promptly to the secretary of state for filing an amendment to the company's certificate of organization stating:

(A) That the company has no members;

(B) The name and street and mailing addresses of the person; and

(C) That the person has been appointed pursuant to this subsection to wind up the company.

(e) The district court may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the company's activities and affairs:

(1) On the application of a member, if the applicant establishes good cause;

(2) On the application of a transferee, if:

(A) The company does not have any members;

(B) The legal representative of the last person to have been a member declines or fails to wind up the company's activities; and

(C) Within a reasonable time following the dissolution, a person has not been appointed pursuant to subsection (c) of this section; or

(3) In connection with a proceeding under section 30-25-701(a), Idaho Code.

History.

I.C., § 30-25-702, as added by 2015, ch. 243, § 49, p. 758.

Official Comment

Under the default rules of this article, dissolution does not change governance arrangements. However, dissolution does change the context for determining, with regard to a member-managed LLC, whether a matter is in or outside "the ordinary course of the activities of the company." Section 5-407(b)(3), (4).

As for determining the post-dissolution power of a member or manager to bind the LLC, other law, primarily agency law, supplies the rules. Thus, dissolution does not change the applicable source of law for determining actual and apparent authority. See comment to Section 5-301.

Subsection (a) — *See* the comment to Section 5-701(a).

Subsection (b) — The particular circumstances determine how long winding up may continue without giving "good cause" for court intervention under Section 5-702(e). The case law is partnership law and applies by analogy. There is no "hard and fast" rule. *See, e.g., Mathis v. Meyeres*, 574 P.2d 447, 450 (Alaska 1978) (stating that "we are aware of [no authority] requiring that deadlines be set in the winding up of a partnership"); *8182 Md. Assocs., Ltd. P'ship v. Sheehan*, 14 S.W.3d 576, 581 (Mo. 2000) ("The Uniform Partnership Law contemplates that dissolved partnerships may continue in business for a short, long or indefinite period of time . . . .") (quoting *Schoeller v. Schoeller*, 497 S.W.2d 860, 867 (Mo. Ct. App. 1973)).

"Winding up usually entails the time necessary for the partners to finish old business, collect and pay debts, and finally distribute remaining assets to the partners." *Gibson v. Deuth*, 270 N.W.2d 632, 635 (Iowa 1978). "Generally the best interests of the partnership will be served by winding up the partnership affairs as quickly as possible." *Doting v. Trunk*, 259 Mont. 343, 349, 856 P.2d 536, 540 (1993). However, in some circumstances, a long period of winding up is not only appropriate but necessary. *Lebanon Trotting Ass'n v. Battista*, 306 N.E.2d 769, 772 (Ohio Ct. App. 1972) ("[I]f the only means of availing the partners of the benefit of the value of the lease would be to continue to operate under such lease until its expiration, then such operation may continue as part of the winding up of the partnership affairs after dissolution. It is not necessary that a partnership, in the absence of the consent of all the partners, abandon a valuable asset upon dissolution merely because it may have no ready market value, but the

value of such asset can continue to inure to the benefit of the partners through the continuation of the partnership after dissolution.")

Subsection (b)(2)(A) and (F) — For the constructive notice effect of a statement of dissolution or termination, see Sections 5-103(d)(2)(A) and (B) and 5-302(h).

Subsection (c) — Section 5-304 provides a shield for managers as well members against automatic, vicarious liability for an LLC's debts, obligations, and other liabilities. Section 5-407 provides default rules for a manager's actual authority. Some of those rules provide for consent by members. See Section 5-407(c)(3). Those rules are inapposite in the circumstances contemplated by this subsection.

Section 5-409 does not apply to a person appointed under this section. Such person will inevitably be an agent of the dissolved limited liability company, acting pursuant to a contract. Thus, agency and contract law will determine the person's duties.

Subsection (d)(1) — See the comment to Subsection (c).

Subsection (e) — Section 5-409 does not apply to a person appointed under this section. The applicable standards of conduct might come from any or all of these sources: the court order, state law pertaining to receiverships, agency law, and contract law.

Subsection (e)(1) — Managers do not have standing under this provision. If a non-member manager has so lost control of the limited liability company as to desire dissolution, the non-manager's remedy is to: (i) seek court enforcement of the relevant provisions of the operating agreement, management agreement, or both; or (ii) resign.

§ 30-25-703. Rescinding dissolution. — (a) A limited liability company may rescind its dissolution, unless a statement of termination applicable to the company is effective, the district court has entered an order under section 30-25-701(a)(4), Idaho Code, dissolving the company, or the secretary of state has dissolved the company under section 30-25-708 [30-21-602], Idaho Code.

(b) Rescinding dissolution under this section requires:

(1) The affirmative vote or consent of each member;

(2) If a statement of dissolution applicable to the limited liability company has been filed by the secretary of state but has not become effective, the delivery to the secretary of state for filing of a statement of withdrawal under section 30-21-208 [30-21-204], Idaho Code, applicable to the statement of dissolution; and

(3) If a statement of dissolution applicable to the limited liability company is effective, the delivery to the secretary of state for filing of a statement of rescission stating the name of the company and that dissolution has been rescinded under this section.

(c) If a limited liability company rescinds its dissolution:

(1) The company resumes carrying on its activities and affairs as if dissolution had never occurred;

(2) Subject to paragraph (3) of this subsection, any liability incurred by the company after the dissolution and before the rescission is effective is determined as if dissolution had never occurred; and

(3) The rights of a third party arising out of conduct in reliance on the dissolution before the third party knew or had notice of the rescission may not be adversely affected.

History.

I.C., § 30-25-703, as added by 2015, ch. 243, § 49, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertions at the end of subsection (a) and near the end of paragraph (b)(2) was added by the compiler to correct the statutory references and to conform to the uniform act. See *http://www.uniformlaws.org/shared/docs/business%20organizations%20code/UBOCFinal20152015aug19.pdf*.

Official Comment

The Harmonization Project added this section, which is based on UPA (1997) § 802(b)(1) permitting the partners to "waive the right to have the partnership's business wound up and the partnership terminated" after which "the partnership resumes carrying on its business as if dissolution had never occurred").

Subsection (a) — The first exclusion results inevitably from the effect of a statement of termination (*i.e*., the limited liability company ceases to exist). A "dead" entity lacks both the capacity and power to bring itself back from the dead.

The second and third exclusions pertain to dissolutions affected by outsiders (*i.e*., the court and the filing office).

Subsections (b)(1) — The requirement of unanimous consent protects any vested rights of, or reliance by, members. However, the operating agreement may vary this provision.

Subsection (c)(3) — This paragraph protects third parties. *E.g*., *Neurobehavorial Assocs., P.A. v. Cypress Creek Hosp., Inc*., 995 S.W.2d 326, 331 (Tex. Ct. App. 1999) ("If the Hospital had the right to terminate the Agreement when it did because the Association was then dissolved, then even though the Association can revoke articles of dissolution and have that relate back to the date of dissolution, it would be grossly unfair to let the Association assert its ex post facto change as a defense. Surely the Association would be estopped from doing so, having created the very conditions that gave the Hospital the correct impression that it was then dissolved.").

§ 30-25-704. Known claims against dissolved limited liability company. — (a) Except as otherwise provided in subsection (d) of this section, a dissolved limited liability company may give notice of a known claim under subsection (b) of this section, which has the effect provided in subsection (c) of this section.

(b) A dissolved limited liability company may in a record notify its known claimants of the dissolution. The notice must: (1) Specify the information required to be included in a claim;

(2) State that a claim must be in writing and provide a mailing address to which the claim is to be sent; (3) State the deadline for receipt of a claim, which may not be less than one hundred twenty (120) days after the date the notice is received by the claimant; and (4) State that the claim will be barred if not received by the deadline.

(c) A claim against a dissolved limited liability company is barred if the requirements of subsection (b) of this section are met and: (1) The claim is not received by the specified deadline; or

(2) If the claim is timely received but rejected by the company:

(A) The company causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the company to enforce the claim not later than ninety (90) days after the claimant receives the notice; and (B) The claimant does not commence the required action not later than ninety (90) days after the claimant receives the notice.

(d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

History.

I.C., § 30-25-704, as added by 2015, ch. 243, § 49, p. 758.

Official Comment

Sections 5-704 through 5-706 provide rules under which a dissolved limited liability company may achieve finality with regard to claims.

This section is derived almost verbatim from Model Business Corporation Act § 14.06.

§ 30-25-705. Other claims against dissolved limited liability company. — (a) A dissolved limited liability company may publish notice of its dissolution and request persons having claims against the company to present them in accordance with the notice.

(b) A notice under subsection (a) of this section must:

(1) Be published at least once in a newspaper of general circulation in the county in this state in which the dissolved limited liability company's principal office is located or, if the principal office is not located in this state, in the county in which the office of the company's registered agent is or was last located;

(2) Describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent; and

(3) State that a claim against the company is barred unless an action to enforce the claim is commenced not later than three (3) years after publication of the notice.

(c) If a dissolved limited liability company publishes a notice in accordance with subsection (2) of this section, the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the company not later than three (3) years after the publication date of the notice:

(1) A claimant that did not receive notice in a record under section 30-25-704, Idaho Code;

(2) A claimant whose claim was timely sent to the company but not acted on; and

(3) A claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) A claim not barred under this section or section 30-25-704, Idaho Code, may be enforced:

(1) Against a dissolved limited liability company, to the extent of its undistributed assets; and

(2) Except as otherwise provided in section 30-27-706 [30-25-706], Idaho Code, if assets of the company have been distributed after dissolution, against a member or transferee to the extent of that person's proportionate share of the claim or of the company's assets distributed to the member or transferee after dissolution, whichever is less, but a person's total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution.

History.

I.C., § 30-25-705, as added by 2015, ch. 243, § 49, p. 758.

STATUTORY NOTES

Compiler's Notes.

The bracketed insertion in paragraph (2)(d) was added by the compiler to correct the statutory reference and to conform to the uniform act.

Official Comment

This section is derived almost verbatim from Model Business Corporation Act § 14.07.

Subsection (d)(2) — Liability under this paragraph extends to those who have received distributions under a charging order. *See* the comment to Section 5-502(a) (explaining that the beneficiary of a charging order is a transferee). Unlike Section 5-406(c) (recapture of improper distributions), this paragraph contains no "knowledge" element.

§ 30-25-706. Court proceedings. — (a) A dissolved limited liability company that has published a notice under section 30-25-705, Idaho Code, may file an application with the district court in the county where the company's principal office is located or, if the principal office is not located in this state, where the office of its registered agent is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are reasonably expected to arise after the date of dissolution based on facts known to the company and:

(1) At the time of application: (A) Are contingent; or

(B) Have not been made known to the company; or (2) Are based on an event occurring after the date of dissolution.

(b) Security is not required for any claim that is or is reasonably anticipated to be barred under section 30-25-705, Idaho Code.

(c) Not later than ten (10) days after the filing of an application under subsection (a) of this section, the dissolved limited liability company shall give notice of the proceeding to each claimant holding a contingent claim known to the company.

(d) In a proceeding under this section, the court may appoint a guardian ad litem to represent all claimants whose identities are unknown. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, must be paid by the dissolved limited liability company.

(e) A dissolved limited liability company that provides security in the amount and form ordered by the court under subsection (a) of this section satisfies the company's obligations with respect to claims that are contingent, have not been made known to the company, or are based on an event occurring after the date of dissolution, and such claims may not be enforced against a member or transferee on account of assets received in liquidation.

History.

I.C., § 30-25-706, as added by 2015, ch. 243, § 49, p. 758.

Official Comment

This section is derived almost verbatim from Model Business Corporation Act § 14.08.

§ 30-25-707. Disposition of assets in winding up. — (a) In winding up its activities and affairs, a limited liability company shall apply its assets to discharge its obligations to creditors, including members that are creditors.

(b) After a limited liability company complies with subsection (a) of this section, any surplus must be distributed in the following order, subject to any charging order in effect under section 30-25-503, Idaho Code:

(1) To each person owning a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and

(2) Among members and persons dissociated as members in proportion to their respective rights to share in distributions immediately before the dissolution of the company, except to the extent necessary to comply with any transfer effective under section 30-25-502, Idaho Code.

(c) If a limited liability company does not have sufficient surplus to comply with subsection (b)(1) of this section, any surplus must be distributed among the owners of transferable interests in proportion to the value of the respective unreturned contributions.

(d) All distributions made under subsections (b) and (c) of this section must be paid in money.

History.

I.C., § 30-25-707, as added by 2015, ch. 243, § 49, p. 758.

Official Comment

Subsection (a) — This subsection is non-waivable at to creditors who are not members. See Section 5-105(c)(15) (stating that the operating agreement may not "restrict the rights under this [Code] of a person other than a member or manager"). However, if a creditor is willing, a dissolved limited liability company may certainly make agreements with the creditor specifying the terms under which the LLC will "discharge its obligations" to the creditor.

Subsections (b), (c) and (d) — For the most part, these subsections state default rules. For example, operating agreements often provide for different distribution rights upon liquidation than during operations. However, distributions under these subsections (or otherwise under the operating agreement) are subject to Section 5-503 (charging orders). As to the extent the operating agreement can be amended to affect the distribution rights of persons already transferees, see Section 5-107(b).

§ 30-25-708. Subjects covered outside chapter. — The following subjects are covered outside this chapter:

(1) Administrative dissolution — sections 30-21-601 and 30-21-602, Idaho Code.

(2) Reinstatement — section 30-21-603, Idaho Code.

(3) Judicial review of denial of reinstatement — section 30-21-604, Idaho Code.

History.

I.C., § 30-25-708, as added by 2015, ch. 243, § 49, p. 758.

Part 8
Actions By Members

Idaho Code § 30-25-801

§ 30-25-801. Direct action by member. — (a) Subject to subsection (b) of this section, a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and protect the member's interests, including rights and interests under the operating agreement or this act or arising independently of the membership relationship.

[(b)](2) A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

History.

I.C., § 30-25-801, as added by 2015, ch. 243, § 50, p. 758.

STATUTORY NOTES

Meaning of "this act". See heading in notes to § 30-21-101.

Compiler's Notes.

The bracketed insertion at the beginning of the second paragraph was added by the compiler to conform to the standard statutory designation scheme.

CASE NOTES

Action by limited liability company.

Because the clear basis of the litigation had been a limited liability company's pursuit of its rights, the action did not fall into the definition of either a derivative or direct action. Wadsworth & Reese, PLLC v. Siddoway & Co., PC, 165 Idaho 364, 445 P.3d 1090 (2019).

Official Comment Subsection (a) — A member's rights under this subsection are subject to the rule of standing stated in Subsection (b). The phrase "otherwise protect the member's interests" pertains to remedies and creates no additional causes of action.

The last phrase of this subsection ("or arising independently . . . ") does not create any new rights, obligations, or remedies, and is included merely to emphasize that a person's membership in an LLC does not preclude the person from enforcing rights existing "independently of the membership relationship" (*e.g.*, as a creditor).

Subsection (b) — This subsection codifies the rule of standing that predominates in entity law. *See, e.g., PacLink Commc'ns Int'l, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 436, 441 (Cal. Ct. App. 2001) (noting that, "[i]n determining whether an individual action as opposed to a derivative action lies, a court looks at 'the gravamen of the wrong alleged in the pleadings'"; holding that "[a] contextual reading of [plaintiffs'] complaint makes clear that they are not suing based upon a claim that as members of the LLC they were entitled to a distribution which was not made, but instead are suing for financial injury caused by fraudulent transfer of the company's assets") (quoting *Nelson v. Anderson*, 84 Cal. Rptr. 2d 753. (Cal. Ct. App. 1999)); *Mallia v. PaineWebber, Inc.*, 889 F. Supp. 277, 282 (S.D. Tex. 1995) ("[T]o bring a direct representative action against a general partner, a limited partner must demonstrate either direct injury or an injury that exists independently of the partnerships.'"); *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004) (expressly disapproving "both the concept of 'special injury' and the concept that a claim is necessarily derivative if it affects all stockholders equally;" stating that "a court should look to the nature of the wrong and to whom the relief should go;" requiring that any "claimed direct injury . . . be independent of any alleged injury to the [entity]"); *Tzolis v. Wolff*, 884 N.E.2d 1005, 1008 (N.Y. 2008) (holding that derivative actions exist under New York LLC law and referring to "the traditional line between direct and derivative claims"); *see also CML V, LLC v. Bax*, 6 A.3d 238, 245 (Del. Ch. 2010) (noting that issues of standing viz-a-viz direct and derivative claims are comparable regardless of whether the entity is a limited partnership, a limited liability company, or a corporation), *aff'd*, 28 A.3d 1037 (Del. 2011).

The distinction between direct and derivative claims protects the operating agreement. If any member can sue directly over any management issue, the mere threat of suit can interfere with the members' agreed-upon arrangements.

Although in ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract, within a limited liability company different circumstances typically exist. A member does not have a direct claim against a manager or another member merely because the manager or other member has breached the operating agreement. Likewise a member's violation of this article does not automatically create a direct claim for every other member. To have standing in his, her, or its own right, a member plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited liability company.

> EXAMPLE: Through grossly negligent conduct, in violation of Section 5-409(c), the manager of a manager-managed LLC reduces the net assets of an LLC by fifty percent, which in turns decreases the value of Member A's investment by $3,000,000. Member A has no standing to bring a direct claim; the damage is merely derivative of the damage first suffered by the LLC. Member A may, however, bring a derivative claim. Sections 5-802 through 5-806.

> EXAMPLE: Same facts, except in addition to violating Section 5-409(c), the manager's conduct breaches an express provision of the operating agreement to which Member A is a signatory. The analysis and the result are the same.

> EXAMPLE: An operating agreement defines "distributable cash" and requires the LLC to periodically distribute that cash among all members. The LLC's manager fails to distribute the cash. Each member has a direct claim against the manager and the LLC.

The reference to "threatened injury" is to encompass potential claims for preventative relief, such as a temporary restraining order or preliminary injunction.

This section's standing rule is subject to reasonable alterations by the operating agreement. *See* the comment to Section 5-105(c)(11).

§ 30-25-802. Derivative action. — A member may maintain a derivative action to enforce a right of a limited liability company if:

(1) The member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or

(2) A demand under subsection (1) of this section would be futile.

History.

I.C., § 30-25-802, as added by 2015, ch. 243, § 50, p. 758.

CASE NOTES

Cited Wadsworth & Reese, PLLC v. Siddoway & Co., PC, 165 Idaho 364, 445 P.3d 1090 (2019).

Official Comment

Paragraph (1) — The demand requirement recognizes that, presumptively at least, the decision to cause a limited liability company to bring suit is a business decision, to be made by those who manage the business. Deborah A. DeMott, Shareholder Derivative Actions: Law and Practice § 5.9 (Westlaw, November 4, 2012) (Demand on directors — Rationales for demand).

Paragraph (2) — Some jurisdictions have a "universal demand" requirement, but the approach stated here is by far the majority one. Deborah A. DeMott, Shareholder Derivative Actions: Law and Practice § 5.12 (Westlaw, November 4, 2012).

§ 30-25-803. Proper plaintiff. — A derivative action to enforce a right of a limited liability company may be maintained only by a person that is a member at the time the action is commenced and:

(1) Was a member when the conduct giving rise to the action occurred; or

(2) Whose status as a member devolved on the person by operation of law or pursuant to the terms of the operating agreement from a person that was a member at the time of the conduct.

History.

I.C., § 30-25-803, as added by 2015, ch. 243, § 50, p. 758.

Official Comment

The rule stated here is conventional in both the law of unincorporated entities and corporate law. Persons dissociated as members have no standing to bring a derivative action. *A fortiori*, mere transferees have no standing. *See* the comments to Sections 5-107(b) and 5-502.

Paragraph (2) — This paragraph will be inapposite if the limited liability company has only two members, one of whom is the derivative plaintiff. In that limited circumstance, the plaintiff's death would cause the derivative action to abate. The "pick your partner" principal enshrined in Section 5-502 would prevent the decedent's heirs from succeeding to plaintiff status in the derivative action (except in the unlikely event that the remaining member consents to the heirs becoming members). The analysis and result will be the same if the derivative plaintiff is an entity whose existence terminates.

This article takes no position on whether:

• the death of member abates a direct claim against the LLC or a fellow member; and

• bringing a direct claim precludes a person from being a proper plaintiff for a derivative claim.

As to the latter issue, see, *e.g., Cordts-Auth v. Crunk, L.L.C.*, 815 F. Supp. 2d 778, 793-94 (S.D.N.Y. 2011) (discussing the potential conflict of interest), *aff'd*, 479 F. App'x 375 (2d Cir. 2012).

§ 30-25-804. Pleading. — In a derivative action, the complaint must state with particularity:

(1) The date and content of plaintiff's demand and the response to the demand by the managers or other members; or (2) Why demand should be excused as futile.

History.

I.C., § 30-25-804, as added by 2015, ch. 243, § 50, p. 758.

Official Comment This section parallels Section 5-802. The pleading requirement first appeared in a uniform act in 1976. ULPA (1976) § 1003.

§ 30-25-805. Special litigation committee. — (a) If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company. If the company appoints a special litigation committee, on motion by the committee made in the name of the company, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from:

(1) Enforcing a person's right to information under section 30-25-410, Idaho Code; or

(2) Granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee must be composed of one (1) or more disinterested and independent individuals, who may be members.

(c) A special litigation committee may be appointed:

(1) In a member-managed limited liability company:

(A) By the consent of a majority of the members not named as parties in the proceeding; or

(B) If all members are named as parties in the proceeding, by a majority of the members named as defendants; or

(2) In a manager-managed limited liability company:

(A) By a majority of the managers not named as parties in the proceeding; or

(B) If all managers are named as parties in the proceeding, by a majority of the managers named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited liability company that the proceeding:

(1) Continue under the control of the plaintiff;

(2) Continue under the control of the committee;

(3) Be settled on terms approved by the committee; or

(4) Be dismissed.

(e) After making a determination under subsection (d) of this section, a special litigation committee shall file with the court a statement of its determination and its report supporting its determination and shall serve each party with a copy of the determination and report. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) of this section and allow the action to continue under the control of the plaintiff.

History.

I.C., § 30-25-805, as added by 2015, ch. 243, § 50, p. 758.

Official Comment

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. An "SLC" can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of members who are neither plaintiffs nor defendants (if any), and bring the benefits of a specially tailored business judgment to any judicial decision.

This section's approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited liability company. Use of an SLC is optional. An operating agreement can

preclude the use of SLCs, rendering this section inapplicable, but cannot otherwise vary this section. *See* Section 5-105(c)(12).

Subsection (a)(1) — Section 5-410 pertains to information rights. On the availability of remedies pending the SLC's investigation, *compare* Section 5-410, *with Kaufman v. Computer Assocs. Int'l, Inc.*, No. Civ.A. 699-N, 2005 WL 3470589, at *1 (Del. Ch. Dec. 21, 2005) (presenting "the question of whether to stay a books and records action under 8 Del. C. § 220 at the request of a special litigation committee when a derivative action encompassing substantially the same allegations of wrongdoing filed by different plaintiffs is pending in another jurisdiction"; concluding "[f]or reasons that have much to do with the light burden imposed by the plaintiff's demand in this case . . . that the special litigation committee's motion to stay the books and records action should be denied").

Subsection (e) — The standard stated for judicial review of the SLC determination follows *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979) rather than *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), because the latter's reference to a court's business judgment has generally not been followed in other states. In essence, an SLC is intended to function as a surrogate decision-maker, allowing the limited liability company to make what is fundamentally a business decision. If a court determines that "the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof," it makes no sense to substitute the court's legal judgment for the business judgment of the SLC.

Houle v. Low, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court's role in reviewing an SLC decision:

> The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]'s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment. . . . [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful

> analysis regarding the plaintiff's derivative suit. . . . The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof — the [entity].

For an extensive discussion of how a court should approach the question of independence, see *Einhorn v. Culea*, 612 N.W.2d 78, 91 (Wis. 2000).

§ 30-25-806. Proceeds and expenses. — (a) Except as otherwise provided in subsection (b) of this section:

(1) Any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited liability company and not to the plaintiff; and (2) If the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the company.

(b) If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited liability company.

(c) A derivative action on behalf of a limited liability company may not be voluntarily dismissed or settled without the court's approval.

History.

I.C., § 30-25-806, as added by 2015, ch. 243, § 50, p. 758.

Official Comment

Subsection (c) — This provision is intended to prevent collusion.

Chapter 26
[RESERVED]

« Title 30 •, « Ch. 27 »

Chapter 27
UNINCORPORATED NONPROFIT ASSOCIATIONS

Part 1. General Provisions

30-27-130. Transition concerning real and personal property.

Part 1
General Provisions

§ 30-27-101. Short title. — This chapter may be cited as the "Idaho Uniform Unincorporated Nonprofit Association Act."

History.

I.C., § 30-27-101, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This article replaces a state's current statutes governing unincorporated nonprofit associations whether or not those statutes are based on the Uniform Unincorporated Nonprofit Association Act.

§ 30-27-102. Definitions. — (a) In this chapter:

(1) "Established practices" means the practices used by an unincorporated nonprofit association without material change during the most recent five (5) years of its existence, or if it has existed for less than five (5) years, during its entire existence.

(2) "Governing principles" means the agreements, whether oral, in a record, or implied from its established practices, or in any combination thereof, that govern the purpose or operation of an unincorporated nonprofit association and the rights and obligations of its members and managers. The term includes any amendment or restatement of the agreements constituting the governing principles.

(3) "Manager" means a person that is responsible, alone or in concert with others, for the management of an unincorporated nonprofit association.

(4) "Member" means a person that, under the governing principles, may participate in the selection of persons authorized to manage the affairs of the unincorporated nonprofit association or in the development of the policies and activities of the association.

(5) "Unincorporated nonprofit association" means an unincorporated organization consisting of two (2) or more members joined under an agreement that is oral, in a record, or implied from conduct for one (1) or more common, nonprofit purposes. The term does not include:

(A) A trust;

(B) A marriage, domestic partnership, common-law domestic relationship, civil union, or other domestic living arrangement;

(C) An organization formed under any other statute that governs the organization and operation of unincorporated associations;

(D) A joint tenancy, tenancy in common, or tenancy by the entireties even if the co-owners share use of the property for a nonprofit purpose; or

(E) A relationship under an agreement in a record that expressly provides that the relationship between the parties does not create an unincorporated nonprofit association.

(b) The following definitions outside this chapter apply to this chapter:

(1) "Person" — section 30-21-102(35), Idaho Code.

(2) "Property" — section 30-21-102(41), Idaho Code.

(3) "Record" — section 30-21-102(44), Idaho Code.

(4) "Sign" — section 30-21-102(47), Idaho Code.

(5) "State" — section 30-21-102(48), Idaho Code.

(6) "Transfer" — section 30-21-102(50), Idaho Code.

History.

I.C., § 30-27-102, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

Section (a) — This subsection contains definitions for terms used throughout this article.

"Established practices" [(a)(1)] — The "established practices" are essentially equivalent to the commercial law concepts of course of performance and course of dealing. *See* UCC § 1-303. Many nonprofit associations operate on a very informal basis. Often there are no written procedures or bylaws — or what writings they have are very incomplete. Nevertheless, over time they develop and follow various practices. These practices, if followed consistently for at least five years (or during the entire existence of the nonprofit association if it has been in existence less than five years), become established practices and therefore can qualify as part of the nonprofit associations "governing principles." An example would be an unincorporated church that has no written bylaws covering the issue of notice of meetings that for the past five years has printed notice of the annual meeting of its members in the church bulletin for the three weeks preceding the annual meeting. This established practice would be part of the church's governing principles and if followed in the sixth and subsequent

years would be determinative of whether reasonable notice of an annual meeting had been given.

“Governing principles” [(a)(2)] — The “governing principles are the equivalent of the articles of incorporation, bylaws and other documents, and established practices that govern the internal affairs of a nonprofit association, sometimes referred to as an entity’s private organic rules.” See Model Entity Transactions Act (2007) (Last Amended 2013) § 102(33). The “governing principles” of a nonprofit association do not have to be in a written form. This is consistent with partnership law, the for-profit equivalent of a nonprofit association. *See* Sections 3-102(9) (general partnerships); 4-102(9) (limited partnerships); 5-102(9) (limited liability companies). Where there is no clear oral agreement or record, the governing principles would come from the nonprofit association’s established practices (subsection (1)).

“Manager” [(a)(3)] — A person is a “manager” of a nonprofit association if the person fits the definition even if that person’s designation might usually be associated with another type of organization. Many nonprofit associations refer to members of their governing boards as “directors” or “trustees.” These designations do not disqualify the organization from being a nonprofit association even though the term “director” is commonly associated with corporations and the term “trustee” is commonly associated with trusts. A manager may, but need not be, a member of the nonprofit association (*see* Section 7-121(2)); and may, and, in fact in most cases will be, an individual, but various types of entities can also be managers of a nonprofit association (see Section 1-102(35) — definition of person).

“Member” [(a)(4)] — The definition of “member” may reach somewhat beyond decisions of some courts. Either participation in the selection of the management or in the development of policies and activities of the nonprofit association is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person simply because the person was a member.

Persons who do not have the right to select a nonprofit association’s manager or to approve its governing policies are not members of the

nonprofit association for purposes of this article even though the nonprofit association may call or refer to them as members. A fund-raising device commonly used by many nonprofit organizations is a membership drive. In most cases the contributors are not members for purposes of this article. They are not authorized to "participate in the selection of persons authorized to manage the affairs of the unincorporated nonprofit association or in the development of policies and activities of the association." Simply because an association calls a person a member does not make the person a member under this article.

The role of a member in the affairs of a nonprofit association is described as "may participate in the selection" instead of "may select or elect" the governing board and officers and "may participate . . . in the development of policies and activities" instead of "may determine" policies and activities. This accommodates this article to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated ex officio members of the governing board. Similarly, the role in determination of policy is described in general terms. "Persons authorized to manage the affairs of the association" is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational structures of nonprofit associations to which this article applies and the informality of many of them, the more generic term is more appropriate.

"Unincorporate nonprofit association" [(a)(5)] — An organization cannot be a nonprofit association if it is organized as a corporation or is a for-profit unincorporated entity, e.g., a partnership. On the other hand, not every form of unincorporated nonprofit organization should automatically become a nonprofit association and therefore be able to have limited liability and the other benefits of this statute. That is the reason for the language excluding trusts, domestic living arrangements including marriages and domestic partnerships, and agreements merely to hold title to property as co-owners. The laws governing the rights of creditors, trustees, and beneficiaries of trusts are well developed and therefore the legal principles in this article are unnecessary. Domestic relations law provides property rights for adults co-habiting together after a legal marriage or in a

long-term unmarried status such as what is frequently referred to as a "common law marriage" or in domestic partnership and civil union statutes. Living together in any of these domestic living arrangements can probably qualify as an association having a nonprofit purpose, but for public policy reasons these arrangements should not be able to qualify as a nonprofit association and therefore avoid individual liability for taxes and other liabilities. For similar reasons, mere co-ownership of property, even if for nonprofit purposes, should not automatically result in the applicability of this article. An enacting jurisdiction can choose to expand or reduce the number of types of exclusions consistent with the concept that a nonprofit association is a default form of organization for unincorporated nonprofit entities.

"Agreement" rather than "contract" is the appropriate term because the legal requirements for an agreement are less stringent and less formal than for a contract. For example, mutual consent must be present in both but the contractual concept of consideration is not necessary for an agreement. The agreement to form a nonprofit association can be in a "record" (see Section 1-102(44)), or oral, or implied from conduct (*e.g.*, course of performance or course of dealing). The agreement to form a nonprofit association becomes part of the nonprofit association's overall "governing principles." "Implied from conduct" rather than "implied from its established practices" (*see* subsection (a)(2)) is used as the standard because the agreement to form a nonprofit association precedes or is contemporaneous with its existence, and established practices can only exist after the nonprofit association is in existence.

Although it is always preferable to have written agreements, most existing nonprofit associations are quite informal and have few, if any, writings setting forth the agreements governing the purpose and operation of the organization. Moreover, most nonprofit associations are formed and operate without independent legal advice. Imposing a statute of frauds or similar writing requirement would, therefore, have the effect of excluding most existing nonprofit associations from being able to qualify under this article. The enacting jurisdiction's general rules governing the proof and effect of oral agreements and the priority of written provisions over subsequent inconsistent oral provisions apply to nonprofit association governing principles. *See* Section 7-103.

Although the agreement to form a nonprofit association can be quite informal and sketchy, there must be some tangible, objective data such as the use of the organization's name in communications to its members or third parties, or the existence of a bank account or of a mailing (or internet) address in the name of the nonprofit association or similar "conduct" indicating that, in fact, there is an actual agreement.

An express provision in a record stating that the parties to a contract do not intend to create an unincorporated nonprofit association, on the other hand, would negate any conclusion that there was an agreement to have a nonprofit association. *See* subsection (a)(5)(E). An example is a contractual relationship between two nonprofit organizations where the parties do not want the contract to be subject to this article. An express provision in a record to that effect in the contract should be upheld.

The members must be joined together for a common purpose. Several states provide that they be "joined together for a *stated* common purpose" (emphasis added). Because of the informality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be "stated." Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this article.

The best reference point for what constitutes a nonprofit purpose is probably the enacting state's Nonprofit Corporation Act. The nonprofit purpose requirement carries with it the implicit understanding that the purpose is not a criminal activity and is otherwise lawful. Each enacting jurisdiction needs to determine whether these limitations need to be set forth explicitly in the article.

The two-person requirement for forming a nonprofit association is quite minimal, assuming the standard broad definition of person (Section 1-102(35)) incorporated into this article. At least two persons are required because that is the minimum number necessary to have an agreement under general legal principles. If one person wants to create a nonprofit organization, it is possible to do so by means of a trust, a nonprofit corporation, or in many states, a single member limited liability company. A few states currently require more than two members at the time of formation. New Jersey, for example, requires seven or more.

Nonprofit corporation statutes typically allow a nonprofit corporation to be formed by one or more incorporators but to operate without members and therefore to be governed by a self-perpetuating board of directors. *See* Model Nonprofit Corporation Act-Third Edition (2008) §§ 2.02(4), 6.01. A nonprofit association, however, must always have at least two members. The definition of a nonprofit association states that it is an organization "consisting of [two] or more members. . . ."

This article applies to all nonprofit associations, whether they are classified as religious, public benefit, or mutual benefit, or whether they are classified as tax-exempt under the laws of the enacting jurisdiction. Therefore, this article will cover unincorporated philanthropic, educational, scientific, social and literary clubs, unions, trade associations, political organizations, such as political parties, churches, hospitals, neighborhood and property owner associations, and sports organizations such as Little League baseball teams. If the enacting jurisdiction decides to exempt one or more types of nonprofit associations from this article, it needs to draft specific provisions listing the exemptions.

Subsection (b) — This subsection contains a list of definitions in Article 1 that are applicable to nonprofit associations.

§ 30-27-103. Relation to other laws. — (a) A statute governing a specific type of unincorporated nonprofit association prevails over an inconsistent provision in this chapter, to the extent of the inconsistency.

(b) This chapter supplements the law of this state that applies to nonprofit associations operating in this state. If a conflict exists, that law applies.

History.

I.C., § 30-27-103, as added by 2015, ch. 243, § 53, p. 758.

Official Comment Subsection (a) — Many jurisdictions have existing statutes governing particular types of nonprofit associations, *e.g.*, churches. Subsection (a) establishes the rule that in the event of an inconsistency between this article and the statute governing a specific type of nonprofit association, the latter will control. Under generally accepted statutory interpretation principles, there is a strong presumption against inconsistency, *i.e.*, the presumption is that the provisions of the two statutes are not inconsistent.

Subsection (b) — Most jurisdictions have statutory provisions giving the chief legal officer of the jurisdiction oversight supervisory powers over nonprofit organizations, including the power to enjoin or prohibit various activities. Most jurisdictions also have statutes that require registration, permits, or advance notice to engage in certain activities, *e.g.*, fundraising from the public, and the filing of reports, *e.g.*, assumed name filings, tax forms, and the like. All of these existing and future statutes, rules, and regulations are applicable to nonprofit associations. Whether specific provisions stating this principle need to be included in this article act depends on the enacting jurisdiction's statutory drafting conventions.

§ 30-27-104. Governing law. — (a) Except as otherwise provided in subsection (b) of this section, the law of this state governs the operation in this state of an unincorporated nonprofit association formed or operating in this state.

(b) Unless the governing principles specify a different jurisdiction, the law of the jurisdiction in which an unincorporated nonprofit association has its main place of activities governs the internal affairs of the association.

History.

I.C., § 30-27-104, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This article applies to pre-existing nonprofit associations formed in the enacting state, as well as to all nonprofit associations formed in the state after the effective date of this article. See Section 1-708. This is a standard approach in statutes governing organizational entities. Exempting various types of existing organizations from the new law is not a desirable practice. Because the existing laws governing nonprofit associations are, for the most part, incomplete and this article may change some of the common understanding of what the law is, an enacting jurisdiction whose standard rule is to have a new statute effective when signed or at the beginning of the next fiscal year after signing may want to have a delayed effective date of 6 or 12 months to provide time to educate the affected organizations and their advisors about the changes.

This article's applicability to nonprofit associations formed in other jurisdictions that are operating in this state is necessary because in all other types of entities the internal affairs rules of the jurisdiction of the entity's formation (*e.g.*, the governance rules and duties and responsibilities of the owners and managers to each other and the entity) control; but it is difficult to determine the jurisdiction of a nonprofit association's formation since it does not, in most jurisdictions, file any public document upon its formation. Some mechanism for choosing the internal affairs jurisdiction is therefore necessary. The default rule in this article is the jurisdiction in which the

nonprofit association has its main place of activities. A nonprofit association can, however, designate the internal affairs jurisdiction in its governing principles, subject to applicable conflicts of laws substantial contact rules. *See* Restatement (Second) of Conflict of Laws § 187(2) (1971).

The term “main place of activities” is not defined but should not be difficult to determine in most cases. Most nonprofit associations are quite informal and probably do not have what are commonly thought of as “executive offices” (*cf*. UCC § 9-103(3)(d) — a debtor’s “chief executive office”, an undefined term, determines the proper place to file a financing statement) or even a “principal office” (*cf*. Section 3-104(2) — default rule is the state where a general partnership has its principal office governs its internal affairs). In any case, most nonprofit associations conduct operations in only one state and a nonprofit association that has operations in more than one state can designate the state that will govern its internal affairs so it will be a rare case when it will be necessary to determine which of two or more states’ laws govern a nonprofit association’s internal affairs.

Since the laws governing nonprofit associations in the enacting jurisdiction govern nonprofit associations formed in other jurisdictions that are conducting activities (except for internal affairs issues in the enacting jurisdiction), a foreign-formed nonprofit association could not conduct activities in the enacting jurisdiction that a nonprofit association formed in this jurisdiction could not conduct, even if the activity were legal in the foreign jurisdiction in which the nonprofit association was formed or has its main place of activities.

§ 30-27-105. Entity — Perpetual existence — Powers. — (a) An unincorporated nonprofit association is an entity distinct from its members and managers.

(b) An unincorporated nonprofit association has perpetual duration unless the governing principles specify otherwise.

(c) An unincorporated nonprofit association has the same powers as an individual to do all things necessary or convenient to carry on its purposes.

(d) An unincorporated nonprofit association may engage in profit-making activities, but profits from any activities must be used or set aside for the association's nonprofit purposes.

History.

I.C., § 30-27-105, as added by 2015, ch. 243, § 53, p. 758.

Official Comment Subsection (a) — The separate legal status of a nonprofit association is a fundamental concept that undergirds all the principles that allow a nonprofit association to hold and dispose of property in its own name and to sue and be sued in its own name and that insulate the assets of the members from claims against the nonprofit association. This is a reversal of traditional common law principles that treat partnerships and other unincorporated entities under an aggregate theory.

Subsection (b) — Providing for perpetual existence of a nonprofit association is one of the key aspects of its separate entity status. Under the traditional common law aggregate theory, a nonprofit association's existence would end with any change in the membership and if the nonprofit association continued in operation it was deemed to be a new nonprofit association.

The members can agree to a limited term and a nonprofit association can, of course, terminate by being dissolved and winding up. *See* Sections 7-127 and 7-128.

Subsection (c) — This is a standard general powers clause. *See e.g.*, Section 5-109 (limited liability companies).

Subsection (d) — Many existing unincorporated nonprofit organizations engage in activities that are intended to produce a profit, *e.g.*, a bingo parlor operated by a church where the profits are used to buy food for a homeless shelter. This type of profit-making endeavor should not disqualify the organization from being a nonprofit association if it otherwise qualifies. A for-profit activity might endanger the tax-exempt status of the organization or may generate taxable income, but these are separate issues and should not affect the organizational status of a nonprofit association or the rights and liabilities of its members and managers.

The fact that some or all of the members receive some direct or indirect benefit from a nonprofit association's profit-making activities will not disqualify an unincorporated nonprofit organization from being a nonprofit association under this article so long as the benefit is in furtherance of the nonprofit association's nonprofit purposes. The distribution of any profits to the members for the members' own use, *e.g.*, a dividend distribution to members, would, however, disqualify the organization from being a nonprofit association because the distribution is not made in furtherance of the nonprofit association's nonprofit purposes. *See* Section 7-125. The organization would be a general partnership, the default organizational form for a for-profit organization. An unincorporated investment club that distributes its profits to its members, for example, would be a general partnership and not a nonprofit association even though its stated purpose is to educate its members about investments.

§ 30-27-106. Ownership and transfer of property. — (a) An unincorporated nonprofit association may acquire, hold, or transfer in its name an interest in property.

(b) An unincorporated nonprofit association may be a beneficiary of a trust or contract, a legatee, or a devisee.

History.

I.C., § 30-27-106, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

Subsection (a) — Subsection (a) is based on Section 3-102(8) of the Uniform Common Interest Ownership Act. It reverses the common law rule. Inasmuch as an unincorporated nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, Unincorporated NonProfit Associations, 1-45 (Oxford Univ. Press (1959); Warburton, The Holding of Property by Unincorporated Associations, Conveyancer 318 (September-October 1985).

This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members of the association. *Matter of Anderson's Estate*, 571 P. 2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, § 3-1.3 (1981

As is the case with many of the problems created by the view that an unincorporated association is not an entity, the statutory solutions are often partial — limited to special circumstances and associations. Subsection (a)

solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

Section 7-130 deals with attempted transfers of real and personal property to a nonprofit association that were made before the effective date of this article where under the current law title did not vest in the nonprofit association.

Subsection (b) — Subsection (b) is a necessary corollary of subsection (a) and, thus, it may be unnecessary. However, several states currently have statutes which expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. *See*, for example, Md. Estates & Trusts Code Ann. § 4-301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (b) applies to both trusts and contracts. Not all existing state statutes apply expressly to both.

§ 30-27-107. Statement of authority as to real property. — (a) In this section, "statement of authority" means a statement authorizing a person to transfer an interest in real property held in the name of an unincorporated nonprofit association.

(b) An interest in real property held in the name of an unincorporated nonprofit association may be transferred by a person authorized to do so in a statement of authority recorded by the association in the office in the county in which a transfer of the property would be recorded.

(c) A statement of authority must state:

(1) The name of the unincorporated nonprofit association;

(2) The address in this state, including the street address, if any, of the association or, if the association does not have an address in this state, its out-of-state address;

(3) That the association is an unincorporated nonprofit association; and

(4) The name, title, or position of a person authorized to transfer an interest in real property held in the name of the association.

(d) A statement of authority must be executed in the same manner as a deed by a person other than the person authorized in the statement to transfer the interest.

(e) A filing officer may collect a fee for recording a statement of authority in the amount authorized for recording a transfer of real property.

(f) A document amending, revoking, or canceling a statement of authority or stating that the statement is unauthorized or erroneous must meet the requirements for executing and recording an original statement.

(g) Unless canceled earlier, a recorded statement of authority and its most recent amendment expire five (5) years after the date of the most recent recording.

(h) If the record title to real property is in the name of an unincorporated nonprofit association and the statement of authority is recorded in the office of the county in which a transfer of the property would be recorded, the

authority of the person named under subsection (c)(4) of this section is conclusive in favor of a person that gives value without notice that the person lacks authority.

History.

I.C., § 30-27-107, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This section is based on Section 3-303 (general partnerships).

A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing, however, provides important documentation. As a general rule a statement of authority will only be filed at the time of a conveyance of an interest in real estate as a means of establishing in the title records who has authority to execute a deed or other instrument conveying an interest in real estate.

Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the office where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. Section 3-303 also provides for central filing, such as with the Secretary of State, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

"Filed" and "recorded" are bracketed to direct an enacting state to choose. In most jurisdictions "recorded" will be the appropriate choice.

Subsection (c)(2) — Subsection (c)(2) may present a problem for small, ad-hoc nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address of some kind, *e.g.*, the mailing address of a member or manager.

Subsection (c)(3) — Subsection (c)(3) informs those relying on the statement of the precise character of the organization. Knowing that the

organization is an unincorporated nonprofit association may cause the person dealing with the organization to act differently.

Subsection (c)(4) — Subsection (c)(4) permits the statement to identify as the person who can act for the association someone who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices, the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

Subsection (d) — Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association. Whether the formalities of execution must conform to those of a deed or an affidavit is left for each state to determine.

Subsection (g) — Subsection (g) makes a statement inoperative five years after its most recent recording or filing. A new statement of authority can be filed before or after the expiration of the five year limitation.

Subsection (h) — The purpose of subsection (h) is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. If the required signatures on the statement, deed, or both are forgeries, the effect of them is not governed by Section 7-107(h). Instead, Section 7-103 applies and would invoke the other law of the state. In many states the deed would be a nullity. *See* Boyer, Hovenkamp, and Kurtz, The Law of Property, An Introductory Survey (West Pub. Co. 4th ed. 1991).

§ 30-27-108. Liability. — (a) A debt, obligation, or other liability of an unincorporated nonprofit association is solely the debt, obligation, or other liability of the association. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise for a debt, obligation, or other liability of the association solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the association.

(b) A person's status as a member or manager does not prevent or restrict law other than this chapter from imposing liability on the person or the association because of the person's conduct.

(c) The failure of an unincorporated nonprofit association to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member or manager of the association for a debt, obligation, or other liability of the association.

History.

I.C., § 30-27-108, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

The effect of Section 7-108 is to provide members and managers of a nonprofit association with the same protection against vicarious liability for the debts and obligations of the nonprofit association and tort liability imposed on the nonprofit association as the members and managers of a nonprofit corporation would have under the enacting jurisdiction's laws. These principles, taken together, constitute what is known as the limited liability doctrine under which a member or manager is personally liable for his or her own tortious conduct under all circumstances and is personally liable for contract liabilities incurred on behalf of the nonprofit association if the member or manager guarantees or otherwise assumes personal liability for the contract or fails to disclose that he or she is acting as the agent for the nonprofit association. A member or manager is not otherwise personally liable for the tort or contract liabilities imposed upon the

nonprofit association. A creditor with a judgment against the nonprofit association must seek to satisfy the judgment out of the nonprofit association's assets but cannot levy execution against the assets of a member or manager.

The one exception is the alter ego doctrine (also known as the veil piercing doctrine). Courts have pierced the corporate veil of nonprofit corporations. *See Comment, Piercing the Nonprofit Corporate Veil*, 66 Marq. L. Rev. 134 (1984); *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251 (1981) (President of nonprofit corporation who commingled funds of the nonprofit corporation with funds of a corporation he controlled held personally liable for unpaid debts of the nonprofit corporation under the veil piercing doctrine). In that connection, disregard for corporate formalities is often cited as a key factor in corporate veil piercing cases. That factor is inappropriate with respect to nonprofit associations because informality of organization and operation is both common and desired. This concept is encapsulated in subsection (c). The fact that members of nonprofit corporations for the most part do not have an expectation of financial gain, as compared to shareholders of a for-profit corporation, should mean that there will be fewer types of cases than those involving for-profit corporations where the veil piercing doctrine will be held to be applicable to nonprofit corporations. The same criteria that are applied to pierce the veil of nonprofit corporations should be applied in nonprofit association veil piercing cases.

If the alter ego doctrine is found to be applicable, the separate entity status of a nonprofit association would be disregarded and the assets of the nonprofit association and its members and managers would be aggregated and subject to a nonprofit association creditor's claims in the same manner that a judgment creditor collects a judgment against the assets of a general partner in a general partnership.

In recent years all states have enacted laws providing unpaid officers, board members, and other volunteers some protection from liability for their own negligence (but generally not for conduct that is determined to constitute gross negligence or willful or reckless misconduct). The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. *State Liability Laws for Charitable Organizations*

and Volunteers (Nonprofit Risk Management & Insurance Institute, 1990); *Developments, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1685-1696 (1992). This means that members and volunteers involved with unincorporated nonprofit associations do not obtain protection under those state statutes. Others may cover the managers of nonprofit associations but only if the nonprofit association qualifies as a tax-exempt entity under federal or state law. *See* N.Y. Not For Profit Corporation Law §§ 720-a and 721 (federal income tax); Minn. Stat. Ann. § 317A.257 (state income tax). Some states have statutes that premise the insulation of liability upon the organizations having specified amounts of liability insurance.

In 1997 Congress enacted the Volunteer Protection Act, 42 U.S.C. §§ 14501-14505. This statute, which preempts state laws to the extent of any inconsistency with the Volunteer Protection Act except to the extent the state law provides additional protections from liability, insulates directors, officers, trustees, and direct service volunteers of nonprofit organizations who receive no compensation (other than reasonable reimbursement of expenses) from liability for harm that "was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious or flagrant indifference to the rights or safety of the individual harmed by the volunteer." 42 U.S.C. § 14503(a)(3). Damages caused by operation of "a motor vehicle, vessel, aircraft, or other vehicle" for which a license or insurance is required to be maintained, are not covered. 42 U.S.C. § 14503(4).

The interplay between the Federal Volunteer Protection Act and the existing state statutes that provide liability protection to volunteers of nonprofit associations is a complex matter and must be determined on a state-by-state basis. *See* subsection (b).

Finally, the liability of the managers of a nonprofit association for breach of the duties of due care, good faith, and loyalty to the nonprofit association and the ability of the governing principles of a nonprofit association to limit or eliminate this liability as far as monetary damages are concerned is a separate subject which is dealt with in Section 7-122.

"Solely" as used in Section 7-108 is intended to make it clear that a member or manager is not vicariously liable for the liabilities of the nonprofit association or the liabilities of another member or manager

merely because of that person's status as a member or manager. A member or manager may, however, have personal liability as a result of his or her own actions. A member or manager will be personally liable, for example, for his or her own tortious acts, or for breach of a contract binding on the nonprofit association which the member or manager is a party to or has guaranteed. This personal liability is imposed by other law (*see* Section 7-108(b) and Section 7-103(c)) and not because of his or her status as a member or manager.

§ 30-27-109. Assertion and defense of claims. — (a) An unincorporated nonprofit association may sue or be sued in its own name.

(b) A member or manager may assert a claim the member or manager has against the unincorporated nonprofit association. An association may assert a claim it has against a member or manager.

History.

I.C., § 30-27-109, as added by 2015, ch. 243, § 53, p. 758.

Official Comment Subsection (a) — Under traditional common law doctrine, a nonprofit association was considered to be an aggregate of members and therefore it could not sue or be sued in its own name. Only the members could sue or be sued and some state court cases held that all of the members had to be named plaintiffs in a suit brought on behalf of the nonprofit association and that all the members had to be named and served with the summons and complaint in a suit against a nonprofit association. Most states have enacted statutes in recent years granting a nonprofit association entity status for the purpose of suits by and against the nonprofit association. Section 7-109 follows the modern rule and is consistent with the concept built into this article that a nonprofit association is a separate entity for many more purposes than existed under traditional common law principles.

This section is intended to apply to all types of judicial, administrative, and governmental proceedings and all types of alternative dispute resolution proceedings such as arbitration and mediation. An enacting state may want to modify this section to make it clear that this is the case if that is not clear under its current civil procedure law.

The enacting state's general civil procedure law will be applicable to nonprofit associations. *See* Section 7-103(c). These statutes and court rules will deal with issues such as standing of a nonprofit association to sue on behalf of its members, joinder, counterclaims, and the like. Most will also cover issues such as pleadings, service of pleadings, and venue. That is why Sections 7-111 and 7-113 are bracketed and should not be enacted in a state

if the existing statutes and court rules are sufficient. Sections 7-109, 7-110, and 7-112 should be enacted as part of this article, however, because there is a body of inconsistent case law or gaps in the existing statutes or rules on the issues dealt with in these sections.

Subsection (b) — Subsection (b) is another aspect of a nonprofit association under this article being a separate legal entity. Under the common law aggregate theory, since a nonprofit association was not an entity separate from its members, a member could not assert a claim against the nonprofit association since there is technically no legal entity, and the member would be both a claimant and the defendant and personally liable for any judgment obtained in the action. For the same reason, a nonprofit association could not assert a claim against a member (*e.g.*, for unpaid dues) because the nonprofit association technically does not exist. This subsection only allows a member to assert that member's claim against the nonprofit association. It does not authorize a member to file a derivative action. The enacting jurisdiction's civil procedure law may, however, authorize derivative actions.

§ 30-27-110. Effect of judgment or order. — A judgment or order against an unincorporated nonprofit association is not by itself a judgment or order against a member or manager.

History.

I.C., § 30-27-110, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This section is consistent with Restatement (Second) of Judgments, § 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation . . . ."

Section 7-110 applies not only to judgments but also to orders, such as an award rendered in arbitration or an injunction.

This section reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-principals, were individually liable for obligations of the association

That a judgment against a nonprofit association is not also a judgment against one authorized to manage the affairs of the nonprofit association recognizes fully the entity status of a nonprofit association. An obvious corollary of this section is that a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member. The one exception to this rule would be an injunction issued against a nonprofit association. Federal Rule of Civil Procedure 65(d) provides that every injunction and restraining order is binding not only on the named parties but also on "the parties' officers, agents, servants, employees, and attorneys . . . who receive actual notice of it by personal notice or otherwise."

§ 30-27-111. Service of process. — In an action or proceeding against an unincorporated nonprofit association, process may be served on an agent authorized by appointment to receive service of process, on a manager of the association, or in any other manner authorized by the law of this state.

History.

I.C., § 30-27-111, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

Some states have expressly addressed service of process on a nonprofit association in court rules or by statute. Those states may wish to continue their rules and so should not adopt this section. For this reason this section is bracketed.

By rule or statute all jurisdictions have extensive law on service of process. The real question for nonprofit associations is which set of these rules should apply. This article treats a nonprofit association as a legal entity. Thus, the rules applicable to another legal entity, a corporation, seem most appropriate.

"Manager" is a defined term. *See* Section 7-102(3). Service on a member of a nonprofit association (also a defined term — *see* Section 7-102(4)) would not be effective under this section unless the member was also a manager of the nonprofit association.

§ 30-27-112. Action or proceeding not abated by change. — An action or proceeding against an unincorporated nonprofit association does not abate merely because of a change in its members or managers.

History.

I.C., § 30-27-112, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated nonprofit associations. Uniform Partnership Act (1914) §§ 29 and 31(4). This article's entity approach requires this change to the old common law rule. *See* Uniform Partnership Act (1997) (Last Amended 2013) §§ 603(a), 701, and 801.

§ 30-27-113. Venue. — Unless otherwise provided by law other than this chapter, venue of an action against an unincorporated nonprofit association brought in this state is determined under the statutes applicable to an action brought in this state against a corporation.

History.

I.C., § 30-27-113, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This section is bracketed because many states have already satisfactorily solved this issue. A criterion used by all states for fixing venue is the county of residence of the defendant. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. *See* Wright, Miller, & Cooper, 15 Federal Procedure & Practice 3812 (1986). Conforming to the entity view of an association, section 7-113 rejects the common law view. Many states have by statute modified the common law rule. Illinois, for example, provides that "a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can be found, in which any officer resides." Ill. Code Civ. Prac. § 2-102(c). In many cases, however, a nonprofit association will not have an office or an officer in the state.

Most states specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated nonprofit association.

§ 30-27-114. Member not agent. — A member is not an agent of the association solely by reason of being a member.

History.

I.C., § 30-27-114, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

The purpose of this section is to make it clear that a person's status as a member does not by itself make that person an agent of the nonprofit association. This is contrary to partnership law where the general partners are considered to be general agents of the partnership and can bind the partnership for acts in the ordinary course of business. Agency and the power to bind in a nonprofit association are determined under the enacting state's agency law. *See* Section 7-103(c). Under agency law the managers of a nonprofit association would in most cases be considered as having apparent authority to bind the nonprofit association for acts in the ordinary course of the nonprofit association's business. Therefore a member who is also a manager would be considered to be an agent of the nonprofit association but this is because that person is a manager as well as a member of the nonprofit association, and therefore the agency authority is not "solely by reason of being a member." Under agency law, a member might have actual authority to bind the nonprofit association or might have apparent authority to bind the nonprofit association because of the member's established course of dealing with third parties or under an estoppel theory. Again, the member's agency authority to bind is not solely because of the member's status as a member.

A nonprofit association might be directly or vicariously liable for actions of a member under general law other than agency law. For example, under the doctrine of respondeat superior, a nonprofit association might be liable for the tortious conduct of a member who is found to be acting as a servant of the nonprofit association at the time of the tortious conduct or for negligently supervising a member who is acting on behalf of the nonprofit association. *See* Section 7-108.

§ 30-27-115 through 30-27-124. Reserved.

History.

I.C., § 30-27-115, as added by 2015, ch. 243, § 53, p. 758.

§ 30-27-125. Distributions prohibited — Compensation and other permitted payments. — (a) Except as otherwise provided in subsection (b) of this section, an unincorporated nonprofit association may not pay dividends or make distributions to a member or manager.

(b) An unincorporated nonprofit association may:

(1) Pay reasonable compensation or reimburse reasonable expenses to a member or manager for services rendered;

(2) Confer benefits on a member or manager in conformity with its nonprofit purposes;

(3) Repurchase a membership and repay a capital contribution made by a member to the extent authorized by its governing principles; or

(4) Make distributions of property to members upon winding up and termination to the extent permitted by section 30-27-128, Idaho Code.

History.

I.C., § 30-27-125, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

A distribution by a nonprofit association to members in violation of this section would disqualify it from continuing to be a nonprofit association. *See* Section 7-102(5).

The permitted distributions authorized by subsection (b) are derived from Sections 6.40 and 6.41 of the Model Nonprofit Corporation Act-Third Edition (2008).

An action to recover improper distributions could be brought by the nonprofit association or by a member as a derivative action, if authorized by state law. The Attorney General may also have authority under state law to bring a disgorgement action.

§ 30-27-126. Reserved.

History.

I.C., § 30-27-126, as added by 2015, ch. 243, § 53, p. 758.

§ 30-27-127. Dissolution. — An unincorporated nonprofit association may be dissolved as follows:

(1) If the governing principles provide a time or method for dissolution, at that time or by that method;

(2) If the governing principles do not provide a time or method for dissolution, upon approval by the members;

(3) If no member can be located and the association's operations have been discontinued for at least three (3) years, by the managers or, if the association has no current manager, by its last manager.

History.

I.C., § 30-27-127, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

The vote required for dissolution under subsection (a)(2) would be a majority vote of the members and under subsection (a)(3) would be a majority of the managers, unless the governing principles require a higher vote. *See* Sections 7-115(5) and 7-121(6).

As a general rule, a court order dissolving a nonprofit association would be appropriate if subsection (a)(1)-(3) are inapplicable. It should also be appropriate if it is impossible or impracticable to continue the nonprofit association, for example because of a deadlock or in other circumstances where the doctrine of cy pres is deemed to be applicable.

A nonprofit association that is totally inactive and has no assets is *de facto* dissolved, even though it is not *de jure* dissolved. Formal dissolution (and winding up and termination under Section 7-128) is only necessary if the nonprofit association has assets.

§ 30-27-128. Winding up and termination. — Winding up and termination of an unincorporated nonprofit association must proceed in accordance with the following rules:

(1) All known debts and liabilities must be paid or adequately provided for.

(2) Any property subject to a condition requiring return to the person designated by the donor must be transferred to that person.

(3) Any property subject to a trust must be distributed in accordance with the trust agreement.

(4) Any remaining property must be distributed as follows:

(A) As required by law other than this chapter that requires assets of an association to be distributed to another person with similar nonprofit purposes;

(B) In accordance with the association's governing principles or in the absence of applicable governing principles, to the members of the association per capita or as the members direct; or

(C) If neither paragraph (A) nor (B) of this subsection apply, as provided in chapter 5, title 14, Idaho Code.

History.

I.C., § 30-27-128, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This section sets out the rules for distribution of a nonprofit association's assets after its affairs have been wound up. It is derived from the California Unincorporated Nonprofit Association statute. *See* Calif. Corp. Code § 18410.

The state's statutes of limitations will determine when an action by a creditor to recover any assets distributed by a nonprofit association upon liquidation will be barred. Many business organization statutes, however, have provisions that shorten the normal statutes of limitations for known

and unknown creditor claims when the organization is liquidated. *See* Sections 5-704 and 5-705 (limited liability companies) and Model Business Corporation Act, §§ 14.06 and 14.07.

§ 30-27-129. Appointment of registered agent. — (a) An unincorporated nonprofit association may deliver to the secretary of state for filing a statement appointing an agent authorized to receive service of process.

(b) A statement appointing a registered agent must state:

(1) The name of the unincorporated nonprofit association; and

(2) The name and street and mailing addresses in this state of the registered agent.

(c) A statement appointing a registered agent must be signed by a person authorized to manage the affairs of the unincorporated nonprofit association. The signing of the statement is an affirmation of fact that the person is authorized to manage the affairs of the unincorporated nonprofit association and that the agent has consented to serve.

(d) An amendment to or cancellation of a statement appointing a registered agent must meet the requirements for signing an original statement. An agent may resign by delivering a resignation to the office of the secretary of state for filing and giving notice to the unincorporated nonprofit association at the address most recently supplied to the agent by the association.

(e) The secretary of state may collect a fee for filing a statement appointing a registered agent, an amendment, a cancellation, or a resignation in the amount charged for filing similar documents.

(f) A statement appointing a registered agent takes effect on filing by the secretary of state and is effective for five (5) years after the date of filing unless canceled or terminated earlier.

(g) A statement appointing a registered agent may not be rejected for filing because the name of the unincorporated nonprofit association signing the statement is not distinguishable on the records of the secretary of state from the name of another entity appearing in those records. The filing of such a statement does not make the name of the unincorporated nonprofit association signing the statement unavailable for use by another entity.

(h) The only duty of a registered agent under this chapter is to forward to the unincorporated nonprofit association at the address most recently supplied to the agent by the association any process, notice or demand pertaining to the association which is served or received by the agent.

History.

I.C., § 30-27-129, as added by 2015, ch. 243, § 53, p. 758.

Official Comment

This section authorizes but does not require, a nonprofit association to file a statement appointing a registered agent. Compare Section 1-402 (domestic filing entities, domestic limited liability partnerships and registered foreign entities "shall" designate and maintain a registered agent in this state). It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's management gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and its address.

Subsection (g) has two purposes: (1) it prohibits the filing office (the Secretary of State is the filing office in most states) from refusing to file a registered agent statement by a nonprofit association on the grounds that the name of the nonprofit association conflicts with the name of another entity that has filed formation documents with the filing office; and (2) the filing of the statement by the nonprofit association does not prohibit another entity formed after the nonprofit association has filed from using the same name as the nonprofit association. Both derive from the non-mandatory nature of the appointment of a registered agent by a nonprofit association. The name of entities that are required to file formation documents with the filing office must be distinguishable on the records of the filing office from the name of other mandatory filing entities.

§ 30-27-130. Transition concerning real and personal property. — (a) If, before the effective date of this chapter, an interest in property was by terms of a transfer purportedly transferred to an unincorporated nonprofit association, but under the law of this state the interest did not vest in the association or in one (1) or more persons on behalf of the association under subsection (b) of this section, on the effective date of this chapter the interest vests in the association, unless the parties to the transfer have treated the transfer as ineffective.

(b) If, before the effective date of this chapter, an interest in property was by terms of a transfer purportedly transferred to an unincorporated nonprofit association, but the interest was vested in one (1) or more persons to hold the interest for members of the association, on or after the effective date of this chapter the persons, or their successors in interest, may transfer the interest to the association in its name, or the association may require that the interest be transferred to it in its name.

History.

I.C., § 30-27-130, as added by 2015, ch. 243, § 53, p. 758.

STATUTORY NOTES

Compiler's Notes.

The phrase "the effective date of this chapter" near the beginning of subsections (a) and (b) refers to the effective date of chapter 27, title 30, Idaho Code, enacted by S.L. 2015, Chapter 243, effective July 1, 2015.

Official Comment

Section 7-130 brings to fruition the parties' expectations that previous law frustrated. Inasmuch as the common law did not consider a nonprofit association to be a legal entity, it could not acquire property. A gift of real or personal property thus failed. Reference to the transfer as "purportedly" made identifies the document of transfer as one not effective under the law. Subsection (a) gives effect to the gift. However, if parties were informed

about the common law they may have treated the gift as ineffective. In that case, the final clause of subsection (a) provides that the gift does not become effective when this article takes effect. The unless clause would apply, for example, if the residual beneficiaries of the donor's will, knowing that the devise of Blackacre to the nonprofit association was ineffective under the law, continued to use Blackacre as their summer home with the approval and acquiescence of members and representatives of the nonprofit association.

Subsection (a) — Section 7-130 is not a retroactive rule. It applies to the facts existing when this article takes effect (see Section 1-708). At that time subsection (a) applies to a purported transfer of property that under the law of the jurisdiction could not be given effect at the time it was made. The first alternative belatedly makes it effective — when this article takes effect and not when made. The practical result is that when the purported transfer is effective, the transfer is subject to interests in the property that came into being in the interim. The nonprofit association's interest is subject, for example, to a tax or judgment lien that became effective in the interim. An intervening transfer by the initial transferor may simply be evidence that the "parties had treated the transfer as ineffective." If so, the purported transfer does not vest ownership in the nonprofit association.

Subsection (b) — Some courts gave effect to a gift of property to a nonprofit association by determining that the gift lodged title in someone, often officers of the association, to hold the property in trust for the benefit of the nonprofit association's members. Subsection (b) addresses this situation. When this article takes effect it authorizes the fiduciary to transfer the property to the nonprofit association. If the fiduciary is unwilling or reluctant, the nonprofit association may require the fiduciary to transfer the property to the nonprofit association. In either case, the nonprofit association will get a deed transferring the property to it which, in the case of real property, the nonprofit association may record.

Jurisdictions that have a statute like New York's concerning grants of property by will have a problem that needs special attention. The New York statute provides that a grant by will of real or personal property to an unincorporated association is effective only if the association incorporates within three years after probate of the will. McKinney's N.Y. Estates, Powers & Trust Law § 3-1.3 (1991). The grants by will that need attention

are those that have not become effective by incorporation of the association and have not become ineffective by the running of the three year period. These grants seem entitled to the benefits of Section 7-130. If so, some modification of Section 7-130 may be required.

Chapter 28
[RESERVED]

« Title 30 •, « Ch. 29 »

Chapter 29
GENERAL BUSINESS CORPORATIONS

Part 1. General Provisions

Sec.

Part 2. Incorporation

Part 7. Shareholders

Part 8. Directors and Officers

Part 9. Domestication and Conversion

Part 10. Amendment of Articles of Incorporation and Bylaws

Part 11. Mergers and Share Exchanges

Part 17. Transition Provisions

Part 1
General Provisions

Idaho Code § 30-29-101

§ 30-29-101. Short title. — This chapter shall be known and may be cited as the "Idaho Business Corporation Act."

History.

I.C., § 30-29-101, as added by 2015, ch. 243, § 56, p. 758.

STATUTORY NOTES

Cross References.

Antitrust law, § 48-101 et seq.

Banking corporations, § 26-201 et seq.

Bridge, ferry, flume and boom corporations, § 30-701 et seq.

Canal corporations, § 30-801 et seq.

Cemetery maintenance districts, § 27-101 et seq.

Constitutional provisions governing corporations, Idaho Const., Art. XI, § 1 et seq.

Cooperative marketing associations, § 22-2601 et seq.

Criminal frauds in management of corporations, § 18-1901 et seq.

Declaratory judgment act, "corporation" included in term "person," § 10-1213.

Disposition of unclaimed property, § 14-501 et seq.

Directors and stockholders, statute of limitations as to actions against, § 5-237.

Fraternal benefit societies, § 41-3201 et seq.

Garnishment, service of writ on corporations, § 8-507.

Gas corporations, § 62-901 et seq.

Irrigation companies, § 30-801 et seq Monopolies, § 48-101 et seq.

Nonprofit corporations, § 30-30-101 et seq.

Railroad corporations, § 62-101 et seq.

Religious corporations, § 30-30-107.

Sale of franchise on execution, § 30-201 et seq.

Savings banks, § 26-1801 et seq.

Securities Act, § 30-14-101 et seq.

Shares of stock subject to attachment on execution, § 11-201.

Surety companies, § 41-2603 et seq.

Telegraph, telephone and electric power corporations, § 62-701 et seq.

Transfer and inheritance tax on shares of domestic corporations owned by nonresidents, § 14-404.

Uniform Commercial Code, § 28-1-101 et seq.

Venue of actions against domestic corporations, § 5-404.

Water companies, § 30-801 et seq.

Compiler's Notes.

This section is derived from former § 30-1-101.

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Official Comment

The short title provided by section 1.01 [this section] creates a convenient name for the state's business corporation act.

§ 30-29-102 through 30-29-119. Reserved.

History.

I.C., § 30-29-102, as added by 2015, ch. 243, § 56, p. 758.

§ 30-29-120. Requirements for documents — Extrinsic facts. — (a) A document delivered to the secretary of state for filing pursuant to this chapter must be typewritten or printed, or, if electronically transmitted, it must be in a format that can be retrieved or reproduced in typewritten or printed form.

(b) Notwithstanding the provisions of section 30-21-209(b), Idaho Code, and except as otherwise permitted by subsection (e) of this section, the document must be signed:

(1) By the chairman of the board of directors of a domestic or foreign corporation, by its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee or other court-appointed fiduciary, by that fiduciary.

(c) The person executing the document shall sign it and state beneath or opposite the person's signature the person's name and the capacity in which the document is signed. The document may, but need not, contain a corporate seal, attestation, acknowledgment, or verification.

(d) Whenever a provision of this chapter, or section 30-22-107, Idaho Code, permits any of the terms of a plan or a filed document to be dependent on facts objectively ascertainable outside the plan or filed document, the following provisions apply:

(1) The manner in which the facts will operate upon the terms of the plan or filed document must be set forth in the plan or filed document.

(2) The facts may include:

(i) Any of the following that are available in a nationally recognized news or information medium either in print or electronically: statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data;

(ii) A determination or action by any person or body, including the corporation or any other party, to a plan or filed document; or

(iii) The terms of, or actions taken under, an agreement to which the corporation is a party, or any other agreement or document.

(3) As used in this subsection:

(i) "Filed document" means a document filed by the secretary of state under any provision of this chapter or chapter 21 or 22, title 30, Idaho Code, except section 30-21-213, Idaho Code, or part 5, chapter 21, title 30, Idaho Code; and

(ii) "Plan" means a plan of domestication, conversion, merger or share exchange.

(4) The following provisions of a plan or filed document may not be made dependent upon facts outside the plan or filed document:

(i) The name and address of any person required in a filed document;

(ii) The registered office, if any, of any entity required in a filed document;

(iii) The registered agent of any entity required in a filed document;

(iv) The number of authorized shares and designation of each class or series of shares;

(v) The effective date of a filed document; and

(vi) Any required statement in a filed document of the date on which the underlying transaction was approved or the manner in which that approval was given.

(5) If a provision of a filed document is made dependent on a fact ascertainable outside of the filed document, and that fact is neither ascertainable by reference to a source described in subsection (d)(2)(i) of this section or a document that is a matter of public record, nor have the affected shareholders received notice of the fact from the corporation, then the corporation shall file with the secretary of state articles of amendment to the filed document setting forth the fact promptly after the time when the fact referred to is first ascertainable or thereafter changes. Articles of amendment under this paragraph are deemed to be authorized

by the authorization of the original filed document to which they relate and may be filed by the corporation without further action by the board of directors or the shareholders.

(e) The annual report delivered to the secretary of state for filing under section 30-21-213, Idaho Code, shall be executed by one (1) of the persons identified in subsection (a) of this section or by another person who is authorized by the board of directors to execute the report.

History.

I.C., § 30-29-120, as added by 2015, ch. 243, § 56, p. 758; am. 2019, ch. 90, § 1, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-120. With the revision of the Idaho business corporation act in 2015, some of the references in the official comments may be outdated. Bracketed updates have been provided where possible.

Official Comment

Section 1.20 [this section] standardizes the filing requirements for all documents expressly required or permitted by the Act to be filed by the secretary of state; it does not authorize or direct the secretary of state to accept or reject for filing other documents relating to corporations and does not address documents required or permitted to be filed under other statutes. In a few instances, other sections of the Act impose additional requirements which must also be complied with if the document in question is to be filed.

The filing requirements of chapter 1 [part 1] are intended to minimize both the number of documents to be processed by the secretary of state and the number of disputes between persons seeking to file documents and the secretary of state as to the legal efficacy of documents.

1. Form.

The Act permits a document to be filed in typewritten or printed form through physical delivery to the secretary of state or (if permitted by the secretary of state) by electronic transmission, which is broadly defined in section 1.40 [§ 30-29-140]. Section 1.21 [not adopted] permits the secretary of state to prescribe forms, but the secretary of state may only make mandatory those forms listed in section 1.21(a). As a result, the secretary of state may not reject other documents on the basis of form if they contain the information called for by the specific statutory requirement and meet the minimal formal requirements of this section. See section 1.25 [not adopted].

2. Signing.

Section 1.40 [§ 30-29-140] defines "sign" and "signing," and section 1.20(f) [subsection (b)] states who must sign a document. The Act does not require that documents be acknowledged or verified as a condition for filing. Requirements such as these serve little purpose in connection with documents filed under the Act because section 1.29 [not adopted] makes it a criminal offense for any person to sign a document for filing with knowledge that it contains false information. On the other hand, many organizations, like lenders or title companies, may desire that specific documents include acknowledgments, verifications, or seals. Section 1.20(g) [subsection (c)] therefore provides that these additional forms of authentication do not affect the eligibility of the document for filing.

3. Copies.

For purposes of section 1.20(i) [not adopted], an "exact" copy is a reproduction of the signed original document, and a "conformed" copy is a copy on which the existence of signatures is entered or noted on the copy. However, a person submitting "duplicate originals" meets any requirement for a conformed copy because the secretary of state may treat the duplicate original as a "conformed copy."

4. Reference to Extrinsic Facts.

Section 1.20(k) [subsection (d)] applies where the Act permits any of the terms of a filed document or a plan to be made dependent on facts outside the document or plan. Common examples are references to an interest rate such as the federal funds rate or to securities market prices. Section 1.20(k)(2) [(d)(2)] also provides that the facts on which a filed document or plan may be made dependent include facts within the control of the corporation to make clear that those facts do not need to occur independently. In addition to a determination or action by the corporation, references to extrinsic facts may also include references to determinations or actions by the board of directors, a committee of the board, an officer, employee or agent of the corporation, or any other person.

If the terms of a filed document or plan are made dependent on an agreement or other document as authorized by section 1.20(k)(2)(iii) [(d)(2)(iii)], care should be taken to identify the agreement or document in a manner that satisfies the objectively ascertainable standard, and the manner in which the terms or events under it are to operate must be specified. Consideration should also be given to the intended effects of an amendment to the agreement or document. A simple reference to an agreement will presumably include subsequent amendments, although a reference to the same agreement as in effect on a specified date presumably will not.

Chapters 9 and 11 [Parts 9 and 11] generally require the board of directors to adopt a plan of domestication, conversion, merger or share exchange, and section 6.21 [§ 30-29-601] requires the board to determine the adequacy of consideration for shares to be issued by the corporation.

§ 30-29-121 through 30-29-122. Reserved.

History.

I.C., § 30-29-121, as added by 2015, ch. 243, § 56, p. 758.

§ 30-29-123. Effective date of filed document. — (a) If a filed document does not specify the time zone or place at which a date or time or both is to be determined, the date or time or both at which it becomes effective shall be those prevailing at the place of filing in this state.

(b) Unless otherwise provided in sections 30-29-145 through 30-29-152, Idaho Code, any document filed pursuant to this chapter may have a delayed effective date and, when accepted for filing, is effective as provided in section 30-21-203, Idaho Code, and this section.

History.

I.C., § 30-29-123, as added by 2019, ch. 90, § 2, p. 220.

Official Comment

Section 1.23 [this section] provides definitive rules governing when a filed document becomes effective. The definition of effective date in section 1.40 [§ 30-29-140] ties in with this section so that throughout the Act the term "effective date" of a filed document means the effective date and time determined pursuant to section 1.23. The Act does not generally distinguish between the effective date of a filed document and the effectiveness of what the document is accomplishing. However, in a few instances where filings in more than one jurisdiction are required, the Act distinguishes between the effective date of the document and the effectiveness of a transaction being effected by the document. See sections 9.22(d) [not adopted] and 9.33(d) [not adopted] regarding certain domestications and conversions and section 11.06(e) [not adopted] regarding certain mergers.

Section 1.41 [§ 30-29-141] deals with the effectiveness of notices and other communications and does not use or define the term "effective date."

§ 30-29-124 through 30-29-139. Reserved.

§ 30-29-140. Chapter definitions. — In this chapter, unless otherwise specified:

(1) "Articles of incorporation" means the articles of incorporation described in section 30-29-202, Idaho Code, all amendments to the articles of incorporation, and any other documents permitted or required to be delivered for filing by a domestic business corporation with the secretary of state under any provision of this chapter that modify, amend, supplement, restate, or replace the articles of incorporation. After an amendment of the articles of incorporation or any other document filed under this chapter that restates the articles of incorporation in their entirety, the articles of incorporation shall not include any prior documents. When used with respect to a foreign corporation or a domestic or foreign nonprofit corporation, the "articles of incorporation" of such an entity means the document of such entity that is equivalent to the articles of incorporation of a domestic business corporation.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Beneficial shareholder" means a person who owns the beneficial interest in shares, that may be a record shareholder or a person on whose behalf shares are registered in the name of an intermediary or nominee.

(4) "Conspicuous" means so written, displayed, or presented that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(5) "Corporation," "domestic corporation," "business corporation," or "domestic business corporation" means a corporation for profit that is not a foreign corporation, incorporated under this chapter.

(6) "Distribution" means a direct or indirect transfer of cash or other property, except a corporation's own shares, or incurrence of indebtedness

by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; a distribution of liquidation; or otherwise.

(7) “Document” means any tangible medium on which information is inscribed, and includes handwritten, typed, printed, or similar instruments, and copies of such instruments; or an electronic record.

(8) “Effective date,” when referring to a record filed by the secretary of state, means the time and date determined in accordance with section 30-21-203 or 30-29-123(b), Idaho Code.

(9) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) “Electronic record” means information that is stored in an electronic or other nontangible medium and is retrievable in paper form through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 30-29-141(j), Idaho Code.

(11) “Electronic transmission” or “electronically transmitted” means any form or process of communication not directly involving the physical transfer of paper, or another tangible medium, that is suitable for the retention, retrieval and reproduction of information by the recipient and is retrievable in paper form by the recipient through an automated process used in conventional commercial practice, unless otherwise authorized in accordance with section 30-29-141(j), Idaho Code.

(12) “Eligible entity” means a domestic or foreign unincorporated entity or a domestic or foreign nonprofit corporation.

(13) “Eligible interests” means interests in eligible entities.

(14) “Employee” includes an officer but not a director. A director may accept duties that make the director also an employee.

(15) “Expenses” means reasonable expenses of any kind that are incurred in connection with a matter.

(16) “Foreign corporation” or “foreign business” means a corporation incorporated under a law other than the law of this state which would be a business corporation if incorporated under the law of this state.

(17) “Foreign nonprofit corporation” means a corporation incorporated under a law other than the law of this state, which would be a nonprofit corporation if incorporated under the law of this state.

(18) “Foreign registration statement” means the foreign registration statement described in section 30-21-503, Idaho Code.

(19) “Includes” and “including” denote a partial definition or a nonexclusive list.

(20) “Individual” means a natural person.

(21) “Interest holder liability” means:

(i) Personal liability for a debt, obligation, or other liability of a domestic corporation or other entity that is imposed on a person:

(A) Solely by reason of the person’s status as a shareholder or other interest holder; or

(B) By the articles of incorporation of the domestic corporation or the organic rules of the other entity that make one (1) or more specified shareholders, members or interest holders, or categories of shareholders or interest holders, liable in their capacity as shareholders or interest holders for all or specified liabilities of the corporation or other entity; or

(ii) An obligation of a shareholder or interest holder under the articles of incorporation of a domestic corporation or the organic rules of another entity or to contribute to the corporation or other entity.

For purposes of the foregoing, except as otherwise provided in the articles of incorporation of a domestic corporation or the organic law or organic rules of another entity, interest holder liability arises under paragraph (i) of this subsection when the corporation or other entity incurs the liability.

(22) “Means” denotes an exhaustive definition.

(23) “Membership” [Reserved.]

(24) “Record date” means the date fixed for determining the identity of the corporation’s shareholders and their shareholdings for purposes of this chapter. Unless another time is specified when the record date is fixed, the

determination shall be made as of the close of business at the principal office of the corporation on the date so fixed.

(25) “Record shareholder” means the person in whose name shares are registered in the records of the corporation or the person identified as the beneficial owner of shares in a beneficial ownership certificate pursuant to section 30-29-723, Idaho Code, on file with the corporation to the extent of the rights granted by such certificate.

(26) “Secretary” means the corporate officer to whom the board of directors has delegated responsibility under section 30-29-840(c), Idaho Code, to maintain the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

(27) “Share exchange” means an interest exchange as defined in section 30-22-102(10), Idaho Code.

(28) “Shareholder” means a record shareholder.

(29) “Shares” means the units into which the proprietary interests in a domestic or foreign corporation are divided.

(30) “Subscriber” means a person who subscribes for shares in a corporation, whether before or after incorporation.

(31) “Treasury shares” means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been canceled or restored to the status of authorized but unissued shares. Treasury shares shall be deemed to be “issued” shares, but not “outstanding” shares.

(32) “Unincorporated entity” means an organization or artificial legal person that either has a separate legal existence or has the power to acquire an estate in real property in its own name and that is not any of the following: a domestic or foreign business or nonprofit corporation, a series of a limited liability company or of another type of entity, an estate, a trust, a state, the United States, or a foreign government. The term includes a general partnership, limited liability company, limited partnership, business trust, joint stock association and unincorporated nonprofit association.

(33) “United States” includes district, authority, bureau, commission, department and any other agency of the United States.

(34) “Unrestricted voting trust beneficial owner” means, with respect to any shareholder rights, a voting trust beneficial owner whose entitlement to exercise the shareholder right in question is not inconsistent with the voting trust agreement.

(35) “Voting group” means all shares of one (1) or more classes or series that under the articles of incorporation or this chapter are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this chapter to vote generally on the matter are for that purpose a single voting group.

(36) “Voting power” means the current power to vote in the election of directors.

(37) “Voting trust beneficial owner” means an owner of a beneficial interest in shares of the corporation held in a voting trust established pursuant to section 30-29-730(a), Idaho Code.

(38) “Writing” or “written” means any information in the form of a document.

History.

I.C., § 30-29-140, as added by 2015, ch. 243, § 56, p. 758; am. 2019, ch. 90, § 3, p. 220.

STATUTORY NOTES

Cross References.

Idaho nonprofit corporation act, § 30-30-101 et seq.

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler’s Notes.

This section is derived from former § 30-1-140. With the revision of the Idaho business corporation act in 2015, some of the references in the official comments may be outdated. Bracketed updates have been provided where possible.

Official Comment

Section 1.40 [this section] contains definitions of terms used generally throughout the Act. Other subchapters and sections of the Act contain specialized definitions that are applicable only to those subchapters or sections.

Beneficial Shareholder.

Because various provisions of the Act allow beneficial owners of shares to take actions as a shareholder even in the absence of a beneficial ownership certificate under section 7.23 [§ 30-29-723], the term "beneficial shareholder" has been defined in section 1.40.

The definition does not specify what interests are necessary for a person to be a beneficial shareholder, but consistent with section 8-207(a) of the Uniform Commercial Code [§ 28-8-207], the Act contemplates that the corporation is entitled to treat the beneficial shareholder as having the full bundle of economic and voting rights associated with the shares. For this reason, the beneficial owner of shares in a voting trust has been defined separately in section 1.40 as a "voting trust beneficial owner."

Unlike section 7.23 [§ 30-29-723], which provides for a procedure to specify a beneficial owner in a beneficial ownership certificate, the definition of "beneficial shareholder" does not prescribe a procedure for establishing beneficial ownership. Where a court proceeding is involved, as it is, for example, in sections 7.41 [§ 30-29-741] (derivative proceeding), 13.30 [§ 30-29-1330] (appraisal rights), and 14.30 [§ 30-29-1430] (judicial dissolution), the court can determine what is necessary to establish beneficial ownership. In other situations, custom and practice and the reasonable requirements of the corporation should apply. Thus, a certification of a broker-dealer or other financial institution or a current account statement from such an institution often is sufficient to establish beneficial ownership. In the case of a public corporation, a filing with the Securities and Exchange Commission identifying beneficial ownership might be sufficient.

When shares of a public corporation are held, as explained in the Official Comment to section 7.23, indirectly in street name with a broker-dealer or other financial institution, which may in turn have the shares on deposit

with Depository Trust Company ("DTC") as a clearing agency, a reference to shares in this Act is technically a reference to a "securities entitlement" under section 8-102(a)(17) of the Uniform Commercial Code [§ 28-8-102], which is an undivided interest in a mass of shares held by the financial intermediary or on deposit with DTC. Nevertheless, the Act continues for convenience to refer to the interests as "shares," and thus references to shares should be read to include securities entitlements with respect to those shares.

Conspicuous.

"Conspicuous" is defined in section 1.40 [§ 30-29-140] and is comparable to section 1-201(10) [§ 28-1-201(10)] of the Uniform Commercial Code. The test is whether attention can reasonably be expected to be elicited.

Corporation, Domestic Corporation, Domestic Business Corporation, Business Corporation and Foreign Corporation.

"Corporation," "domestic corporation," "business corporation," and "domestic business corporation," as defined in section 1.40, all mean the same thing and may be used interchangeably. The word "corporation," when used alone, refers only to a domestic corporation. In some instances, the phrase "domestic corporation" has been used to contrast it with a foreign corporation, a term also defined in section 1.40. The phrase "domestic business corporation" has been used on occasion to contrast it with a domestic nonprofit corporation. "Corporation" has been given special meanings in sections 5.01 [not adopted], 8.50 [§ 30-29-850] and 13.01 [§ 30-29-1301].

Distribution.

Section 1.40 defines "distribution" to include all transfers of cash or other property made by a corporation to any shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as share dividends and share splits. Thus, a "distribution" includes the payment of a dividend, a purchase by a corporation of its own shares, a distribution of evidences of indebtedness or promissory notes of the corporation, and a distribution in voluntary or involuntary liquidation. If a corporation incurs indebtedness to shareholders in connection with a

distribution (as in the case of a distribution of a debt instrument or an installment purchase of shares), the creation, incurrence, or distribution of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the corporation, except in the situation addressed in section 6.40(g) [§ 30-29-640].

The term "indirect" in the definition of "distribution" is intended to address transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to address any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

The test for validity of distributions other than distributions in liquidation is set forth in section 6.40, and for distributions in liquidation in chapter 14 [part 14].

Electronic Transmission.

The terms "electronic," "electronic record," "electronic transmission" and "electronically transmitted" incorporate into the Act terminology from the Uniform Electronic Transmissions Act ("UETA") and the federal Electronic Signatures in Global and National Commerce Act ("E-Sign"). See Official Comment to section 1.41 [§ 30-29-141], Note on the Relationship Between Act Provisions on Electronic Technology and UETA and E-Sign. Electronic records and transmissions are intended to be broadly construed.

Entity.

The term "entity," defined in section 1.40, appears in the definition of "person" in section 1.40 and covers all types of artificial persons. Estates and trusts and general partnerships are included even though they may not, in some jurisdictions, be considered artificial persons. "Trust," by itself, means a nonbusiness trust, such as a traditional testamentary or inter vivos trust. The term "entity" is broader than the term "unincorporated entity" which is also defined in section 1.40. See also the definitions in section 1.40 of "governmental subdivision," "state," and "United States." A form of co-ownership of property or sharing of returns from property that is not a partnership under the Uniform Partnership Act will not be an "unincorporated entity."

Expenses. The Act provides in a number of contexts that expenses relating to a proceeding incurred by a person shall or may be paid by another, through indemnification or by court order in specific contexts. See, for example, sections 7.46 [§ 30-29-746], 7.48 [§ 30-29-748], 8.53(a) [§ 30-29-853], 8.54 [§ 30-29-854], 13.31 [§ 30-29-1331], 14.32(e) [§ 30-29-1432], 16.04(c) [§ 30-29-1604] and 16.05(c) [§ 30-29-1605]. Other than the requirement that expenses must be reasonable in the circumstances, the type or character of the expenses is not limited. Examples include such things as fees and disbursements of counsel, experts of all kinds, and jury and similar litigation consultants; travel, lodging, transcription, reproduction, photographic, video recording, communication, and delivery costs, whether included in the disbursements of counsel, experts, or consultants, or directly incurred; court costs; and premiums for posting required bonds.

Interest Holder Liability.

The term "interest holder liability" is used in the context of provisions in chapters [parts] 9 and 11 that describe the effects on the personal liability of shareholders, members and interest holders when the entity in which they hold shares, memberships or interests is the subject of a transaction under those chapters. The term is also used in section 2.02 [§ 30-29-202] and chapter [part] 10 with respect to the articles of incorporation and certain amendments to them. The term includes only liabilities that are imposed solely because of the person's status as a shareholder, member or interest holder, or by the organic rules of an entity on shareholders, members or interest holders. Liabilities that a shareholder, member or interest holder incurs by contract (other than a contract that is part of an entity's organic rules, such as a partnership agreement) are not included. Thus, for example, if a state's business corporation law were to make shareholders personally liable for unpaid wages, that liability would be an "interest holder liability." If, on the other hand, a shareholder were to contractually guarantee payment of an obligation of a corporation, that liability would not be an "interest holder liability."

Membership.

"Membership" is defined in section 1.40 to refer only to the rights of a member in a nonprofit corporation. Although the owners of a limited liability company are generally referred to as "members," for purposes of

the Act they are referred to as "interest holders" and what they own in the limited liability company is referred to in the Act as an "interest."

Organic Rules, Public Organic Record and Private Organic Rules.

The term "organic rules" in section 1.40 includes both public organic records and private organic rules. The term "public organic record" includes such documents as the articles of incorporation of a business or nonprofit corporation, the certificate of limited partnership of a limited partnership, the articles of organization or certificate of formation of a limited liability company, the deed of trust of a business trust and comparable documents, however denominated, that are publicly filed to create other types of unincorporated entities. An election of limited liability partnership status is not of itself a public organic record because it does not create the underlying general or limited partnership by filing the election, although the election may be made part of the public organic record of the partnership by its organic law. The term "private organic rules" includes corporate bylaws, a partnership agreement of a general or limited partnership, an operating agreement of a limited liability company and comparable agreements, however denominated, of unincorporated types of other entities. Private organic rules of unincorporated entities are not required by the Act to be in writing, and therefore would include oral partnership agreements and oral operating agreements.

Person.

The term "person" is defined in section 1.40 to include an individual or an entity. In the case of an individual the Act assumes that the person is competent to act in the matter under general state law independent of the corporation statute.

Principal Office.

Many corporations maintain numerous offices, but there is usually one office, sometimes colloquially referred to as the home office or headquarters, where the principal corporate officers are located. The corporation must designate its principal office address in the annual report required by section 16.21 [see § 30-21-213], and a foreign corporation must also do so in its foreign registration statement. To clarify which corporate office is the principal office, the Act defines the office designated by the

corporation in the annual report (or foreign registration statement) as the principal office of the corporation.

Secretary.

The term "secretary" is defined in section 1.40 because the Act does not require the corporation to maintain any specific or titled officers. See section 8.40 [§ 30-29-840]. However, some corporate officer, however titled, must perform the functions described in this definition, and various sections of the Act refer to that officer as the "secretary."

Shareholder and Record Shareholder.

The term "shareholder" is usually used in the Act to mean a "record shareholder" as defined in section on 1.40, but section 1.40 contemplates that definitions may be expanded or limited by the Act for purposes of specific provisions. The definition of "record shareholder" in section 1.40 includes a beneficial owner of shares named in a beneficial ownership certificate under section 7.23 [§ 30-29-723]), but only to the extent of the rights granted the beneficial owner in the certificate — for example, the right to receive notice of, and vote at, shareholders' meetings. Various substantive sections of the Act also permit holders of voting trust certificates or beneficial owners of shares (not subject to a beneficial ownership certificate under section 7.23 to exercise some of the rights of a "shareholder." See, for example, section 7.40 [§ 30-29-740], which relates to derivative proceedings. Separate definitions of "voting trust beneficial owner," "unrestricted voting trust beneficial owner" and "beneficial shareholder" also appear in section 1.40.

Sign or Signature.

The definition of "sign" or "signature" incorporates into the Act concepts and terminology from UETA and the federal E-Sign. Thus, the terms "sign" and "signature" include not only traditional forms of signing, such as manual, facsimile, or conformed signatures, but also electronic signatures in electronic transmissions. The intent of the Act is that any manifestation of an intention to sign or authenticate a document be accepted, although electronic transmissions having electronic signatures must comply with the requirements in the definition of "electronic transmission," including being retrievable in paper form by the recipient through an automated process

unless otherwise authorized in accordance with section 1.41(j) [§ 30-29-141].

Unincorporated Entity.

The term "unincorporated entity" is a subset of the broader term "entity" and includes an unincorporated nonprofit association. The Uniform Unincorporated Nonprofit Association Act gives an unincorporated nonprofit association the power to acquire an estate in real property and thus an unincorporated nonprofit association organized in a state that has adopted that act will be an "unincorporated entity." At common law, an unincorporated nonprofit association was not a legal entity and did not have the power to acquire real property.

As used in the definition of unincorporated entity, "business trust" includes any trust carrying on a business, such as a Massachusetts business trust, real estate investment trust, or other common law or statutory business trust. The term "unincorporated entity" (and thus the term "eligible entity") expressly excludes series of limited liability companies or of other types of entities, and estates and trusts (i.e., trusts that are not business trusts), regardless of whether they would be considered artificial persons under the governing jurisdiction's law, to make it clear that they are not eligible to participate in a conversion under chapter [part] 9 or a merger or share exchange under chapter [part] 11.

Voting Group.

Section 1.40 defines "voting group" for purposes of the Act as a matter of convenient reference. When the definition refers to shares entitled to vote "generally" on a matter, it signifies all shares entitled to vote together on the matter by the articles of incorporation or the Act, regardless of whether they also have the right to be counted or tabulated separately. "Voting groups" are thus the basic units of collective voting by shareholders, and voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series.

The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of the Act. In a few instances under the Act, the board of directors may establish

the right to vote by voting groups. On most matters to be voted on by shareholders, only a single voting group, consisting of a class of voting or common shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 7.25 [§ 30-29-725]. In other circumstances, the vote of multiple groups may be required. See sections 7.25 and 7.26 [§§ 30-29-725 and 30-29-726].

Voting Power.

Application of the definition of "voting power" turns on whether the relevant shares carry the power to vote in the election of directors as of the time for voting on the relevant transaction. If shares carry the power to vote in the election of directors only under a certain contingency, as is often the case with preferred stock, the shares would not carry voting power within the meaning of section 1.40 unless the contingency has occurred, and then only during the period when the voting rights are in effect. Shares that carry the power to vote for any directors as of the time to vote on the relevant transaction have the current power to vote in the election of directors within the meaning of the definition, even if the shares do not carry the power to vote for all directors.

Voting Trust Beneficial Owner and Unrestricted Voting Trust Beneficial Owner.

Section 1.40 has a separate definition of "voting trust beneficial owner" because the number of such owners and value of their shares can enter into determinations under sections 13.02(b)(1) [§ 30-29-1302] and 14.30(b)(ii) [§ 30-29-1430]. It also has a separate definition of "unrestricted voting trust beneficial owner" because rights are given under some provisions of the Act for a beneficial owner of shares deposited in a voting trust established under section 7.30 [§ 30-29-730] to take actions as a shareholder. These owners have the economic interest in the shares but the voting rights have been given to the voting trustee. In addition to the typical grant of voting rights, section 7.30 permits the voting trust agreement to confer on the voting trustee the right otherwise to act with respect to the shares, and thus could vest in the trustee the exclusive right to exercise statutory shareholder rights. The term "unrestricted voting trust beneficial owner" is used to distinguish from this possible limitation. If the voting trust agreement grants the trustee the exclusive right to act with respect to the shareholder right in

question, then the voting trustee, and not the voting trust beneficial owner, may exercise those rights.

Writing or Written.

"Writing" or "written" means information in the form of a "document," which in turn means any tangible medium on which information is inscribed, such as a paper instrument, as well as an electronic record. Thus, under the Act a written consent of shareholders under section 7.04 [§ 30-29-704], for example, may be in the form of paper or an electronic record.

§ 30-29-141. Notices and other communications. — (a) Notice under this chapter must be in writing unless oral notice is reasonable in the circumstances. Unless otherwise agreed between the sender and the recipient, words in a notice or other communication under this chapter must be in English.

(b) A notice or other communication may be given by any method of delivery, except that electronic transmissions must be in accordance with this section. If the methods of delivery are impracticable, notice or other communication may be given by means of a broad non-exclusionary distribution to the public that may include a newspaper of general circulation in the area where published, radio, television, or other methods of distribution that the corporation has previously identified to its shareholders.

(c) Notice or other communication to a domestic corporation or to a foreign corporation registered to do business in this state may be delivered to the corporation's registered agent at its registered office or to the secretary at the corporation's principal office shown in its most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its foreign registration statement.

(d) A notice or other communications may be delivered by electronic transmission if consented to by the recipient or if authorized by subsection (j) of this section.

(e) Any consent under subsection (d) of this section may be revoked by the person who consented by written or electronic notice to the person to whom the consent was delivered. Any such consent is deemed revoked if the corporation is unable to deliver two (2) consecutive electronic transmissions given by the corporation in accordance with such consent, and such inability becomes known to the secretary or an assistant secretary or to the transfer agent, or other person responsible for the giving of notice or other communications; provided, however, the inadvertent failure to treat such inability as a revocation shall not invalidate any meeting or other action.

(f) Unless otherwise agreed between the sender and the recipient, an electronic transmission is received when:

(1) It enters an information processing system that the recipient has designated or uses for the purposes of receiving electronic transmissions or information of the type sent, and from which the recipient is able to retrieve the electronic transmission; and

(2) It is in a form capable of being processed by that system.

(g) Receipt of an electronic acknowledgment from an information processing system described in subsection (f)(1) of this section establishes that an electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

(h) An electronic transmission is received under this section even if no person is aware of its receipt.

(i) A notice or other communication, if in a comprehensible form or manner, is effective at the earliest of the following:

(1) If in a physical form, the earliest of when it is actually received, or when it is left at:

(i) A shareholder's address shown on the corporation's record of shareholders maintained by the corporation under section 30-29-1601(d), Idaho Code;

(ii) A director's residence or usual place of business; or

(iii) The corporation's principal office;

(2) If mailed postage prepaid and correctly addressed to a shareholder, upon deposit in the United States mail;

(3) If mailed by United States mail postage prepaid and correctly addressed to a recipient other than a shareholder, the earliest of when it is actually received, or:

(i) If sent by registered or certified mail, return receipt requested, the date shown on the return receipt signed by or on behalf of the addressee; or

(ii) Five (5) days after it is deposited in the United States mail;

(4) If an electronic transmission, when it is received as provided in subsection (f) of this section; and

(5) If oral, when communicated.

(j) A notice or other communication may be in the form of an electronic transmission that cannot be directly reproduced in paper form by the recipient through an automated process used in conventional commercial practice only if the electronic transmission is otherwise retrievable in perceivable form, and the sender and the recipient have consented in writing to the use of such form of electronic transmission.

(k) If this chapter prescribes requirements for notices or other communications in particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe requirements for notices or other communications, not inconsistent with this section or other provisions of this chapter, those requirements govern. The articles of incorporation or bylaws may authorize or require delivery of notices of meetings of directors by electronic transmission.

(*l*) In the event that any provisions of this chapter are deemed to modify, limit, or supersede the federal electronic signatures in global and national commerce act, 15 U.S.C. 7001 *et. seq*., the provisions of this chapter shall control to the maximum extent permitted by section 102(a)(2) of that federal act.

History.

I.C., § 30-29-141, as added by 2015, ch. 243, § 56, p. 758; am. 2019, ch. 90, § 4, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-141. With the revision of the Idaho business corporation act in 2015, some of the references in the

official comments may be outdated. Bracketed updates have been provided where possible.

Official Comment

Section 1.41 [this section] establishes rules for determining how notices and other communications may be given and when they are effective for a variety of purposes under the Act. Not only do the rules of section 1.41 apply to the delivery of notices of meetings of shareholders and directors and other similar notices, they apply as well to director and shareholder consents, demands to hold meetings, proxies, demands to commence derivative actions, demands to inspect books and records, assertions of appraisal rights, and other communications to and from the corporation.

Note on the Relationship Between Act Provisions on Electronic Technology and UETA and E-Sign.

The provisions of the Act relating to electronic records, electronic transmissions and related matters, found principally in the definitions in section 1.40, are set against the backdrop of the Uniform Electronic Transmissions Act ("UETA") and the federal Electronic Signatures in Global and National Commerce Act ("E-Sign"). A brief description of certain aspects of UETA and E-Sign is useful to understand the Act's electronic technology provisions.

UETA adopted definitions for the terms electronic, electronic records, electronic signatures, records, transactions, and the like, as well as provisions governing the use of those terms. UETA applies to "transactions," which are defined to mean actions between two or more persons "relating to the conduct of business [or] commercial . . . affairs." UETA §§ 2(16) and 3(a). The reach of the term "transactions" in the context of a comprehensive business corporation act is unclear. For example, although obtaining a proxy from a shareholder that is voting on a cash-out merger would likely constitute a "transaction," the unilateral act by a corporation of sending notice of an annual meeting at which no significant action is proposed might not.

If UETA applies, it establishes certain statutory norms for the validity of electronic signatures, electronic records, *etc*. However, UETA also provides that it applies only to transactions between parties each of which has agreed

to conduct transactions by electronic means, and that such agreement is determined from the context and surrounding circumstances, including the parties' conduct. *Id* . § 5(b).

E-Sign, codified at 15 U.S.C. §§ 7001 *et. seq*., in turn adopted the substance of UETA's principal definitions, including electronic, electronic signature, record, and transaction, as well as many of the operative provisions of UETA. The applicability of E-Sign, like UETA, turns on whether a "transaction" is involved. *Id* . § 7001(a). Like UETA, E-Sign's applicability also depends upon the parties consenting to transact business by electronic means. *Id* . § 7001(b)(2).

Importantly, E-Sign contains a federal preemption provision that itself excepts certain state adoptions of UETA. Thus, in general terms, section 7002(a) of E-Sign allows a state statute to modify, limit, or supersede the provisions of E-Sign section 7001 only if (i) it is a state enactment of the version of UETA approved in 1999, and (ii) the state's enactment of UETA does not contain any state exceptions, or "carve outs," other than those contained in the 1999 version of UETA § 3(b)(4). If, for example, a state enactment of UETA carved out that state's general business corporation law from the applicability of UETA, a carve out that is not contained in the 1999 version of UETA § 3(b)(4), and that business corporation law was deemed to be inconsistent with E-Sign, the offending provisions of the business corporation law would be preempted. *Id* . § 7002(a)(1).

Note one aspect of the definition of "record" in both UETA and E-Sign: they both provide that information that is stored in an electronic medium must simply be "retrievable in perceivable form." This is in contrast to states that require not only that an electronic transmission may be retained, retrieved, and reviewed but also requires that it "may be directly reproduced in paper form by [the] recipient through an automated process." The former would include, *e.g*., a voicemail, a text message, and an electronic page, although the latter would not.

Against that backdrop, the Act's electronic technology provisions align, in all material respects, with the terminology and concepts of UETA and E-Sign. However, the Act does not adopt wholesale the vocabulary and concepts of UETA and E-Sign for the following reasons:

• Such wholesale changes would have involved amendments to the black letter in over 50 sections of the Act. Given that more than half the states in the United States have state corporation laws based in large measure on the Act, an approach to electronic technology that would require so many statutory changes in each state would have been extremely burdensome.

• The vocabulary of UETA and E-Sign, particularly the definition of "record" and "sign," although technically precise, are not written in the same style as the Act, do not use its terminology, and are less understandable to the ordinary reader. And if engrafted directly into the full body of the Act, the result would have been a major change from well-understood, obvious, and traditional terminology (*e.g.*, a "unanimous written consent") to a comparatively awkward and less intuitively obvious terminology (*e.g.*, a "consent in the form of a record").

• The Act rejects the concept that a voicemail or a text message alone should, as a default matter, have the same status as a paper document. In so doing, the Act implicitly acknowledges the corruptibility and/or inaccessibility of electronic data.

The Act instead adopts an approach that involves incorporating into the definitions in section 1.40, the principal electronic technology vocabulary and concepts of UETA and E-Sign, in ways that do not require substantial changes throughout the Act.

Thus, the Act's electronic technology provisions:

• define "document" "writing" and "written," to include electronic records;

• define "deliver" and "delivery" to include electronic transmissions if properly authorized;

• use definitions of "electronic" and "electronic record" that borrow heavily from UETA and E-Sign;

• define "electronic transmission" and "electronically transmitted" to incorporate UETA and E-Sign vocabulary and concepts;

• require that electronic records and electronic transmissions be retrievable in paper form through an automated process used in conventional commercial practice, unless specifically authorized in

accordance with section 1.41(j), thereby establishing the default rule that, until they are used in conventional commercial practice, voicemails and text messages are not generally recognized as valid, absent a specific consent (parties may, however, consent to their use); and

• define "sign" or "signature" to incorporate technical E-Sign and UETA terminology, while retaining common terminology such as "any manual, facsimile, or conformed signature."

This approach is pragmatic, addresses the vast majority of recurring questions involving electronic transmissions and records, and yet enables parties who wish to do so to consent specifically to use electronic records or transmissions that are merely "retrievable in perceivable form."

As for the preemption issue under E-Sign, the Act's electronic technology provisions are consistent in all material respects with E-Sign and UETA. Although the Act's basic provision has the additional requirement that electronic records or transmissions be retrievable in paper form through an automated process, section 1.41(j) permits parties to agree to the broader "retrievable in perceivable form" formulation found in E-Sign and UETA, and accordingly the Act's provisions are consistent with those laws. Section 1.41(l) implements E-Sign section 7002(a)(2), which exempts from the federal preemption provisions of E-Sign certain state laws that modify, limit, or supersede E-Sign, and that also make specific reference to E-Sign.

Note that corporations desiring to conduct transactions by electronic means must also comply with the requirements of UETA or E-Sign, as applicable, to ensure the legal effect, validity, and enforceability of its transactions and records. For example, E-Sign contains specific provisions regarding accuracy, authenticity, accessibility, and retention of electronic records. Compliance with these statutes will require that corporations address certain technical issues, including system security and procedures.

*

1. General.

The rules set forth in section 1.41 permit many other sections of the Act to be phrased simply in terms of giving or delivering notice without repeating details with respect to how notice should be given and when it is

effective. If all methods of delivery used in conventional commercial practice and electronic transmission in accordance with section 1.41 are impracticable, section 1.41(b) provides for alternate methods of communication.

2. Rules Governing Use of Electronic Transmissions.

Electronic records and transmissions are effective under the Act if in accordance with section 1.41. The definition of writing in section 1.40 includes a document, which is defined in section 1.40 [§ 30-29-140] to include an electronic record. Section 1.40 then defines the terms "deliver" or "delivery" to include delivery by hand, mail, commercial delivery, or by electronic transmission if authorized in accordance with section 1.41. Authorization of notices or other communications delivered by electronic transmission is governed by sections 1.41(d) and 1.41(j), which require the consent of the recipient.

Assuming consent, section 1.41 then establishes a number of rules with respect to electronic transmissions and records. Subsection (e) provides that any consent to the use of electronic transmissions may be revoked at any time. Subsection (e) also establishes a default rule in cases of failed electronic deliveries: a consent under section 1.41(d) is deemed revoked if the corporation is unable to deliver two consecutive electronic transmissions and the inability becomes known to specified corporate officers or agents. Subsection (f), based on UETA § 15(b), establishes basic rules, which can be varied by the sender and recipient, for when an electronic transmission is "received." An electronic transmission is received, even if the recipient's electronic filters, firewalls, or other similar systems effectively block the transmission, because a recipient who consents to the use of electronic transmissions is responsible for any such filters or firewalls that block access to them. Subsection (g), based on UETA § 15(f), provides legal certainty regarding an electronic acknowledgment, but only addresses the fact of receipt, not the quality of the content or whether it was "opened" or read. Subsection (h), based on UETA § 15(h), establishes that an electronic transmission is received even if the recipient or individual is unaware of its receipt, just as a written notice physically delivered to a person's correct address is duly delivered even if the addressee is not aware of its delivery or declines to open the envelope.

Section 1.41(j) requires specific consent to the use of the electronic transmissions that are only “retrievable in perceivable form” and that cannot be directly reproduced in paper form through an automated process used in conventional commercial practice. See the Official Comment to section 1.40. Such consent between the sender and recipient must be in writing, except with respect to notices of meetings to directors, which may be in the articles of incorporation or bylaws.

3. When Notices or Other Communications Are Effective.

Section 1.41(i) establishes rules governing when notices or communications are deemed to be legally effective, serially addressing delivery in physical form, regular mail sent to shareholders and to other recipients, registered or certified mail, electronic transmissions, and oral communications.

§ 30-29-142. Number of shareholders. — (a) For purposes of this chapter, the following identified as a shareholder in a corporation's current record of shareholders constitutes one (1) shareholder:

(1) Three (3) or fewer co-owners; (2) A corporation, partnership, trust, estate, or other entity; or (3) The trustees, guardians, custodians, or other fiduciaries of a single trust, estate, or account.

(b) For purposes of this chapter, shareholdings registered in substantially similar names constitute one (1) shareholder if it is reasonable to believe that the names represent the same person.

History.

I.C., § 30-29-142, as added by 2019, ch. 90, § 5, p. 220.

Official Comment The Act generally avoids provisions that are based on the number of shareholders of a corporation, since these provisions may encourage individual shareholders to divide or combine their holdings for private strategic advantage. But the number of shareholders is important in determining: (i) whether the market exception to appraisal rights is available under section 13.02(b)(2) and (ii) [§ 30-29-1302] whether a shareholder may bring a proceeding for judicial dissolution under section 14.30(a)(2) [§ 30-29-1430].

§ 30-29-143. Qualified director. — (a) A "qualified director" is a director who, at the time action is to be taken under:

(1) Section 30-29-202(b)(6), Idaho Code, is not a director to whom the limitation or elimination of the duty of an officer to offer potential business opportunities to the corporation would apply or who has a material relationship with any other person to whom the limitation or elimination would apply;

(2) Section 30-29-744, Idaho Code, does not have a material interest in the outcome of the proceeding or a material relationship with a person who has such an interest;

(3) Section 30-29-853 or 30-29-855, Idaho Code, is not a party to the proceeding, is not a director as to whom a transaction is a director's conflicting interest transaction or who sought a disclaimer of the corporation's interest in a business opportunity under section 30-29-870, Idaho Code, which transaction or disclaimer is challenged in the proceeding, and does not have a material relationship with a director described in this subsection;

(4) Section 30-29-862, Idaho Code, is not a director as to whom the transaction is a director's conflicting interest transaction or who has a material relationship with another director as to whom the transaction is a director's conflicting interest transaction; or

(5) Section 30-29-870, Idaho Code, is not a director who pursues or takes advantage of the business opportunity, directly or indirectly through or on behalf of another person or has a material relationship with a director or officer who pursues or takes advantage of the business opportunity, directly or indirectly through or on behalf of another person.

(b) For purposes of this section:

(1) "Material interest" means an actual or potential benefit or detriment, other than one which would devolve on the corporation or the shareholders generally, that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken; and

(2) “Material relationship” means a familial, financial, professional, employment, or other relationship that would reasonably be expected to impair the objectivity of the director’s judgment when participating in the action to be taken.

(c) The presence of one (1) or more of the following circumstances shall not automatically prevent a director from being a qualified director:

(1) Nomination or election of the director to the current board by any director who is not a qualified director with respect to the matter, or by any person who has a material relationship with that director, acting alone or participating with others;

(2) Service as a director of another corporation of which a director who is not a qualified director with respect to the matter, or any individual who has a material relationship with that director, is or was also a director; or

(3) With respect to action to be taken under section 30-29-744, Idaho Code, status as a named defendant, as a director against whom action is demanded, or as a director who approved the conduct being challenged.

History.

I.C., § 30-29-143, as added by 2019, ch. 90, § 6, p. 220.

Official Comment

The definition of the term “qualified director” identifies those directors: (i) who may take action on the dismissal of a derivative proceeding (section 7.44 [§ 30-29-744]); (ii) who are eligible to make, in the first instance, the authorization and determination required in connection with the decision on a request for advance for expenses (section 8.53(c) [§ 30-29-853]) or for indemnification (sections 8.55(b) and (c) [§ 30-29-855]); (iii) who may authorize a director’s conflicting interest transaction (section 8.62 [§ 30-29-862]); (iv) who may disclaim the corporation’s interest in a business opportunity (section 8.70(a) [§ 30-29-870]); and (v) who may make applicable the limitation or elimination of a duty of an officer to offer the corporation business opportunities before the officer or a related person of the officer pursues or takes the opportunity (section 2.02(b)(6) [§ 30-29-202]).

Although the term “qualified director” embraces the concept of independence, it does so only in relation to the director’s interest or involvement in the specific situations to which the definition applies. The judicial decisions that have examined the qualifications of directors for such purposes have generally required that directors be both *disinterested*, in the sense of not having exposure to an actual or potential benefit or detriment arising out of the action being taken (as opposed to an actual or potential benefit or detriment to the corporation or all shareholders generally), and *independent*, in the sense of having no personal or other relationship with an interested director (*e.g.*, a director who is a party to a transaction with the corporation) that presents a reasonable likelihood that the director’s objectivity will be impaired. The “qualified director” concept embraces both of those requirements, and its application is situation-specific; that is, “qualified director” determinations will depend upon the directly relevant facts and circumstances, and the disqualification of a director to act arises from factors that would reasonably be expected to impair the objectivity of the director’s judgment. On the other hand, the concept does not suggest that a “qualified director” has or should have special expertise to act on the matter in question.

1. Disqualification Due to Conflicting Interest.

The “qualified director” concept prescribes significant disqualifications, depending upon the purpose for which a director might be considered eligible to participate in the action to be taken. These disqualifications include the following:

• In the case of action under a provision adopted under the authority of section 2.02(b)(6) to limit or eliminate any duty of an officer to offer the corporation business opportunities, the definition excludes any director who is also an officer and to whom the provision would apply.

• In the case of action on dismissal of a derivative proceeding under section 7.44, the definition excludes any director who has a material interest in the outcome of the proceeding, such as where the proceeding involves a challenge to the validity of a transaction in which the director has a material financial interest.

• In the case of action to approve indemnification or advance of funds for expenses, the definition excludes any director who is a party to the

proceeding (see section 8.50 [§ 30-29-850] for the definition of "party" and for the definition of "proceeding").

• In the case of action to approve a director's conflicting interest transaction, the definition excludes any director whose interest, knowledge or status results in the transaction being treated as a "director's conflicting interest transaction." See section 8.60 [§ 30-29-860] for the definition of "director's conflicting interest transaction."

• In the case of action under section 8.70(a) to disclaim corporate interest in a business opportunity, the definition excludes any director who directly or indirectly pursues or takes advantage of the business opportunity, or who has a material relationship with another director or officer who does so.

Whether a director has a material interest in the outcome of a proceeding in which the director does not have a conflicting personal interest is heavily fact-dependent. At one end of the spectrum, if a claim against a director is clearly frivolous or is not supported by particularized and well-pleaded facts, the director should not be deemed to have a "material interest in the outcome of the proceeding" within the meaning of section 1.43(a)(2) [this section], even though the director is named as a defendant. At the other end of the spectrum, a director normally should be deemed to have a "material interest in the outcome of the proceeding" within the meaning of section 1.43(a)(2) if a claim against the director is supported by particularized and well-pleaded facts which, if true, would be likely to give rise to a significant adverse outcome against the director.

2. Disqualification Due to Relationships with Interested Persons.

In each context in which the "qualified director" definition applies, it also excludes any director who has a "material relationship" with another director (or, with respect to a provision applying to an officer under section 2.02(b)(6) or section 8.70, a "material relationship" with that officer) who is not disinterested for one or more of the reasons outlined in the preceding paragraph. Any relationship with such a person, whether the relationship is familial, financial, professional, employment or otherwise, is a "material relationship," as that term is defined in section 1.43(b)(1), if it would reasonably be expected to impair the objectivity of the director's judgment when voting or otherwise participating in action to be taken on a matter referred to in section 1.43(a). The determination of whether there is a

"material relationship" should be based on the practicalities of the situation rather than on formalistic considerations. For example, a director employed by a corporation controlled by another director should be regarded as having an employment relationship with that director. On the other hand, a casual social acquaintance with another director should not be regarded as a disqualifying relationship.

The term "qualified director" is distinct from the generic term "independent director," which is not used in the Act. As a result, a director who might typically be viewed as an "independent director" may in some circumstances not be a "qualified director," and vice versa. See also the Official Comment to section 8.01 [§ 30-29-801].

3. Elimination of Automatic Disqualification in Certain Circumstances.

Section 1.43(c) addresses three categories of circumstances that, if present alone or together, do not automatically prevent a director from being a qualified director:

• Subsection (c)(1) makes it clear that the participation of nonqualified directors (or interested shareholders or other interested persons) in the nomination or election of a director does not automatically prevent the director so nominated or elected from being qualified. Special litigation committees acting with regard to derivative litigation often consist of directors nominated or elected (after the alleged wrongful acts) by directors named as defendants in the action. In other settings, directors who are seeking indemnification, or who are interested in a director's conflicting interest transaction, may have participated in the nomination or election of an individual director who is otherwise a "qualified director."

• Subsection (c)(2) provides, in a similar fashion, that the mere fact that an individual director is or was a director of another corporation — on the board of which a director who is not a "qualified director" also serves or has served — does not automatically prevent qualification to act.

• Subsection (c)(3) confirms a number of decisions, involving dismissal of derivative proceedings, in which the court rejected a disqualification claim predicated on the mere fact that a director had been named as a defendant, was an individual against whom action has been demanded, or

had approved the action being challenged. These cases have held that, where a director's approval of the challenged action is at issue, approval does not automatically make the director ineligible to act. On the other hand, for example, director approval of a challenged transaction, in combination with other particularized facts showing that the director's ability to act objectively on a proposal to dismiss a derivative proceeding is impaired by a material conflicting personal interest in the transaction, disqualifies a director from acting on the proposal to dismiss the proceeding.

The effect of section 1.43(c), while significant, is limited. It merely precludes an automatic inference of director disqualification from the circumstances specified in that subsection.

§ 30-29-144. Householding. — (a) A corporation has delivered written notice or any other report or statement under this chapter, the articles of incorporation, or the bylaws to all shareholders who share a common address if:

(1) The corporation delivers one (1) copy of the notice, report, or statement to the common address;

(2) The corporation addresses the notice, report, or statement to those shareholders either as a group or to each of those shareholders individually or to the shareholders in a form to which each of those shareholders has consented; and

(3) Each of those shareholders consents to delivery of a single copy of such notice, report, or statement to the shareholders' common address.

(b) Any such consent described in subsections (a)(2) or (a)(3) of this section shall be revocable by any of such shareholders who deliver written notice of revocation to the corporation. If such written notice of revocation is delivered, the corporation shall begin providing individual notices, reports, or other statements to the revoking shareholder no later than thirty (30) days after delivery of the written notice of revocation.

(c) Any shareholder who fails to object by written notice to the corporation, within sixty (60) days of written notice by the corporation of its intention to deliver single copies of notices, reports, or statements to shareholders who share a common address as permitted by subsection (a) of this section shall be deemed to have consented to receiving such single copy at the common address; provided that the notice of intention explains that consent may be revoked and the method for revoking.

History.

I.C., § 30-29-144, as added by 2019, ch. 90, § 7, p. 220.

Official Comment

The proxy rules under the Securities Exchange Act of 1934 permit publicly held corporations to meet their obligation to deliver proxy

statements and annual reports to shareholders who share a common address by delivery of a single copy of such materials to the common address under certain conditions. This practice is known as “householding.” This section permits a corporation comparable flexibility to household the written notice of shareholders’ meetings as well as any other written notices, reports or statements required to be delivered to shareholders under the Act or the corporation’s articles of incorporation or bylaws. Ability to household such notices, reports or statements would not, of course, eliminate the practical necessity of delivering to a common address sufficient copies of any accompanying document requiring individual shareholder signature or other action, such as a proxy card or consent.

To meet the conditions of section 1.44(a) [this section], the written notice, report or statement must be delivered to the common address. Address means a street address, a post office box number, an electronic mail address, a facsimile telephone number or another similar destination to which paper or electronic transmission may be sent. Whether consent is explicit or implicit, it is revocable at any time as provided in section 1.44(b).

To be effective, the written notice of intention to household notices, reports or other statements permitted by section 1.44(b) must explain that affirmative or implied consent may be revoked and the method for revoking.

§ 30-29-145. Definitions. — For purposes of sections 30-29-145 through 30-29-152, Idaho Code:

(1) "Corporate action" means any action taken by or on behalf of the corporation, including any action taken by the incorporator, the board of directors, a committee of the board of directors, an officer or agent of the corporation, or the shareholders.

(2) "Date of the defective corporate action" means the date, or the approximate date if the exact date is unknown, the defective corporate action was purported to have been taken.

(3) "Defective corporate action" means any corporate action purportedly taken that is, and at the time such corporate action was purportedly taken, would have been within the power of the corporation, but is void or voidable due to a failure of authorization, and is an overissue.

(4) "Failure of authorization" means the failure to authorize, approve or otherwise effect a corporate action in compliance with the provisions of this chapter, the articles of incorporation or bylaws, a corporate resolution, or any plan or agreement to which the corporation is a party, if and to the extent such failure would render such corporate action void or voidable.

(5) "Overissue" means the purported issuance of shares of a class or series in excess of the number of shares of a class or series the corporation has the power to issue under section 30-29-601, Idaho Code, at the time of such issuance; or shares of any class or series that is not then authorized for issuance by the articles of incorporation.

(6) "Putative shares" means the shares of any class or series, including shares issued upon exercise of rights, options, warrants, or other securities convertible into shares of the corporation or interests with respect to such shares that were created or issued as a result of a defective corporate action that, but for any failure of authorization, would constitute valid shares or cannot be determined by the board of directors to be valid shares.

(7) "Valid shares" means the shares of any class or series that have been duly authorized and validly issued in accordance with this chapter,

including as a result of ratification or validation under sections 30-29-145 through 30-29-152, Idaho Code.

(8) "Validation effective time" with respect to any defective corporate action ratified under sections 30-29-145 through 30-29-152, Idaho Code, means the later of:

(a) The time at which the ratification of the defective corporate action is approved by the shareholders, or if approval of shareholders is not required, the time at which the notice required by section 30-29-149, Idaho Code, becomes effective in accordance with section 30-29-141, Idaho Code; and

(b) The time at which any articles of validation filed in accordance with section 30-29-151, Idaho Code, become effective.

The validation effective time shall not be affected by the filing or pendency of a judicial proceeding under section 30-29-152, Idaho Code, or otherwise, unless otherwise ordered by the court.

History.

I.C., § 30-29-145, as added by 2019, ch. 90, § 8, p. 220.

Official Comment

The definitions of "corporate action," "defective corporate action" and "failure of authorization" are intentionally broad so as to permit ratification of any corporate action purportedly taken that would have been within the power granted to a corporation under the Act.

The term "defective corporate action" includes an "overissue" of shares and other defects in share issuances that could cause shares to be treated as void. For purposes of determining which shares are overissued, only those shares issued in excess of the number of shares permitted to be issued under section 6.01 [§ 30-29-601] of the Act would be deemed overissued shares. If it cannot be determined from the records of the corporation which shares were issued before others, all shares included in an issuance that is or results in an overissue would be overissued shares.

§ 30-29-146. Defective corporate actions. — (a) A defective corporate action shall not be void or voidable if ratified in accordance with section 30-29-147, Idaho Code, or validated in accordance with section 30-29-152, Idaho Code.

(b) Ratification under section 30-29-147, Idaho Code, or validation under section 30-29-152, Idaho Code, shall not be deemed to be the exclusive means of ratifying or validating any defective corporate action, and the absence or failure of ratification in accordance with sections 30-29-145 through 30-29-152, Idaho Code, shall not, of itself, affect the validity or effectiveness of any corporate action properly ratified under common law or otherwise, nor shall it create a presumption that any such corporate action is or was a defective corporate action or void or voidable.

(c) In the case of an overissue, putative shares shall be valid shares effective as of the date originally issued or purportedly issued upon: (1) The effectiveness under sections 30-29-145 through 30-29-152, Idaho Code, and under part 10 of this chapter or an amendment to the articles of incorporation authorizing, designating, or creating such shares; or (2) The effectiveness of any other corporate action under sections 30-29-145 through 30-29-152, Idaho Code, ratifying the authorization, designation, or creation of such shares.

History.

I.C., § 30-29-146, as added by 2019, ch. 90, § 9, p. 220.

Official Comment

Subchapter E [§§ 30-29-145 to 30-29-152] provides a statutory ratification procedure for corporate actions that may not have been properly authorized and shares that may have been improperly issued. The statutory ratification procedure is designed to supplement common law ratification. Corporate actions ratified under this subchapter remain subject to equitable review.

Examples of defective corporate actions subject to ratification include the failure of the incorporator to validly appoint an initial board of directors,

corporate action taken in the absence of board resolutions authorizing the action, the failure to obtain the requisite shareholder approval of a corporate action, issuance of shares in the absence of evidence that consideration payable to the corporation for shares was received, the failure to comply with appraisal requirements and the issuance of shares without complying with preemptive rights. The ratification procedure is intended to be available only where there is objective evidence that a corporate action was defectively implemented. For example, subchapter E would permit ratification of shares previously issued but subsequently determined to have been issued improperly. It would not permit the corporation to issue shares retroactively as of an earlier date, however, where there is no objective evidence that those shares had previously been issued. Objective evidence may include resolutions, issuance of share certificates, subscription or share purchase agreements, entries in a share ledger or other correspondence indicating that shares were issued or intended to have been issued.

Section 1.46(a) [this section] does not distinguish between void and voidable actions. Instead it provides that any defective corporate action that is ratified in accordance with section 1.47 [§ 30-29-147] or validated under section 1.52 [§ 30-29-152] shall not be void or voidable. Section 1.47 is not the exclusive means by which a defective corporate action may be ratified. Thus, the general common law doctrine of ratification, as applied to a board of directors' adoption of actions taken by officers who may not have had the actual authority to take such actions, continues to be an effective mode of ratification. Section 1.46(b) makes clear that the corporation's ratification of a defective corporate action that is voidable but not void using common law methods of ratification rather than under section 1.47 will not, standing alone, affect the validity of the action or create a presumption that the action is not valid. In addition, ratification under subchapter E is distinct from correction of an already filed document under section 1.24 [see § 30-21-205].

Section 1.46(c) provides that an overissue can be remedied by the adoption of articles of amendment or other corporate action that has the effect of authorizing, designating or creating shares of a series or class, such that the putative shares that resulted in the overissue are deemed to be validly issued from the date of original issuance. This provision enables a corporation to cure an overissue occurring when shares have been duly

authorized but are issued before articles of amendment are filed. It also permits a corporation to remedy an overissue even if it cannot specifically identify the putative shares.

§ 30-29-147. Ratification of defective corporate actions. — (a) To ratify a defective corporate action under this section, other than the ratification of an election of the initial board of directors under subsection (b) of this section, the board of directors shall take action ratifying the action in accordance with section 30-29-148, Idaho Code, stating:

(1) The defective corporate action to be ratified and, if the defective corporate action involved the issuance of putative shares, the number and type of putative shares purportedly issued;

(2) The date of the defective corporate action;

(3) The nature of the failure of authorization with respect to the defective corporate action to be ratified; and

(4) That the board of directors approves the ratification of the defective corporate action.

(b) In the event that a defective corporate action to be ratified relates to the election of the initial board of directors of the corporation under section 30-29-205(a)(2), Idaho Code, a majority of the persons who, at the time of the ratification, are exercising the powers of directors, may take an action stating:

(1) The name of the person or persons who first took action in the name of the corporation as the initial board of directors of the corporation;

(2) The earlier of the date on which such persons first took such action or were purported to have been elected as the initial board of directors; and

(3) That the ratification of the election of such person or persons as the initial board of directors is approved.

(c) If any provision of this chapter, the articles of incorporation or bylaws, any corporate resolution or any plan or agreement to which the corporation is a party in effect at the time action under subsection (a) of this section is taken, requires shareholder approval or would have required shareholder approval at the date of the occurrence of the defective corporate action, the ratification of the defective corporate action approved in the action taken by the directors under subsection (a) of this section shall be

submitted to the shareholders for approval in accordance with section 30-29-148, Idaho Code.

(d) Unless otherwise provided in the action taken by the board of directors under subsection (a) of this section, after the action by the board of directors has been taken and, if required, approved by the shareholders, the board of directors may abandon the ratification at any time before the validation effective time without further action of the shareholders.

History.

I.C., § 30-29-147, as added by 2019, ch. 90, § 10, p. 220.

Official Comment

The information required by section 1.47(a)(1) [this section] regarding the listing of putative shares may be satisfied by attaching a table, including a capitalization table, listing the putative shares. Section 1.47(b) permits the ratification of the initial election of the board of directors by the persons who are acting as the current board of directors, recognizing that if the corporation's initial board of directors was defectively appointed, there may be no effective method of ratification because a duly elected board of directors does not exist.

§ 30-29-148. Action on ratification. — (a) The quorum and voting requirements applicable to a ratifying action by the board of directors under section 30-29-147(a), Idaho Code, shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time such ratifying action is taken.

(b) If the ratification of the defective corporate action requires approval by the shareholders under section 30-29-147(c), Idaho Code, and if the approval is to be given at a meeting, the corporation shall notify each holder of valid and putative shares, regardless of whether entitled to vote, as of the record date for notice of the meeting and as of the date of the occurrence of defective corporate action, provided that notice shall not be required to be given to holders of valid or putative shares whose identities or addresses for notice cannot be determined from the records of the corporation. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider ratification of a defective corporate action and must be accompanied by either a copy of the action taken by the board of directors in accordance with section 30-29-147(a), Idaho Code, or the information required by paragraphs (1) through (4) of subsection (a) of section 30-29-147, Idaho Code, and a statement that any claim that the ratification of such defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within 120 days from the applicable validation effective time.

(c) Except as provided in subsection (d) of this section with respect to the voting requirements to ratify the election of a director, the quorum and voting requirements applicable to the approval by the shareholders required by section 30-29-147(c), Idaho Code, shall be the quorum and voting requirements applicable to the corporate action proposed to be ratified at the time of such shareholder approval.

(d) The approval by shareholders to ratify the election of a director requires that the votes cast within the voting group favoring such ratification exceed the votes cast opposing such ratification of the election at a meeting at which a quorum is present.

(e) Putative shares on the record date for determining the shareholders entitled to vote on any matter submitted to shareholders under section 30-29-147(c), Idaho Code, and without giving effect to any ratification of putative shares that becomes effective as a result of such vote, shall neither be entitled to vote nor counted for quorum purposes in any vote to approve the ratification of any defective corporate action.

(f) If the approval under this section of putative shares would result in an overissue, in addition to the approval required by section 30-29-147, Idaho Code, approval of an amendment to the articles of incorporation under part 10 of this chapter to increase the number of shares of an authorized class or series, or to authorize the creation of a class or series of shares so there would be no overissue, shall also be required.

History.

I.C., § 30-29-148, as added by 2019, ch. 90, § 11, p. 220.

Official Comment

Notwithstanding the shareholder notice required by section 1.48(b) [this section], only valid shares are entitled to vote on the ratification action or counted for quorum purposes. The retroactive effect of a ratification of putative shares does not invalidate the quorum or voting result of the ratification.

For matters other than the election of directors, the quorum and voting requirements applicable to shareholder approval of ratification are the quorum and voting requirements applicable to the corporate action being ratified at the time of such approval. For example, if the defective corporate action being ratified is an amendment to the articles of incorporation, whether in connection with an overissue or otherwise, the vote required would be governed by section 10.03 [§ 30-29-1003]. If the defective corporate action involves a merger, the vote required would be the vote required by section 11.04 [§ 30-29-1104].

§ 30-29-149. Notice requirements. — (a) Unless shareholder approval is required under section 30-29-147(c), Idaho Code, prompt notice of an action taken under section 30-29-147, Idaho Code, shall be given to each holder of valid and putative shares, regardless of whether entitled to vote, as of the date of such action by the board of directors and the date of the defective corporate action ratified, provided that notice shall not be required to be given to holders of valid and putative shares whose identities or addresses for notice cannot be determined from the records of the corporation.

(b) The notice must contain either a copy of the action taken by the board of directors in accordance with subsection (a) or (b) of section 30-29-147, Idaho Code, or the information required by paragraphs (1) through (4) of subsection (a) of section 30-29-147, Idaho Code, or paragraphs (1) through (3) of subsection (b) of section 30-29-147, Idaho Code, as applicable; and a statement that any claim that the ratification of the defective corporate action and any putative shares issued as a result of such defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within 120 days from the applicable validation effective time.

(c) No notice under this section is required with respect to any action required to be submitted to shareholders for approval under section 30-29-147(c), Idaho Code, if notice is given in accordance with section 30-29-148(b), Idaho Code.

(d) A notice required by this section may be given in any manner permitted by section 30-29-141, Idaho Code, and, for any corporation subject to the reporting requirements of section 13 or 15(d) of the securities exchange act of 1934, may be given by means of a filing or furnishing of such notice with the United States securities and exchange commission.

History.

I.C., § 30-29-149, as added by 2019, ch. 90, § 12, p. 220.

§ 30-29-150. Effect of ratification. — From and after the validation effective time, and without regard to the one hundred twenty (120) day period during which a claim may be brought under section 30-29-152, Idaho Code:

(a) Each defective corporate action ratified in accordance with section 30-29-147, Idaho Code, shall not be void or voidable as a result of the failure of authorization identified in the action taken under subsection (a) or (b) of section 30-29-147, Idaho Code, and shall be deemed a valid corporate action effective as of the date of the defective corporate action; (b) The issuance of each putative share or fraction of a putative share purportedly issued pursuant to a defective corporate action identified in the action taken under section 30-29-147, Idaho Code, shall not be void or voidable, and each such putative share or fraction of a putative share shall be deemed to be an identical share or fraction of a valid share as of the time it was purportedly issued; and (c) Any corporate action taken subsequent to the defective corporate action ratified in accordance with sections 30-29-145 through 30-29-152, Idaho Code, in reliance on such defective corporate action having been validly effected and any subsequent defective corporate action resulting directly or indirectly from such original defective corporate action shall be valid as of the time taken.

History.

I.C., § 30-29-150, as added by 2019, ch. 90, § 13, p. 220.

Official Comment

Ratification is effective as of the validation effective time and is not dependent on the expiration of the 120-day time period in which an action challenging the ratification must be brought. The ratification of a defective corporate action has the additional effect of ratifying corporate actions that are defective as a result of the original defective corporate action. For example, an overissue which results in subsequent director elections being invalid calls into question all actions by the invalidly elected board members. The ratification of the overissue, however, would cure any such additional defects.

§ 30-29-151. Filings. — (a) If the defective corporate action ratified under sections 30-29-145 through 30-29-152, Idaho Code, would have required under any other section of this chapter a filing in accordance with this chapter, then, regardless of whether a filing was previously made in respect of such defective corporate action and in lieu of a filing otherwise required by this chapter, the corporation shall file articles of validation in accordance with this section, and such articles of validation shall serve to amend or substitute for any other filing with respect to such defective corporate action required by this chapter.

(b) The articles of validation must set forth:

(1) The defective corporate action that is the subject of the articles of validation including, in the case of any defective corporate action involving the issuance of putative shares, the number and type of putative shares issued, and the date or dates upon which such putative shares were purported to have been issued;

(2) The date of the defective corporate action;

(3) The nature of the failure of authorization in respect of the defective corporate action;

(4) A statement that the defective corporate action was ratified in accordance with section 30-29-147, Idaho Code, including the date on which the board of directors ratified such defective corporate action and the date, if any, on which the shareholders approved the ratification of such defective corporate action; and

(5) The information required by subsection (c) of this section.

(c) The articles of validation must also contain the following information:

(1) If a filing was previously made in respect of the defective corporate action and no changes to such filing are required to give effect to the ratification of such defective corporate action in accordance with section 30-29-147, Idaho Code, the articles of validation must set forth the name, title, and filing date of the filing previously made and any articles of correction to that filing and a statement that a copy of the filing

previously made, together with any articles of correction to that filing, is attached as an exhibit to the articles of validation;

(2) If a filing was previously made in respect of the defective corporate action and such filing requires any change to give effect to the ratification of such defective corporate action in accordance with section 30-29-147, Idaho Code, the articles of validation must set forth the name, title, and filing date of the filing previously made and any articles of correction to that filing; a statement that a filing containing all of the information required to be included under the applicable section or sections of this chapter to give effect to such defective corporate action is attached as an exhibit to the articles of validation; and the date and time that such filing is deemed to have become effective; or

(3) If a filing was not previously made in respect of the defective corporate action and the defective corporate action ratified under section 30-29-147, Idaho Code, would have required a filing under any other section of this chapter, the articles of validation must set forth a statement that a filing containing all of the information required to be included under the applicable section or sections of this chapter to give effect to such defective corporate action is attached as an exhibit to the articles of validation; and the date and time that such filing is deemed to have become effective.

History.

I.C., § 30-29-151, as added by 2019, ch. 90, § 14, p. 220.

Official Comment

Section 1.51 [this section] requires that in the event any filing is or would have been required under the Act to effect the defective corporate action, such filing (if no filing was previously made), such corrected filing (if correction to a previous filing is required), or such original filing (if no correction to a previous filing is required) be attached as an exhibit to the articles of validation. This is intended to provide a clear public record of the actions relating to the ratification.

§ 30-29-152. Judicial proceedings regarding validity of corporate actions. — (a) Upon application by the corporation, any successor entity to the corporation, a director of the corporation, any shareholder, beneficial shareholder or unrestricted voting trust beneficial owner of the corporation, including any such shareholder, beneficial shareholder or unrestricted voting trust beneficial owner as of the date of the defective corporate action ratified under section 30-29-147, Idaho Code, or any other person claiming to be substantially and adversely affected by a ratification under section 30-29-147, Idaho Code, the Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, may:

(1) Determine the validity and effectiveness of any corporate action or defective corporate action;

(2) Determine the validity and effectiveness of any ratification under section 30-29-147, Idaho Code;

(3) Determine the validity of any putative shares; and

(4) Modify or waive any of the procedures specified in section 30-29-147, Idaho Code, or 30-29-148, Idaho Code, to ratify a defective corporate action.

(b) In connection with an action under this section, the court may make such findings or orders, and take into account any factors or considerations regarding such matters as it deems proper under the circumstances.

(c) Service of process of the application under subsection (a) of this section on the corporation may be made in any manner provided by statute of this state or by rule of the applicable court for service on the corporation, and no other party need be joined in order for the court to adjudicate the matter. In an action filed by the corporation, the court may require notice of the action be provided to other persons specified by the court and permit such other persons to intervene in the action.

(d) Notwithstanding any other provision of this section or otherwise under applicable law, any action asserting that the ratification of any defective corporate action and any putative shares issued as a result of such

defective corporate action should not be effective, or should be effective only on certain conditions, shall be brought within one hundred twenty (120) days of the validation effective time.

History.

I.C., § 30-29-152, as added by 2019, ch. 90, § 15, p. 220.

Official Comment

Section 1.52 [this section] confers plenary jurisdiction on a designated court to hear and determine claims regarding the validity of any corporate action or any shares, rights, options or warrants. The court's jurisdiction is not limited to reviewing corporate actions ratified or purportedly ratified under section 1.47 [§ 30-29-147], and includes the ability of a corporation or other permitted person to obtain a declaration regarding the validity of any corporate actions or shares that are potentially defective. In determining the validity of a corporate action or reviewing a corporate action ratified under section 1.47, the court may consider any factors or considerations it deems proper under the circumstances. These might include whether the person originally taking the defective corporate action believed that the action complied with corporate requirements, whether the corporation and board of directors has treated the defective corporate action as a valid action, whether any person has acted in reliance on the public record that such defective corporate action was valid and whether any person will be or was harmed by the ratification of the defective corporate action or will be harmed by the failure to ratify or validate the defective corporate action.

Part 2
Incorporation

Idaho Code § 30-29-201

§ 30-29-201. Incorporators. — One (1) or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the secretary of state for filing.

History.

I.C., § 30-29-201, as added by 2015, ch. 243, § 57, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-1-201.

Official Comment

The only functions of incorporators under the Act are (i) to sign the articles of incorporation, (ii) to deliver them to the secretary of state for filing, and (iii) to complete the formation of the corporation to the extent set forth in section 2.05 [§ 30-29-205]. "Person" is defined in section 1.40 [§ 30-29-140] and includes both individuals and entities.

The Act does not require that articles of incorporation be acknowledged or verified. See the Official Comment to section 1.20 [§ 30-29-120] with respect to execution and filing requirements.

§ 30-29-202. Articles of incorporation. — (a) The articles of incorporation must set forth:

(1) A corporate name for the corporation that satisfies the requirements of sections 30-21-301 and 30-21-302(a), Idaho Code;

(2) The number of shares the corporation is authorized to issue;

(3) The information required by section 30-21-404(a), Idaho Code; and

(4) The name and address of each incorporator.

(b) The articles of incorporation may set forth:

(1) The names and addresses of the individuals who are to serve as the initial directors;

(2) Provisions not inconsistent with law regarding:

(i) The purpose or purposes for which the corporation is organized;

(ii) Managing the business and regulating the affairs of the corporation;

(iii) Defining, limiting and regulating the powers of the corporation, its board of directors, and shareholders;

(iv) A par value for authorized shares or classes of shares; or

(v) The imposition of interest holder liability on shareholders;

(3) Any provision that under this chapter is required or permitted to be set forth in the bylaws;

(4) A provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for:

(i) The amount of a financial benefit received by a director to which the director is not entitled;

(ii) An intentional infliction of harm on the corporation or the shareholders;

(iii) A violation of section 30-29-832, Idaho Code; or

(iv) An intentional violation of criminal law;

(5) A provision permitting or making obligatory indemnification of a director for liability, as defined in section 30-29-850(3), Idaho Code, to any person for any action taken, or any failure to take any action, as a director, except liability for:

(i) Receipt of a financial benefit to which the director is not entitled;

(ii) An intentional infliction of harm on the corporation or its shareholders;

(iii) A violation of section 30-29-832, Idaho Code; or

(iv) An intentional violation of criminal law; and

(6) A provision limiting or eliminating any duty of a director or any other person to offer the corporation the right to have or participate in any, or one (1) or more classes or categories of, business opportunities, before the pursuit or taking of the opportunity by the director or other person; provided that any application of such a provision to an officer or a related person of that officer also requires approval of that application by the board of directors, subsequent to the effective date of the provision, by action of qualified directors taken in compliance with the same procedures as are set forth in section 30-29-862, Idaho Code; and may be limited by the authorizing action of the board.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter.

(d) Provisions of the articles of incorporation may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with section 30-29-120(d), Idaho Code.

(e) As used in this section, “related person” has the meaning specified in section 30-29-860, Idaho Code.

History.

I.C., § 30-29-202, as added by 2015, ch. 243, § 57, p. 758; am. 2019, ch. 90, § 16, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (b), rewrote paragraph (2)(v), which formerly read: "The imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions", substituted "section 30-29-832, Idaho Code" for "section 30-29-833, Idaho Code" at the end of paragraph (4)(iii), substituted "section 30-39-850(3), Idaho Code" for "30-29-850(5), Idaho Code" near the middle of the introductory paragraph and substituted "section 30-29-832, Idaho Code" for "section 30-29-833, Idaho Code" at the end of paragraph (iii) in paragraph (5), and added paragraph (6); substituted "section 30-29-120(d), Idaho Code" for "section 30-29-120(2), Idaho Code" at the end of subsection (d); and added subsection (e).

Compiler's Notes.

This section is derived from former § 30-1-202.

Official Comment

1. Introduction.

A corporation will have perpetual duration unless a special provision is included in its articles of incorporation providing for a shorter period. See section 3.02 [§ 30-29-302]. Similarly, a corporation with articles of incorporation which do not contain a purpose clause will have the purpose of engaging in any lawful business under section 3.01(a) [§ 30-29-301]. The option of providing a narrower purpose clause is also preserved in sections 2.02(b)(2)(i) [this section] and 3.01, with the effect described in the Official Comment to section 3.01.

2. Required Provisions.

If a single class of shares is authorized, only the number of shares authorized need be stated; if more than one class of shares is authorized, however, both the number of authorized shares of each class and a description of the rights of each class must be included. See the Official Comment to sections 6.01 and 6.02 [§§ 30-29-601 and 30-29-602]. It is

unnecessary to specify par value, expected minimum capitalization, or contemplated issue price.

The corporation's initial registered office and agent must be included, and a mailing address alone, such as a post office box, is not sufficient since the registered office is the designated location for service of process. See chapter 5 [see § 30-21-401 et seq].

No reference need be made to a variety of other matters such as preemptive rights. See section 6.30 [§ 30-29-630] and its Official Comment. Generally, no substantive effect should be given to the absence of a specific reference to such matters in section 2.02. They are referred to in other sections of the Act that usually provide an "opt in" privilege. See particularly the list of optional provisions set forth in parts 4 and 5 of this Official Comment.

3. Optional Provisions.

Section 2.02(b) allows the articles of incorporation to contain optional provisions deemed sufficiently important to be of public record or subject to amendment only by the processes applicable to amendments of articles of incorporation.

A. BUSINESS OR AFFAIRS.

Provisions relating to the business or affairs of the corporation that may be included in the articles may be subdivided into four general classes:

• provisions that under the Act may be elected only by specific inclusion in the articles of incorporation (a list of these provisions is set forth in part 4 of this Official Comment);

• provisions that under the Act may be elected by specific inclusion in either the articles of incorporation or the bylaws, as listed in part 5 of this Official Comment;

• other provisions not referred to in the Act, including any provision that the Act requires or permits to be set forth in the bylaws (see section 2.02(b)(3)); and

• other provisions that are inconsistent with one or more provisions of the Act but are nonetheless permitted by section 7.32 [§ 30-29-702] for

inclusion in a shareholders' agreement, if the requirements of that section are met.

B. CORPORATE POWERS.

Section 2.02(c) makes it unnecessary to set forth any corporate powers in the articles of incorporation in view of the broad grant of power in section 3.02. This grant of power, however, may be overbroad for particular corporations; if so, it may be qualified or narrowed by appropriate provisions in the articles of incorporation.

C. PAR VALUE.

Although par value is no longer a mandatory statutory concept under the Act, section 2.02(b)(2)(iv) permits optional "par value" provisions with regard to shares. Other than being permitted by section 2.02(b)(2)(iv), however, "par value" is not mentioned in the Act. Special provisions may be included to give effect or meaning to "par value" essentially as a matter of contract between the parties. These provisions, whether appearing in the articles of incorporation or in other documents, have only the effect any permissible contractual provision has in the absence of a prohibition by statute. Provisions in the articles of incorporation establishing an optional par value may also be of use to corporations which are to be qualified or registered in foreign jurisdictions that compute franchise or other taxes upon the basis of par value.

For a general discussion of capitalization, see the Official Comment to section 6.21 § 30-29-621].

D. SHAREHOLDER LIABILITY.

The basic tenet of corporation law is that shareholders are not liable for the corporation's liabilities by reason of their status as shareholders. Section 2.02(b)(2)(v) nevertheless permits a corporation to impose that liability under specified circumstances if that is desirable. If no provision of this type is included, shareholders have no liability for corporate liabilities except to the extent they become liable by reason of their own conduct or acts. See section 6.22(b) [§ 30-29-622].

E. LIMITATIONS OF DIRECTOR LIABILITY.

Section 2.02(b)(4) authorizes the inclusion of a provision in the articles of incorporation eliminating or limiting, with certain exceptions, the liability of the directors to the corporation or its shareholders for money damages. This section is optional rather than self-executing and does not apply to equitable relief. Likewise, nothing in section 2.02(b)(4) in any way affects the right of the shareholders to remove directors, under section 8.08(a), with or without cause. The phrase “as a director” emphasizes that section 2.02(b)(4) applies to a director’s actions or failures to take action in the director’s capacity as a director and not in any other capacity, such as officer, employee or controlling shareholder. However, it is not intended to exclude coverage of conduct by individuals, even though they are also officers, employees or controlling shareholders, to the extent they are acting in their capacity as directors.

Shareholders are given considerable latitude in limiting directors’ liability for money damages. The statutory exceptions to permitted limitations of director liability are few and narrow and are discussed below.

Financial Benefit.

Corporate law subjects transactions from which a director could benefit personally to special scrutiny. The financial benefits exception is limited to the amount of the benefit actually received. Thus, liability for punitive damages could be eliminated, except in cases of intentional infliction of harm or for violation of criminal law (as described below) where, in a particular case (for example, theft), punitive damages may be available. The benefit must be financial rather than in less easily measured and more conjectural forms, such as business goodwill, personal reputation, or social ingratiation. The phrase “received by a director” is not intended to be a “bright line.” As a director’s conduct moves toward the edge of what may be exculpated, the director should bear the risk of miscalculation. Depending upon the circumstances, a director may be deemed to have received a benefit that the director caused to be directed to another person, for example, a relative, friend, or affiliate.

What constitutes a financial benefit “to which the director is not entitled” is left to judicial development. For example, a director is entitled to reasonable compensation for the performance of services or to an increase in the value of stock or stock options held by the director; on the other

hand, a director is not entitled to a bribe, a kick-back, or the profits from a corporate opportunity improperly taken by the director. See section 8.70 [§ 30-29-870] as to procedures for disclaiming the corporation's interest in a business opportunity by action of qualified directors or shareholders. See section 2.02(b)(6) for optional provisions permitted in the articles of incorporation to limit or eliminate, in advance, any duty of directors and others to bring business opportunities to the corporation. If the corporation declines the opportunity after it has been presented to the corporation by the director in accordance with the provisions of section 8.70(a)(1)(i) or (ii), or if a provision under section 2.02(b)(6) limits or eliminates the duty to bring the particular opportunity to the corporation, the corporation will have no right to participate in any financial benefit arising from the opportunity if the director pursues or takes the opportunity.

Intentional Infliction of Harm.

There may be situations in which a director intentionally causes harm to the corporation even though the director does not receive any improper benefit. The use of the word "intentional," rather than a less precise term such as "knowing," is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director's action, or failure to act, will cause harm, rather than a general intent to perform the acts which cause the harm.

Unlawful Distributions.

Section 8.32(a) [§ 30-29-832] indicates a strong policy in favor of liability for unlawful distributions approved by directors who have not complied with the standards of conduct of section 8.30 [§ 30-29-830]. Accordingly, the exception in section 2.02(b)(4)(iii) prohibits the shareholders from eliminating or limiting the liability of directors for a violation of section 8.32.

Intentional Violation of Criminal Law.

Even though a director committing a crime may intend to benefit the corporation, the shareholders should not be permitted to exculpate the director for any harm caused by an intentional violation of criminal law, including, for example, fines and legal expenses of the corporation in defending a criminal prosecution. The use of the word "intentional," rather

than a less precise term such as "knowing," is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director's action, or failure to act, constitutes a violation of criminal law.

F. DIRECTOR INDEMNIFICATION.

Section 2.02(b)(5) specifically prohibits provisions for indemnification of director liability arising out of improper financial benefit received by a director, an intentional infliction of harm on the corporation or the shareholders, an unlawful distribution or an intentional violation of criminal law. These excepted liabilities parallel those a corporation is not permitted to limit or eliminate under section 2.02(b)(4). See "E. Limitations of Director Liability" above. Officers are not included in the language of section 2.02(b)(5) because the expansion of indemnification for directors that section permits must be set forth in the articles of incorporation as required by section 8.51(a)(2) [§ 30-29-851]; section 8.56 [§ 30-29-856] allows a similar expansion of indemnification for officers to be set forth also in the bylaws, resolutions or contracts.

G. BUSINESS OPPORTUNITIES.

Section 2.02 (b)(6) authorizes the inclusion of a provision in the articles of incorporation to limit or eliminate, in advance, the duty of a director or other person to bring a business opportunity to the corporation. The limitation or elimination may be blanket in nature and apply to any business opportunities, or it may extend only to one or more specified classes or categories of business opportunities. The adoption of such a provision constitutes a curtailment of the duty of loyalty which includes the doctrine of corporate opportunity. If such a provision is included in the articles, taking advantage of a business opportunity covered by the provision of the articles without offering it to the corporation will not expose the director or other person to whom it is made applicable either to monetary damages or to equitable or any other relief in favor of the corporation upon compliance with the requirements of section 2.02(b)(6).

This provision may be useful, for example, in the context of a private equity investor that wishes to have a nominee on the board but conditions its investment on an advance limitation or elimination of the corporate opportunity doctrine because of the uncertainty over the application of the corporate opportunity doctrine inherent when investments are made in

multiple enterprises in specific industries. Another example is a joint venture in corporate form where the participants in the joint venture want to be sure that the corporate opportunity doctrine would not apply to their activities outside the joint venture.

The focus of the advance limitation or elimination is on the duty of the director which extends indirectly to the investor through the application of the related party definition in section 8.60 [§ 30-29-860]. This provision also permits extension of the limitation or elimination of the duty to any other persons who might be deemed to have a duty to offer business opportunities to the corporation. For example, courts have held that the corporate opportunity doctrine extends to officers of the corporation. Although officers may be included in a provision under this subsection, the limitation or elimination of corporate opportunity obligations of officers must be addressed by the board of directors in specific cases or by the directors' authorizing provisions in employment agreements or other contractual arrangements with such officers. Accordingly, section 2.02(b)(6) requires that the application of an advance limitation or elimination of the duty to offer a business opportunity to the corporation to any person who is an officer of the corporation or a related person of an officer also requires action by the board of directors acting through qualified directors. This action must be taken subsequent to the inclusion of the provision in the articles of incorporation and may limit the application. This means that if the advance limitation or elimination of the duty of an officer to offer business opportunities to the corporation is included in the articles by an amendment recommended by the directors and approved by the shareholders, that recommendation of the directors does not serve as the required authorization by qualified directors; rather, separate authorization by qualified directors after the amendment is included in the articles is necessary to apply the provision to a particular officer or any related person of that officer. See sections 1.43(a)(1) [§ 30-29-143] and 8.60 for the definition of "qualified directors" and "related persons," respectively.

Whether a provision for advance limitation or elimination of duty in the articles of incorporation should be a broad "blanket" provision or one more tailored to specific categories or classes of transactions deserves careful consideration given the particular circumstances of the corporation.

Limitation or elimination of the duty of a director or officer to present a business opportunity to the corporation does not limit or eliminate the director's or officer's duty not to make unauthorized use of corporate property or information or to compete unfairly with the corporation.

4. List of Options in the Act That May Be Elected Only in the Articles of Incorporation.

A. OPTIONS WITH RESPECT TO DIRECTORS.

- Board of directors may be dispensed with entirely, § 7.32, or its functions may be restricted, § 8.01.

- Power to compensate directors may be restricted or eliminated, § 8.11.

- Election of directors by cumulative voting may be authorized, § 7.28.

- Election of directors by greater than plurality vote may be authorized, § 7.28.

- Directors may be elected by classes or series of shares, § 8.04.

- Director's term may be limited by failure to receive specified vote for election, § 8.05.

- Power to remove directors without cause may be restricted or eliminated, § 8.08.

- Terms of directors may be staggered so that all directors are not elected in the same year, § 8.06.

- Power to fill vacancies may be limited to the shareholders, § 8.10.

- Power to indemnify directors, officers, and employees may be limited, §§ 8.50 through 8.59.

- Prohibition on adoption of bylaw provision under § 10.22.

B. OPTIONS WITH RESPECT TO SHAREHOLDERS.

- Action by shareholders may be taken without a meeting, § 7.04.

- Special voting groups of shareholders may be authorized, § 7.25.

- Elimination or restriction of separate voting groups for mergers and share exchanges, § 11.04, and for domestications, § 9.21.

• Quorum for voting groups of shareholders may be increased or reduced, §§ 7.25, 7.26, and 7.27.

• Quorum for voting by voting groups of shareholders may be prescribed, see § 7.26.

• Greater than majority vote may be required for action by voting groups of shareholders, § 7.27.

C. OPTIONS WITH RESPECT TO SHARES.

• Shares may be divided into classes and classes into series, §§ 6.01 and 6.02.

• Cumulative voting for directors may be permitted, § 7.28.

• Distributions may be restricted, § 6.40.

• Share dividends may be restricted, § 6.23.

• Share dividends may be restricted, § 6.23.

• Voting rights of classes or series of shares may be limited or denied, § 6.01.

• Classes or series of shares may be given more or less than one vote per share, § 7.21.

• Terms of a class or series of shares may vary among holders of the same class or series, so long as such variations are expressly set forth in the articles, § 6.01.

• The board of directors may allocate authorized but unissued shares of a class or series of shares to another class or series without shareholder approval, § 6.02.

• Shares may be redeemed at the option of the corporation or the shareholder, § 6.01.

• Reissue of acquired or redeemed shares may be prohibited, § 6.31.

• Shareholders may be given preemptive rights to acquire unissued shares, § 6.30.

• Redemption preferences may be ignored in determining lawfulness of distributions, § 6.40.

5. List of Options in the Act That May Be Elected Either in the Articles of Incorporation or in the Bylaws.

A. OPTIONS WITH RESPECT TO DIRECTORS.

• Number of directors may be fixed or changed within limits, § 8.03.

• Qualifications for directors may be prescribed, § 8.02.

• Notice of regular or special meetings of board of directors may be prescribed, § 8.22.

• Power of board of directors to act without meeting may be restricted, § 8.21.

• Quorum for meeting of board of directors may be increased or decreased (down to one-third) from majority, § 8.24.

• Action at meeting of board of directors may require a greater than majority vote, § 8.24.

• Power of directors to participate in meeting without being physically present may be prohibited, § 8.20.

• Board of directors may create board committees and specify their powers, § 8.25.

• Board of directors may create safe harbor for consideration of corporate opportunities, § 8.70.

• Power of board of directors to amend bylaws may be restricted, §§ 10.20 and 10.21.

• Election of directors may be governed by the optional rules under section 10.22.

B. OPTIONS WITH RESPECT TO SHARES.

• Shares may be issued without certificates, § 6.26.

• Procedure for treating beneficial owner of street name shares as record owner may be prescribed, § 7.23.

• Transfer of shares may be restricted, § 6.27.

§ 30-29-203. Incorporation. — (a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(b) The secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

History.

I.C., § 30-29-203, as added by 2015, ch. 243, § 57, p. 758; am. 2019, ch. 90, § 17, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated former subsections (1) and (2) as subsections (a) and (b) and substituted "conclusive proof" for "prima facie proof" near the beginning of subsection (b).

Compiler's Notes.

This section is derived from former § 30-1-203.

Official Comment

Section 2.03(a) [this section] fixes the beginning of corporate existence as the date and time the articles are filed by the secretary of state, as provided in section 1.23 [§ 30-29-123], unless the articles of incorporation provide that the corporation's existence will begin at a time later than the time of filing, to the extent permitted by section 1.23.

Under section 2.03(b) the filing of the articles of incorporation is conclusive proof that all conditions precedent to incorporation have been met, except in specified proceedings brought by the state.

See Chapter [Part] 1, which contains rules for the filing and effective dates of documents, all of which are applicable to articles of incorporation

and other documents.

§ 30-29-204. Liability for preincorporation transactions. — All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting.

History.

I.C., § 30-29-204, as added by 2015, ch. 243, § 57, p. 758; am. 2019, ch. 90, § 18, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, substituted "knowing there was no incorporation" for "when there was no incorporation" near the middle of the section.

Compiler's Notes.

This section is derived from former § 30-1-204.

CASE NOTES

Personal Liability.

District court did not err when it imposed personal liability on the sole stockholder of a corporation under the theory of preincorporation liability, because the corporation was not incorporated until after a contract was formed between the corporation and a grocery store owner. KDN Mgmt. v. WinCo Foods, LLC, 164 Idaho 1, 423 P.3d 422 (2018).

Official Comment Ordinarily, only the filing of articles of incorporation should create the privilege of limited liability. Situations may arise, however, in which the protection of limited liability arguably should be recognized even though the simple incorporation process established by the Act has not been completed.

As a result, the Act imposes liability only on persons who act as or on behalf of corporations "knowing" that no corporation exists. In addition, section 2.04 [this section] does not foreclose the possibility that persons who urge defendants to execute contracts in the corporate name knowing that no steps to incorporate have been taken may be estopped to impose personal liability on individual defendants. This estoppel may be based on the inequity perceived when persons, unwilling or reluctant to enter into a commitment under their own name, are persuaded to use the name of a nonexistent corporation, and then are sought to be held personally liable under section 2.04 by the party advocating execution in the name of the corporation.

§ 30-29-205. Organization of corporation. — (a) After incorporation:

(1) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting; or

(2) If initial directors are not named in the articles of incorporation, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(i) To elect initial directors and complete the organization of the corporation; or

(ii) To elect a board of directors, who shall complete the organization of the corporation.

(b) Action required or permitted by this chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one (1) or more written consents describing the action taken and signed by each incorporator.

(c) An organizational meeting may be held in or out of this state.

History.

I.C., § 30-29-205, as added by 2015, ch. 243, § 57, p. 758; am. 2019, ch. 90, § 19, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), deleted "and shall hold an organizational meeting at the call of a majority of the incorporators" from the end of paragraph (1); added the introductory paragraph in paragraph (2); and inserted "initial" near the beginning of paragraph (2)(i).

Compiler's Notes.

This section is derived from former § 30-1-205.

Official Comment

Following incorporation, the organization of a new corporation must be completed so that it may engage in business. This usually requires adoption of bylaws, the appointment of officers and agents, the raising of equity capital by the issuance of shares to the participants in the venture, and the election of directors.

Section 2.05 [this section] allows alternative methods of completing the organization of the corporation. First, section 2.05(a)(1) contemplates that if initial directors are named in the articles of incorporation, the persons so named will organize the corporation. Second, section 2.05(a)(2) provides alternative methods for completing the organization of the corporation if initial directors are not named in the articles of incorporation. The incorporators may themselves complete the organization, or they may simply meet to elect a board of directors who are then to complete the organization. In routine incorporations, the first alternative is often elected, although in more complex situations when prompt business decisions must be made, the second alternative will be chosen and the completion of the organization will be turned over to the board of directors that will continue to serve the organization beyond its incorporation.

Section 2.05(b) is limited to incorporators because section 8.21 [§ 30-29-821] permits action by written consent by the board of directors.

§ 30-29-206. Bylaws. — (a) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(b) The bylaws of a corporation may contain any provision that is not inconsistent with law or the articles of incorporation.

(c) The bylaws may contain one (1) or both of the following provisions:

(1) A requirement that if the corporation solicits proxies or consents with respect to an election of directors, the corporation include in its proxy statement and any form of its proxy or consent, to the extent and subject to such procedures or conditions as are provided in the bylaws, one (1) or more individuals nominated by a shareholder in addition to individuals nominated by the board of directors; and

(2) A requirement that the corporation reimburse the expenses incurred by a shareholder in soliciting proxies or consents in connection with an election of directors, to the extent and subject to such procedures and conditions as are provided in the bylaws, provided that no bylaw so adopted shall apply to elections for which any record date precedes its adoption.

(d) Notwithstanding section 30-29-1020(b)(2), Idaho Code, the shareholders in amending, repealing, or adopting a bylaw described in subsection (c) of this section may not limit the authority of the board of directors to amend or repeal any condition or procedure set forth in or to add any procedure or condition to such a bylaw to provide for a reasonable, practical, and orderly process.

History.

I.C., § 30-29-206, as added by 2015, ch. 243, § 57, p. 758; am. 2019, ch. 90, § 20, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-206.

Official Comment

The responsibility for adopting the original bylaws is placed on the person or persons completing the organization of the corporation. Section 2.06(b) [this section] permits any bylaw provision that is not inconsistent with law or the articles of incorporation. This limitation precludes bylaw provisions that limit the managerial authority of directors established by section 8.01(b) [§ 30-29-801]. For a list of provisions that may be included in the bylaws, see the Official Comment to section 2.02 [§ 30-29-202].

The power to amend or repeal bylaws, or adopt new bylaws after the organization of the corporation is completed, is addressed in sections 10.20, 10.21 and 10.22 [§ 30-29-1020, 30-29-1021, and 30-29-1022].

Section 2.06(c) expressly authorizes bylaws that require the corporation to include individuals nominated by shareholders for election as directors in its proxy statement and proxy cards (or consents) and that require the reimbursement by the corporation of expenses incurred by a shareholder in soliciting proxies (or consents) in an election of directors, in each case subject to such procedures or conditions as may be provided in the bylaws. Expenses reimbursed under section 2.06(c)(2) must be reasonable as contemplated in the definition of expenses set forth in section 1.40 [§ 30-29-140].

Examples of the procedures and conditions that may be included in bylaws contemplated by section 2.06(c) include provisions that relate to the ownership of shares (including requirements as to the duration of ownership); informational requirements; restrictions on the number of directors to be nominated or on the use of the provisions by shareholders seeking to acquire control; provisions requiring the nominating shareholder to indemnify the corporation; limitations on reimbursement based on the amount spent by the corporation or the proportion of votes cast for the

nominee; and limitations concerning the election of directors by cumulative voting.

Section 2.06(c) clarifies that proxy access and expense reimbursement provisions do not infringe upon the scope of authority granted to the board of directors of a corporation under section 8.01(b). Section 2.06(c) underscores the model of corporate governance embodied by the Act and reflected in section 8.01, but recognizes that different corporations may wish to grant shareholders varying rights in selecting directors through the election process.

Section 2.06(d) limits the rule set forth in section 10.20(b)(2) that shareholder adopted bylaws may limit the authority of directors to amend bylaws, by specifying that such a limit will not apply absolutely to conditions and procedures set forth in access or reimbursement bylaws authorized by section 2.06(c). Section 2.06(d) allows directors to ensure that such bylaws adequately provide for a reasonable, practical, and orderly process, but is not intended to allow the board of directors to frustrate the purpose of a shareholder-adopted proxy access or expense reimbursement provision.

§ 30-29-207. Emergency bylaws. — (a) Unless the articles of incorporation provide otherwise, the board of directors may adopt bylaws to be effective only in an emergency defined in subsection (d) of this section. The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including:

(1) Procedures for calling a meeting of the board of directors; (2) Quorum requirements for the meeting; and (3) Designation of additional or substitute directors.

(b) All provisions of the regular bylaws not inconsistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(c) Corporate action taken in good faith in accordance with the emergency bylaws: (1) Binds the corporation; and

(2) May not be used to impose liability on a director, officer, employee or agent of the corporation.

(d) An emergency exists for purposes of this section if a quorum of the board of directors cannot readily be assembled because of some catastrophic event.

History.

I.C., § 30-29-207, as added by 2015, ch. 243, § 57, p. 758; am. 2019, ch. 90, § 21, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), in the first sentence in the introductory paragraph, deleted “of a corporation” following “board of directors” near the beginning and substituted “subsection (d)” for “subsection (4)” near the end; substituted “not inconsistent” for “consistent” near the beginning of subsection (b); in

subsection (c), rewrote paragraph (2), which formerly read: "May not be used to impose liability on a corporate director, officer, employee or agent"; and substituted "board of directors" for "corporation's directors" near the middle of subsection (d).

Compiler's Notes.

This section is derived from former § 30-1-207.

Official Comment

The adoption of emergency bylaws in advance of an emergency not only clarifies lines of command and responsibility but also tends to ensure continuity of responsibility. The board of directors may be authorized by the emergency bylaws, for example, to designate the officers or other persons, in order of seniority and subject to various conditions, who may be deemed to be directors during the emergency.

The definition of "emergency" adopted by section 2.07(d) includes any catastrophic event that makes it difficult or impossible for a quorum of the board of directors to be assembled. To encourage corporations to adopt emergency bylaws, section 2.07(c) broadly validates all corporate actions taken "in good faith" pursuant to them and immunizes all directors, officers, employees, and agents of the corporation from liability as a result of these actions. The phrase "action taken in good faith in accordance with the emergency bylaws" is designed to conform to the standard for immunity elsewhere in the Act.

A corporation that does not adopt emergency bylaws under this section may nevertheless exercise the powers described in section 3.03 [§ 30-29-303] in the event of an emergency as defined in section 2.07(d).

§ 30-29-208. Forum selection provisions. — (a) The articles of incorporation or the bylaws may require that any or all internal corporate claims shall be brought exclusively in any specified court or courts of this state and, if so specified, in any additional courts in this state or in any other jurisdictions with which the corporation has a reasonable relationship.

(b) A provision of the articles of incorporation or bylaws adopted under subsection (a) of this section shall not have the effect of conferring jurisdiction on any court or over any person or claim, and shall not apply if none of the courts specified by such provision has the requisite personal and subject matter jurisdiction. If the court or courts of this state specified in a provision adopted under subsection (a) of this section do not have the requisite personal and subject matter jurisdiction and another court of this state does have such jurisdiction, then the internal corporate claim may be brought in such other court of this state, notwithstanding that such other court of this state is not specified in such provision, and in any other court specified in such provision that has the requisite jurisdiction.

(c) No provision of the articles of incorporation or the bylaws may prohibit bringing an internal corporate claim in the courts of this state or require such claims to be determined by arbitration.

(d) As used in this section, “internal corporate claim” means any claim that is based upon a violation of a duty under the laws of this state by a current or former director, officer, or shareholder in such capacity; any derivative action or proceeding brought on behalf of the corporation; any action asserting a claim arising pursuant to any provision of this chapter or the articles of incorporation or bylaws; or any action asserting a claim governed by the internal affairs doctrine that is not included in this section.

History.

I.C., § 30-29-208, as added by 2019, ch. 90, § 22, p. 220.

Official Comment

Section 2.08(a) authorizes a provision in either the articles of incorporation or the bylaws creating an exclusive forum or forums for the

adjudication of internal corporate claims. Under section 2.08(a), the provision must specify at least one court of this state (*i.e.*, a state court rather than a federal court). The provision may also include additional specified courts or all courts of this state or courts in this state (such as federal courts) or in one or more additional jurisdictions with a reasonable relationship to the corporation. In addition, the provision may prioritize among the specified courts. For example, the provision may specify that the claim shall be brought exclusively in a particular court of this state unless such court does not have the requisite personal and subject matter jurisdiction, in which case the claim shall be brought in other specified courts.

Under the last sentence of section 2.08(b), an internal corporate claim will always be permitted to be brought in at least one court of this state unless there is no court of this state that has the requisite personal and subject matter jurisdiction. For example, if the articles of incorporation or the bylaws provide that an internal corporate claim may only be brought in a specified court of this state and in the courts of another state with a reasonable relationship to the corporation, and the specified court of this state does not have the requisite personal and subject matter jurisdiction, then the claim can be brought in any other court of this state that does have the requisite jurisdiction or in the courts of the specified other state (so long as those courts have the requisite jurisdiction). Similarly, if the articles of incorporation or the bylaws provide that an internal corporate claim may only be brought in a specified court of this state and in the federal courts in this state, and the specified court of this state does not have the requisite personal and subject matter jurisdiction, then the claim can be brought in any other court of this state that does have the requisite jurisdiction or in the federal courts in this state (so long as the federal court has the requisite jurisdiction). In each of the foregoing examples, (i) if the specified court of this state does have the requisite personal and subject matter jurisdiction, then such court would be the only court of this state in which the internal corporate claim could be brought, and (ii) if no court of this state has the requisite personal and subject matter jurisdiction, then the courts of the other state (in the first example) or the federal courts in this state (in the second example) would become the exclusive forum for such internal corporate claim, in each case so long as such court has the requisite jurisdiction.

If no court of this state has the requisite personal and subject matter jurisdiction, and none of the other courts, if any, specified in the provision of the articles of incorporation or the bylaws has the requisite jurisdiction, then the provision will have no effect and the internal corporate claim may be brought in any court that does have the requisite jurisdiction.

Part 3
Purposes and Powers

Idaho Code § 30-29-301

§ 30-29-301 . Purposes. — (a) Every corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.

(b) A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this chapter only if permitted by, and subject to all limitations of, the other statute.

History.

I.C., § 30-29-301, as added by 2015, ch. 243, § 58, p. 758; am. 2019, ch. 90, § 23, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1) and (2) as subsections (a) and (b).

Compiler's Notes.

This section is derived from former § 30-1-301.

Official Comment

The choice of an "any lawful business" clause has become nearly universal in states that permit the clause. Even if the articles of incorporation limit lines of business in which the corporation may engage, the limited scope of the ultra vires concept in litigation between the corporation and outsiders means that a third person entering into a transaction that violates the restrictions in the purpose clause may be able to enforce the transaction in accordance with its terms if the third person was unaware of the narrow purpose clause when entering into the transaction. See the Official Comment to section 3.04 [§ 30-29-304].

Many corporations may also find it desirable to supplement a general purpose clause with an additional statement of business purposes. This may be necessary for licensing or for qualification or registration purposes in some states.

Section 3.01(b) recognizes that certain state statutes may preclude incorporation under the Act or limit the purpose of or otherwise regulate the business or affairs of corporations formed to, or actually engaging in, certain lines of business.

• Some of these statutes, particularly those relating to banking and insurance, establish a separate incorporation process and incorporating agency. These special incorporating statutes may refer to or incorporate by reference portions of the Act. Other statutes provide for incorporation for the purpose of practicing a profession.

• Other statutes may permit incorporation under the Act if the corporation imposes restrictions or limitations in its articles of incorporation; these restrictions may relate to the business in which the corporation may engage, its manner of internal governance, or the persons who may or may not be shareholders and participate in the venture. The language of section 3.01(b) is designed to cover all these multiple variations.

• Other types of entities, such as nonprofit corporations, cooperatives, and unions, usually may not incorporate under the Act. Special statutes may apply to these entities, such as the Model Nonprofit Corporation Act.

§ 30-29-302. General powers. — Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including power:

(a) To sue and be sued, complain and defend in its corporate name;

(b) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(c) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for managing the business and regulating the affairs of the corporation;

(d) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property wherever located;

(e) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(f) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;

(g) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other securities and obligations, which may be convertible into or include the option to purchase other securities of the corporation, and secure any of its obligations by mortgage or pledge of any of its property, franchises or income;

(h) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(i) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity;

(j) To conduct its business, locate offices, and exercise the powers granted by this chapter within or without this state;

(k) To elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(*l*) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees and agents;

(m) To make donations for the public welfare or for charitable, scientific, or educational purposes;

(n) To transact any lawful business that will aid governmental policy; and

(o) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

History.

I.C., § 30-29-302, as added by 2015, ch. 243, § 58, p. 758; am. 2019, ch. 90, § 24, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing paragaphs (1) to (15) as paragraphs (a) to (o); deleted “without limitation” preceding “power” at the end of the introductory paragraph; and inserted “securities and” near the beginning of paragraph (g).

Compiler’s Notes.

This section is derived from former § 30-1-302.

CASE NOTES

Jurisdiction.

Cooperative was properly treated as a corporation for the purpose of diversity jurisdiction because it was incorporated under state law. The

unconventional nature of the corporation did not deprive it of its corporate status or its susceptibility to treatment as a corporation under 28 U.S.C.S. § 1332(c)(1), and the cooperative, and not its members, was the real party in interest under § 30-1-302. The district court, therefore, had subject matter jurisdiction under 28 U.S.C.S. § 1332(a) because there was complete diversity of citizenship. Kuntz v. Lamar Corp., 385 F.3d 1177 (9th Cir. 2004).

Official Comment

The general philosophy of section 3.02 [this section] is that corporations formed under the Act should be automatically authorized to engage in all acts and have all powers that an individual may have. Because broad grants of power of this nature may not be desired in some corporations, section 3.02 generally authorizes articles of incorporation to deny or limit specific powers to a corporation.

The powers of a corporation under the Act exist independently of whether a corporation has a broad or narrow purpose clause. A corporation with a narrow purpose clause nevertheless has the same powers as an individual to do all things necessary or convenient to carry out its business. Many actions are therefore within the corporation's powers even if they do not directly affect the limited purpose for which the corporation is formed. For example, a corporation may generally make charitable contributions without regard to the purpose for which the charity will use the funds or may invest money in shares of other corporations without regard to whether the corporate purpose of the other corporation is broader or narrower than the limited purpose clause of the investing corporation. In some instances, however, a limited or narrow purpose clause may be considered to be a restriction on corporate powers as well as a restriction on purposes. Since the same ultra vires rule is applicable to corporations that exceed their purposes or powers (see the Official Comment to section 3.04 [§ 30-29-304]), it is not necessary to determine whether a narrow purpose clause also limits the powers of the corporation but simply whether the purpose of the transaction in question is consistent with the purpose clause. These issues do not arise in corporations with an "any lawful business" purpose clause.

§ 30-29-303. Emergency powers. — (a) In anticipation of or during an emergency defined in subsection (d) of this section, the board of directors of a corporation may:

(1) Modify lines of succession to accommodate the incapacity of any director, officer, employee or agent; and

(2) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d) of this section, unless emergency bylaws provide otherwise:

(1) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner; and

(2) One (1) or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

(1) Binds the corporation; and

(2) May not be used to impose liability on a director, officer, employee or agent.

(d) An emergency exists for purposes of this section if a quorum of the board of directors cannot readily be assembled because of some catastrophic event.

History.

I.C., § 30-29-303, as added by 2015, ch. 243, § 58, p. 758; am. 2019, ch. 90, § 25, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted “subsection (d) of this section” for “subsection (4) of this section” near the middle of the introductory paragraph in subsection (a); in subsection (b), substituted “subsection (d) of this section” for “subsection (4) of this section” near the beginning of the introductory paragraph and deleted “including by publication and radio” following “practicable manner” near the end of paragraph (1); deleted “corporation” preceding “director” near the middle of paragraph (c)(2); and substituted “board of directors” for “corporation’s directors” near the beginning of paragraph (d).

Compiler’s Notes.

This section is derived from former § 30-1-303.

Official Comment

Section 3.03 [this section] should be read in conjunction with section 2.07 [§ 30-29-207], which authorizes a corporation to adopt emergency bylaws. Section 3.03 grants every corporation limited powers to act in an emergency even though it has failed to adopt emergency bylaws under section 2.07.

§ 30-29-304. Lack of power to act. — (a) Except as provided in subsection (b) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) In a proceeding by a shareholder against the corporation to enjoin the act;

(2) In a proceeding by the corporation, directly, derivatively or through a receiver, trustee or other legal representative, against an incumbent or former director, officer, employee or agent of the corporation; or

(3) In a proceeding by the attorney general under section 30-29-1430, Idaho Code.

(c) In a shareholder's proceeding under subsection (b)(1) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act.

History.

I.C., § 30-29-304, as added by 2015, ch. 243, § 58, p. 758; am. 2019, ch. 90, § 26, p. 220.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Amendments.

The 2019 amendment, by ch. 90, rewrote the section heading, which formerly read: "Ultra vires"; redesignated the existing paragraphs; and substituted "subsection (b)(1) of this section" for "subsection (2)(a) of this section" near the beginning of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-304.

Official Comment

Under section 3.04 [this section], it is unnecessary for persons dealing with a corporation to inquire into limitations on its purpose or powers that may appear in its articles of incorporation. A person who is unaware of these limitations when dealing with the corporation is not bound by them. The phrase in section 3.04(a) that the "validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act" applies equally to the use of the doctrine as a sword or as a shield: a third person may no more avoid an undesired contract with a corporation on the ground the corporation was without authority to make the contract than a corporation may defend a suit on a contract on the ground that the contract is ultra vires.

The language of section 3.04 extends beyond contracts and conveyances of property; "corporate action" of any kind cannot be challenged on the ground of ultra vires. For this reason it makes no difference whether a limitation in articles of incorporation is considered to be a limitation on a purpose or a limitation on a power; both are equally subject to section 3.04. Corporate action also includes inaction or refusal to act. The common law of ultra vires distinguished between executory contracts, partially executed contracts, and fully executed ones; section 3.04 treats all corporate action the same — except to the extent described in section 3.04(b) — and the same rules apply to all contracts no matter at what stage of performance.

Section 3.04, however, does not validate corporate conduct that is made illegal or unlawful by statute or common law decision. This conduct is subject to whatever sanction, criminal or civil, that is provided by the statute or decision. Whether illegal corporate conduct is voidable or rescindable depends on the applicable statute or substantive law and is not affected by section 3.04.

Section 3.04 also does not address the validity of essentially intra vires conduct that is not approved by appropriate corporate action. It does not deal, for example, with the enforceability of an executory contract to sell substantially all the assets of a corporation not in the ordinary course of business that was not approved by the shareholders as required by section

12.02 [§ 30-29-1202]. This type of transaction is not beyond the purposes or powers of the corporation; it simply has not been approved by the corporate authorities as required by law. Similarly, section 3.04 does not deal with whether a corporation is bound by the action of a corporate agent if the action requires, but has not received, approval by the board of directors. Whether the corporation is bound by this action depends on the law of agency, particularly the scope of apparent authority and whether the third person knew or should have known of the defect in the corporate approval process. These actions may be ultra vires with respect to the agent's authority but they are not ultra vires with respect to the corporation and are not controlled by section 3.04.

Similarly, corporate action is not ultra vires under section 3.04 merely because it constitutes a breach of duty. For example, a misuse of corporate assets for personal purposes by an officer or director is a breach of duty and may be enjoined. Similarly, in some circumstances a lien on corporate assets and a contract entered into by the corporation may be cancelled or enjoined if they constitute breaches of duty and the third person is charged with knowledge that they were improper. These transactions, however, are not ultra vires with respect to the corporation, and cannot be attacked under section 3.04. They may be enjoined because of breach of the duty, not because the transaction exceeds the powers or purposes of the corporation.

• In a suit by a shareholder against the corporation to enjoin an ultra vires act. This suit, however, is subject to the requirements of section 3.04(c). Section 3.04(c) authorizes a court to enjoin or set aside an ultra vires act or grant other relief that may be necessary to protect the interests of all affected persons, including the interests of third persons who deal with the corporation. Under this subsection an ultra vires act may be enjoined only if all "affected parties" are parties to the suit. The requirement that the action be "equitable" generally means that only third persons dealing with a corporation while specifically aware that the corporation's action was ultra vires will be enjoined. The general phrase "if equitable" is used because of the possibility that other circumstances may exist in which it may be equitable to refuse to enforce an ultra vires contract. Further, if enforcement of the contract is enjoined, either the third person or the corporation may in the discretion of the court be awarded damages from the other for loss (excluding anticipated profits).

• In a suit by the corporation, either directly or through a legal representative, against incumbent or former officers or directors for authorizing or causing the corporation to engage in an ultra vires act. Again, this section does not address whether there is liability for causing the corporation to enter into an ultra vires act; it simply preserves the power of the corporation to assert that certain corporate action was ultra vires.

• In a suit by the attorney general under section 14.30 [§ 30-29-1430]. This provision does not answer the question whether a corporation may be dissolved or enjoined by the attorney general for committing an ultra vires act; it simply preserves the power of the state to assert that certain corporate action was ultra vires.

Part 4
[Reserved]

« Title 30 •, « Ch. 29 », « Pt. 5 »

Part 5
[Reserved]

« Title 30 •, « Ch. 29 », « Pt. 6 »

Part 6
Shares and Distributions

Idaho Code § 30-29-601

§ 30-29-601. Authorized shares. — (a) The articles of incorporation must set forth any classes of shares and series of shares within a class, and the number of shares of each class and series, that the corporation is authorized to issue. If more than one (1) class or series of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class or series and before the issuance of shares of a class or series, describe the terms, including the preferences, rights and limitations of that class or series. Except to the extent varied as permitted by this section, all shares of a class or series must have terms, including preferences, rights and limitations, that are identical with those of other shares of the same class or series.

(b) The articles of incorporation must authorize:

(1) One (1) or more classes or series of shares that together have full voting rights; and

(2) One (1) or more classes or series of shares, which may be the same class, classes, or series as those with voting rights, that together are entitled to receive the net assets of the corporation upon dissolution.

(c) The articles of incorporation may authorize one (1) or more classes or series of shares that:

(1) Have special, conditional or limited voting rights, or no right to vote, except to the extent otherwise provided by this chapter;

(2) Are redeemable or convertible as specified in the articles of incorporation:

(i) At the option of the corporation, the shareholder, or another person or upon the occurrence of a specified event;

(ii) For cash, indebtedness, securities or other property; and

(iii) At prices and in amounts specified or determined in accordance with a formula;

(3) Entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative or partially cumulative; or

(4) Have preference over any other class or series of shares with respect to distributions, including distributions upon the dissolution of the corporation.

(d) Terms of shares may be made dependent upon facts objectively ascertainable outside the articles of incorporation in accordance with section 30-29-120(d), Idaho Code.

(e) Any of the terms of shares may vary among holders of the same class or series so long as such variations are expressly set forth in the articles of incorporation.

(f) The description of the preferences, rights and limitations of classes or series of shares in subsection (c) of this section is not exhaustive.

History.

I.C., § 30-29-601, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 27, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "before the issuance of shares of a class or series, describe the terms" for "must describe, prior to the issuance of shares of a class or series, the terms" near the end of the second sentence in subsection (a); in subsection (b), substituted "full voting rights" for "unlimited voting rights" near the end of paragraph (1) and substituted "same class, classes, or series" for "same class or classes" near the middle of paragraph (2); substituted "section 30-29-120(d), Idaho Code" for "section 30-29-120(2), Idaho Code" at the end of subsection (d); and substituted "subsection (c) of this section" for "subsection (3) of this section" near the middle of subsection (f).

Compiler's Notes.

This section is derived from former § 30-1-601.

Official Comment

1. Section 6.01(a).

Section 6.01(a) [this section] requires that the articles of incorporation prescribe the classes and series of shares and the number of shares of each class and series that the corporation is authorized to issue. If the articles of incorporation authorize the issue of only one class of shares, no designation or description of the shares is required, it being understood that these shares have both the power to vote and the power to receive the net assets of the corporation upon dissolution. See section 6.01(b). Shares with both of these characteristics are usually referred to as "common shares" but no specific designation is required by the Act. The articles of incorporation may set forth the number of shares authorized and permit the board of directors under section 6.02 [§ 30-29-602] to allocate the authorized shares among designated classes or series of shares.

The preferences, rights and limitations of each class or series of shares constitute the "contract" of the holders of those classes and series of shares with respect to the holders' interest in the corporation and must be set forth in sufficient detail reasonably to define their interest. The terms, including the preferences, rights and limitations, of shares with one or more special or preferential rights which may be authorized are further described in section 6.01(c).

If more than one class or series is authorized (or if only one class or series is originally authorized but at some future time one or more other classes or series of shares are added by amendment), the terms, including the preferences, rights and limitations of each class, classes or series of shares, including the class, classes or series that possess the fundamental characteristics of voting and residual equity financial interests, must be described before shares of those classes or series are issued. If both fundamental characteristics are placed exclusively in a single class of shares, that class may be described simply as "common shares" or by statements such as the "shares have the general distribution and voting

rights," the "shares have all the rights of common shares," or the "shares have all rights not granted to the class A shares."

If the articles of incorporation create classes or series of shares that divide these fundamental rights among two or more classes or series of shares, it is necessary that the rights be clearly allocated among the classes and series. Specificity is required only to the extent necessary to differentiate the relative rights of the respective classes and series. For example, where one class or series has a liquidation preference over another, it is necessary to specify only the preferential liquidation right of that class or series; in the absence of a contrary provision in the articles of incorporation, the remaining class or series would be entitled to receive the net assets remaining after the liquidation preference has been satisfied. More than one class or series of shares may be designated as "common shares;" however, each must have a "distinguishing designation" under section 6.01(a), *e.g.*, "nonvoting common shares" or "class A common shares," and the rights of the classes and series must be described. For example, if a corporation authorizes two classes of shares with equal rights to share in all distributions and with identical voting rights except that one class is entitled exclusively to elect one director and the second class is entitled exclusively to elect a second director, the two classes may be designated, *e.g.*, as "Class A common" and "Class B common." What is required is language that makes the allocation of these rights clear.

Rather than describing the terms of each class or series of shares in the articles of incorporation, the corporation may delegate to the board of directors under section 6.02 the power to establish the terms of a class of shares or a series within a class if no shares of that class or series have previously been issued. Those terms, however, must be set forth in an amendment to the articles of incorporation that is effective before the shares are issued.

2. Section 6.01(b).

Section 6.01(b) requires that every corporation authorize one or more classes or series of shares that in the aggregate have the two fundamental characteristics of full voting rights and the right to receive the net assets of the corporation upon its dissolution. The phrase "full voting rights" refers to

the right to vote on all matters for which voting is required by either the Act or the articles of incorporation.

The two fundamental characteristics need not be placed in a single class or series of shares but may be divided as desired. It is nevertheless essential that the corporation always have authorized shares having in the aggregate these two characteristics, and section 6.03 requires that shares having in the aggregate these characteristics always be outstanding.

3. Section 6.01(c).

Section 6.01(c) provides a non-exhaustive list of the principal features that are customarily incorporated into classes or series of shares.

A. IN GENERAL.

Section 6.01(c) authorizes creation of classes or series of shares with a range of preferences, rights and limitations as further described below. The Act permits the creation of shares convertible into, or redeemable in exchange for, cash, other property, or shares or debt securities of the corporation ranking senior to the shares, at the option of either the holder or the corporation. Such a conversion or redemption is subject to the restrictions on distributions under section 6.40.

B. VOTING OF SHARES.

Any class or series of shares may be granted multiple or fractional votes per share without limitation. See section 7.21 [§ 30-29-721]. Shares of any class or series may also be made nonvoting "except to the extent otherwise provided by this Act." This "except" clause refers to the provisions in the Act that permit shares which are designated to be nonvoting to vote as separate voting groups on amendments to articles of incorporation and other organic changes in the corporation that directly affect that class or series (see sections 7.26 and 10.04 [§§ 30-29-726 and 30-29-1004]). In addition, shares may be given voting rights that are limited or conditional (*e.g.*, voting rights triggered by the failure to pay specified dividends).

C. REDEMPTION AND CONVERSION OF SHARES.

Section 6.01(c)(2) permits redemption for any class or series of shares and thereby permits the creation of redeemable or callable shares without limitation (subject only to the provisions that the class, classes or series of

shares described in section 6.01(b) must always be authorized and that at least one or more shares which together have those rights must be outstanding under section 6.03 [§ 30-29-603]).

The prices to be paid upon the redemption of shares under section 6.01(c)(2) and the amounts to be redeemed may be fixed in the articles of incorporation or "determined in accordance with a formula." The formula could be self contained or, pursuant to the provisions of section 6.01(d), could be determined by reference to extrinsic data or events. This permits the redemption price and the amounts to be redeemed to be established on the basis of matters external to the corporation, such as the purchase price of other shares, the level of market reference rates, the effective interest rate at which the corporation may obtain short or long-term financing, the consumer price index or a designated currency ratio.

All redemptions of shares are subject to the restrictions on distributions set forth in section 6.40 [§ 30-29-640]. See section 6.03(b).

Section 6.01(c)(2) also permits shares of any class or series to be made convertible into shares of any other class or series or into cash, indebtedness, securities, or other property of the corporation or another person.

D. EXTRINSIC FACTS.

Section 6.01(d) permits the creation of classes or series of shares with terms that are dependent upon facts objectively ascertainable outside the articles of incorporation. See section 1.20(k) [§ 30-29-120] and the related Official Comment for an explanation of the meaning of the phrase "facts objectively ascertainable" and the requirement for the filing of articles of amendment under the circumstances set forth in that section. Terms that depend upon reference to extrinsic facts may include dividend rates that vary according to some external index or event. Because such a "variable rate" class or series of shares would be intended to respond to current market conditions, it would most often be used with "blank check" provisions in the articles of incorporation with the terms of shares set by the board of directors immediately before issuance. See the Official Comment to section 6.02. Note that section 6.21 [§ 30-29-621] requires the board to determine the adequacy of consideration received or to be received by the corporation before issuing shares. If shares with terms to be determined by

reference to extrinsic facts are to be authorized for issuance, the board should take care to establish appropriately defined parameters for such terms.

E. VARIATION AMONG HOLDERS.

Section 6.01(e) permits the creation of classes or series of shares with terms that may vary among holders of the same class or series of shares. An example of such variation would be a provision that shares held by a bank or bank holding company in excess of a certain percentage would not have voting rights. In addition, section 6.24(b) [§ 30-29-624] expressly permits the issuance of rights, options or warrants for the purchase of shares or other securities of the corporation that contain terms and conditions which vary the rights of the holders of such rights, warrants or options based on a holder's ownership of, or offer to acquire, a specified number or percentage of the outstanding shares or other securities of the corporation.

4. Examples of Classes or Series of Shares Permitted by Section 6.01.

Section 6.01 is enabling rather than restrictive given that corporations often find it necessary to create new classes or series of shares for a variety of reasons, for instance in connection with raising debt or equity capital. Classes or series of shares may also be used in connection with desired control relationships among the participants in a venture. Under section 7.21, only securities classified as "shares" in the articles of incorporation can have the power to vote.

Examples of such classes and series of shares include:

• Shares of one class or series may be authorized to elect a specified number of directors while shares of a second class or series may be authorized to elect the same or a different number of directors.

• Shares of one class or series may be entitled to vote as a separate voting group on certain transactions, but shares of two or more classes or series may be only entitled to vote together as a single voting group on the election of directors and other matters.

• Shares of one class or series may be nonvoting or may be given multiple or fractional votes per share.

• Shares of one class or series may be entitled to different dividend rights or rights on dissolution than shares of another class or series.

• Shares of one class or series may be created to include some characteristics of debt securities.

A corporation has power to issue debt securities under section 3.02 [§ 30-29-302]. Although 6.01 authorizes the creation of interests that usually will be classed as "equity" rather than "debt," it is permissible to create classes or series of securities under section 6.01 that have some of the characteristics of debt securities. These securities are often referred to as "hybrid securities." Section 6.01 does not limit the development of hybrid securities, and equity securities may be created under the Act that embody any characteristics of debt. As noted above, however, the Act restricts the power to vote to securities classified as "shares" in the articles of incorporation.

§ 30-29-602. Terms of class or series determined by board of directors. — (a) If the articles of incorporation so provide, the board of directors is authorized, without shareholder approval, to:

(1) Classify any unissued shares into one (1) or more classes or into one (1) or more series within a class;

(2) Reclassify any unissued shares of any class into one (1) or more classes or into one (1) or more series within one (1) or more classes; or

(3) Reclassify any unissued shares of any series of any class into one (1) or more classes or into one (1) or more series within a class.

(b) If the board of directors acts pursuant to subsection (a) of this section, it shall determine the terms, including the preferences, rights, and limitations, to the same extent permitted under section 30-29-601, Idaho Code, of:

(1) Any class of shares before the issuance of any shares of that class; or

(2) Any series within a class before the issuance of any shares of that series.

(c) Before issuing any shares of a class or series created under this section, the corporation shall deliver to the secretary of state for filing articles of amendment setting forth the terms determined under subsection (a) of this section.

History.

I.C., § 30-29-602, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 28, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901.

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "subsection (a) of this section" for "subsection (1) of this section" near the beginning of subsection (b) and at the end of subsection (c); substituted "shall determine" for "must determine" near the beginning of subsection (b), and substituted "shall deliver" for "must deliver" near the beginning of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-602.

Official Comment

Section 6.02 [this section] permits the board of directors, if authority to do so is contained in the articles of incorporation, to determine the terms of a class of shares or of a series of shares within a class to meet corporate needs, including current requirements of the securities markets or the flexibility needed for acquisitions, without the necessity of holding a shareholders' meeting to amend the articles of incorporation. If given that authority, the board of directors may create new series within a class and may also determine the terms of a class or series if there are no outstanding shares of that class or series.

A provision in the articles of incorporation authorizing shares to be issued in different classes or series with terms to be set by the board of directors is sometimes referred to as a "blank check" provision. The power to make the terms of shares so created dependent on facts objectively ascertainable outside the articles of incorporation and to vary their terms among holders of the same class or series extends to all the permitted provisions set forth in section 6.01(c) [§ 30-29-601].

Sections 6.02(a) and (b) make it clear that the board of directors has the same broad flexibility with regard to setting the terms of a class or series under this section as is permitted under section 6.01(c). Section 6.02(c) requires a filing to amend the articles of incorporation so there will be a public record of the class or series which the corporation intends to issue. The amendment does not require shareholder action. See section 10.05(h) [§ 30-29-1005].

§ 30-29-603. Issued and outstanding shares. — (a) A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or canceled.

(b) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of subsection (c) of this section and to section 30-29-640, Idaho Code.

(c) At all times that shares of the corporation are outstanding, one (1) or more shares that together have full voting rights and one (1) or more shares that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding.

History.

I.C., § 30-29-603, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 29, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "subsection (c) of this section" for "subsection (3) of this section" in subsection (b); and substituted "full voting rights" for "unlimited voting rights" near the middle of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-603.

Official Comment

The determination of the number of shares to be issued under section 6.03 [this section] is usually made by the board of directors but may be reserved by the articles of incorporation to the shareholders. The only requirements are that no class or series of shares be overissued and that one or more shares of a class, classes or series that together have full voting

rights and one or more shares of a class, classes or series that together are entitled to the net assets of the corporation upon dissolution at all times must be outstanding.

The corporation may acquire outstanding shares pursuant to a voluntary transaction between a shareholder and the corporation. Also, shares may be made subject to transfer restrictions that may result in contractual obligations by the corporation to reacquire shares. See section 6.27 [§ 30-29-627]. Further, the corporation may reacquire shares pursuant to a right of redemption (or an obligation to redeem) established in the articles of incorporation. See section 6.01(c)(2) [§ 30-29-601]. All voluntary or contractual reacquisitions are subject to the limitations set forth in section 6.03(c) and to section 6.40 [§ 30-29-640].

The provisions of the Act are consistent with the specialized class of corporation known as the open-end investment company, which permits unlimited redemptions of shares at net asset value at the request of shareholders. Sections 6.01 and 6.03 permit the classes or series of shares with voting and dissolution rights to be made redeemable without limitation. The requirement of section 6.03(c) that at least one share be outstanding is also consistent with an unlimited right of redemption since that section only applies while there are shares outstanding.

§ 30-29-604. Fractional shares. — (a) A corporation may issue fractions of a share or, in lieu of doing so, may:

(1) Pay in cash the value of fractions of a share;

(2) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share; or

(3) Arrange for disposition of fractional shares by the holders of such shares.

(b) Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by section 30-29-625(b), Idaho Code.

(c) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the rights to vote, to receive dividends, and to receive distributions upon dissolution. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(d) The board of directors may authorize the issuance of scrip subject to any condition, including that:

(1) The scrip will become void if not exchanged for full shares before a specified date; and

(2) The shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders.

History.

I.C., § 30-29-604, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 30, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs, in subsection (a), added "issue fractions of a share or, in lieu of doing so, may" at the end of the introductory paragraph, substituted "Pay in cash" for

"Issue fractions of a share or pay in money" at the beginning of paragraph (1), deleted former subsection (b), which read: "Arrange for disposition of fractional shares by the shareholders" and added paragraph (3); substituted "section 30-29-625(b), Idaho Code" for "section 30-29-625(2), Idaho Code" at the end of subsection (b); rewrote subsection (c), which formerly read: "The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them"; and, in subsection (d), substituted "condition, including that" for "condition considered desirable, including" at the end of the introductory paragraph.

Compiler's Notes.

This section is derived from former § 30-1-604.

Official Comment

Fractional shares may arise from a share dividend that, as applied to a particular holder, does not produce an even multiple of shares. They may also result from other corporate actions, such as fractional stock splits, reverse splits, and reclassifications and mergers. Although corporations are authorized to issue fractional shares, which are vested proportionately with the same rights as full shares, the creation of fractional shares may create administrative difficulties, particularly for voting and dividend purposes.

Section 6.04 [this section] authorizes handling fractional shares in the following ways:

• The corporation may pay in cash the value of the fractional shares.

• The corporation may issue scrip instead of fractional shares. Unless otherwise specified in the scrip, scrip confers none of the substantive rights of shareholders, but only authorizes holders to combine scrip certificates in amounts aggregating a full share and then to exchange them for a full share. This aggregation must occur within the time and subject to the conditions set initially by the board of directors and stated in the scrip certificate. To protect shareholders against forfeiture of their interest, it is usually provided that the shares represented by scrip certificates not exchanged by the

expiration date are to be sold and the proceeds held, either indefinitely or for a stated period, for the benefit of the scripholders and paid to them on surrender of their scrip certificates.

• The corporation may authorize the immediate sale of all fractional share interests, typically by an agent on behalf of the holders, thereby avoiding the expense and delay of other methods of dealing with fractional shares. Although this procedure denies shareholders the benefit of any subsequent rise in the market price of the shares, it protects them against any subsequent decline and ensures them of recognition based on market prices at the time of the transaction.

Under section 6.04, fractional shares may be certificated or uncertificated. There is no difference in treatment of certificated or uncertificated shares for this purpose. See sections 6.25 and 6.26 [§§ 30-29-625 and 30-29-626].

§ 30-29-605 through 30-29-619. Reserved.

History.

I.C., § 30-29-605, as added by 2015, ch. 243, § 61, p. 758.

§ 30-29-620. Subscription for shares before incorporation. — (a) A subscription for shares entered into before incorporation is irrevocable for six (6) months unless the subscription agreement provides a longer or shorter period or all the subscribers agree to revocation.

(b) The board of directors may determine the payment terms of subscriptions for shares that were entered into before incorporation, unless the subscription agreement specifies them. A call for payment by the board of directors must be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement specifies otherwise.

(c) Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration specified in the subscription agreement, provided that such consideration meets the requirements of section 30-29-621(b), Idaho Code.

(d) If a subscriber defaults in payment of cash or property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid for more than twenty (20) days after the corporation delivers a written demand for payment to the subscriber.

(e) A subscription for stock of a corporation, whether made before or after the formation of a corporation, shall not be enforceable against the subscriber or the corporation, unless in writing and signed by the party to be bound.

History.

I.C., § 30-29-620, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 31, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; deleted “must be in writing and” following “before incorporation” near the beginning of subsection (a); substituted “section 30-29-621(b), Idaho Code” for “section 30-29-621(2), Idaho Code” at the end of subsection (c); in subsection (d), substituted “cash” for “money” near the beginning of the first sentence and substituted “delivers a” for “sends” near the end of the second sentence; and deleted former subsection (5), which read: “A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to section 30-29-621, Idaho Code.”

Compiler’s Notes.

This section is derived from former § 30-1-620.

Official Comment

Because of the uncertainty of the legal enforceability of preincorporation agreements to purchase shares, section 6.20 [this section] provides a simple set of rules applicable to the enforcement of preincorporation subscriptions by the corporation after its formation. It does not address the extent to which preincorporation subscriptions may constitute a contract between or among subscribers, and other subscribers may enforce whatever contract rights they have without regard to section 6.20.

Section 6.20(a) provides as a default that preincorporation subscriptions are irrevocable for six months but the subscription agreement may provide otherwise or all the subscribers to shares may agree otherwise. If the corporation accepts the subscription during the period of irrevocability, the subscription becomes a contract binding on both the subscribers and the corporation. The terms of this contract are set forth in sections 6.20(b) and (d).

Section 6.20(c) provides that shares issued pursuant to preincorporation subscriptions are fully paid and nonassessable when the corporation receives the subscription price. The liability of the subscriber to pay the purchase price is addressed in section 6.22 [§ 30-29-622]. Section 6.20 does not address the liability of transferees of shares for any unpaid subscription price, or the power of the corporation to cancel for nonpayment shares that have been issued before payment of the full subscription price. Issued

shares represented by unpaid subscriptions are subject to cancellation for nonpayment to the same extent as shares issued for promissory notes or shares issued before the consideration therefor is paid. See the Official Comment to sections 6.21 [§ 30-29-621] and 6.22.

§ 30-29-621. Issuance of shares. — (a) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors shall determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid and nonassessable.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the benefits are received, or the note is paid. If the note is not paid, the shares escrowed or restricted and the distributions credited may be canceled in whole or part.

(f)(1) An issuance of shares or other securities convertible into or rights exercisable for shares, in a transaction or a series of integrated transactions, requires approval of the shareholders, at a meeting at which a quorum consisting of a majority, or such greater number as the articles of incorporation may prescribe, of the votes entitled to be cast on the matter exists, if:

(i) The shares, other securities, or rights are to be issued for consideration other than cash or cash equivalents; and

(ii) The voting power of shares that are issued and issuable as a result of the transaction or series of integrated transactions will comprise

more than twenty percent (20%) of the voting power of the shares of the corporation that were outstanding immediately before the transaction.

(2) In this subsection:

(i) For purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares, or other securities convertible into or rights exercisable for shares, shall be the greater of:

(A) The voting power of the shares to be issued; or

(B) The voting power of the shares that would be outstanding after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued.

(ii) A series of transactions is integrated only if consummation of one (1) transaction is made contingent on consummation of one (1) or more of the other transactions.

History.

I.C., § 30-29-621, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 32, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; inserted "or benefit to the corporation" near the middle of subsection (b); substituted "shall determine" for "must determine" near the beginning of the first sentence in subsection (c); inserted "services are performed, the benefits are received, or the" near the end of the first sentence in subsection (e); and, in subsection (f), substituted "a majority, or such greater number as the articles of incorporation may prescribe" for "at least a majority" near the end of the introductory paragraph in paragraph (1), inserted "to be" preceding "issued" near the middle of paragraph (1)(i), inserted "or other securities convertible into or rights exercisable for share" near the end of paragraph (2)(i), and inserted "only" near the beginning of paragraph (2)(ii).

Compiler's Notes.

This section is derived from former § 30-1-621.

Official Comment

Because a statutory structure embodying "par value" and "stated capital" concepts does not protect creditors and senior security holders from payments to junior security holders, section 6.21 [this section] does not use these concepts.

1. Consideration.

Because shares need not have a par value under section 6.21, there is no minimum price at which shares must be issued. Section 6.21(b) specifically validates "any tangible or intangible property or benefit to the corporation," as consideration for the present issue of shares, specifically including contracts for future services (including promoters' services) and promissory notes. The term "benefit" should be broadly construed also to include, for example, a reduction of a liability, a release of a claim, or intangible gain obtained by a corporation. Business judgment should determine what kind of property or benefit should be obtained for shares, and a determination by the directors meeting the requirements of section 8.30 [§ 30-29-830] to accept a specific kind of property or benefit for shares should be accepted and not circumscribed by artificial or arbitrary rules.

2. Board Determination of Adequacy.

Protection of shareholders against abuse of the power granted to the board of directors to determine that shares should be issued for intangible property or benefit is provided by the requirements of section 8.30 applicable to a determination that the consideration received for shares is adequate.

In many instances, property or benefit received by the corporation will be of uncertain value; if the board of directors determines that the issuance of shares for the property or benefit is an appropriate transaction, that is sufficient under section 6.21. The board of directors does not have to make an explicit "adequacy" determination by formal resolution; that determination may be inferred from a determination to authorize the issuance of shares for a specified consideration. Likewise, section 6.21 does

not require the board of directors to determine an exact value of the consideration to be entered on the books of the corporation.

The second sentence of section 6.21(c) describes the effect of the determination by the board of directors that consideration is adequate for the issuance of shares. That determination, without more, is conclusive to the extent that adequacy is relevant to the question whether the shares are validly issued, fully paid, and nonassessable. Whether shares are validly issued may depend on compliance with corporate procedural requirements, such as issuance within the amount authorized in the articles of incorporation or holding a directors' meeting upon proper notice and with a quorum present. The Act does not address the remedies that may be available for issuances that are subject to challenge. See subchapter E of chapter 1 [§ 30-29-145 et seq.] regarding ratification of defective issuance of shares.

The Act also does not address whether validly issued shares may thereafter be cancelled on the grounds of fraud or bad faith if the shares are in the hands of the original shareholder or other persons who were aware of the circumstances under which they were issued when they acquired the shares. It also leaves to the Uniform Commercial Code other questions relating to the rights of persons other than the person acquiring the shares from the corporation. See the Official Comment to section 6.22 [§ 30-29-622].

Section 6.21(e) permits shares issued for contracts for future services or benefits or for promissory notes to be placed in escrow, or their transfer otherwise restricted, until the services are performed, the benefits are received or the notes are paid. In addition, any distributions on such shares may be credited against payment, or other agreed performance, of the consideration for the shares. Under section 6.21(e), if the corporation has restricted the transfer of the shares or placed them in escrow, it may cancel the shares and any credited distributions, in whole or in part, in the event of a failure of performance. This remedy is in the nature of a partial or complete rescission, and therefore rescission principles would be applicable.

Section 6.21 addresses only the corporation's cancellation remedy. It does not address whether other remedies may be available to the

corporation, including a right to a deficiency against the nonperforming shareholder, or whether the shareholder may have any rights where the value of the shares subject to cancellation exceeds the value of the obligation remaining unperformed.

If the shares are issued without being restricted as provided in section 6.21(e), they are validly issued in so far as the adequacy of consideration is concerned. See section 6.22 and its Official Comment.

Section 6.24(c) [§ 30-29-624] provides express authority for delegation by the board of directors to officers for the issuance of shares as compensatory awards within limitations established by the board.

3. Shareholder Approval Requirement for Certain Issuances.

The shareholder approval requirement of section 6.21(f) is generally patterned after the listing standards of national securities exchanges. The calculation of the 20% compares the maximum number of votes entitled to be cast by the shares to be issued or that could be outstanding after giving effect to the conversion of convertible securities and the exercise of rights being issued, with the actual number of votes entitled to be cast by outstanding shares before the transaction.

In making the 20% determination under section 6.21(f), shares that are issuable in a transaction of any kind, including a merger, share exchange, or acquisition of assets, on a contingent basis are counted as shares or securities to be issued as a result of the transaction. On the other hand, shares that are issuable under antidilution clauses, such as those designed to take account of future share splits or share dividends, are not counted as shares or securities to be issued as a result of the transaction, because they are issuable only as a result of a later corporate action authorizing the split or dividend. If a transaction involves an earn-out provision, under which the total amount of shares or securities to be issued will depend on future earnings or other performance measures, the maximum amount of shares or securities that can be issued under the earn-out must be included in the determination.

If the number of shares to be issued or issuable is not fixed, but is subject to a formula, the application of the test in section 6.21(f)(2)(i) requires a calculation of the maximum amount that could be issued under the formula,

whether stated as a range or otherwise, in the governing agreement. Even if ultimate issuance of the maximum amount is unlikely, a vote will be required if the maximum amount would result in an issuance of more than 20% of the voting power of shares outstanding immediately before the transaction.

Shares that have or would have only contingent voting rights when issued or issuable are not shares that carry voting power for purposes of the calculation under section 6.21(f).

The vote required to approve issuances that fall within section 6.21(f) is the basic voting rule under the Act, set forth in section 7.25 [§ 30-29-725], that more shares must be voted in favor of the issuance than are voted against. This is the same voting rule that applies under chapter [part] 9 for domestications and conversions, chapter [part] 10 for amendments of the articles of incorporation, chapter [part] 11 for mergers and share exchanges, chapter [part] 12 for dispositions of assets that require shareholder approval, and chapter [part] 14 for voluntary dissolutions. The quorum rule under section 6.21(f) is also the same as the quorum rule under chapters 9, 10, 11, 12, and 14.

Section 6.21(f) does not apply to an issuance for cash or cash equivalents, regardless of whether in connection with a public offering. "Cash equivalents" are generally short-term investments that are both readily convertible to known amounts of cash and present insignificant risk of changes in interest rates. Shares that are issued partly for cash or cash equivalents and partly for other consideration are "issued for consideration other than cash or cash equivalents" within the meaning of section 6.21(f).

The term "rights" in section 6.21(f) includes warrants, options, and rights of exchange, whether at the option of the holder, the corporation, or another person. The term "voting power" is defined in section 1.40 [§ 30-29-140] as the current power to vote in the election of directors. See also the Official Comment to that section. Because transactions are integrated within the meaning of section 6.21(f) only where consummation of one transaction is made contingent on consummation of one or more of the other transactions, transactions are not integrated for purposes of section 6.21(f) merely because they are proximate in time or because the kind of consideration for which the corporation issues shares is similar in each transaction.

Section 6.21(f) only applies to issuances for consideration. Accordingly, section 6.21(f) does not require shareholder approval for share dividends or for shareholder rights plans. See section 6.23 [§ 30-29-623] and its Official Comment.

Illustrations of the application of section 6.21(f) follow:

1. C corporation, which has 2,000,000 shares of Class A voting common stock outstanding (carrying one vote per share), proposes to issue 600,000 shares of authorized but unissued Class B nonvoting common stock in exchange for a business owned by D Corporation. The proposed issuance does not require shareholder approval under section 6.21(f) because the Class B shares do not carry voting power.

2. The facts being otherwise as stated in Illustration 1, C proposes to issue 600,000 additional shares of its Class A voting common stock. The proposed issuance requires shareholder approval under section 6.21(f) because the voting power carried by the shares to be issued will comprise more than 20% of the voting power of C's shares outstanding immediately before the issuance.

3. The facts being otherwise as stated in Illustration 1, C proposes to issue 400,000 shares of authorized but unissued voting preferred stock, each share of which carries one vote and is convertible into 1.5 shares of Class A voting common stock. The proposed issuance requires shareholder approval under section 6.21(f). Although the voting power of the preferred shares to be issued will not comprise more than 20% of the voting power of C's shares outstanding immediately before the issuance, the voting power of the shares issuable upon conversion of the preferred shares will carry more than 20% of such voting power.

4. The facts being otherwise as stated in Illustration 1, C proposes to issue 200,000 shares of its Class A voting common stock, and 100,000 shares of authorized but unissued nonvoting preferred stock, each share of which is convertible into 2.5 shares of C's Class A voting common stock. The proposed issuance requires shareholder approval under section 6.21(f) because the voting power of the Class A shares to be issued, after giving effect to the common stock that is issuable upon conversion of the preferred shares, would comprise more than 20% of the voting power of C's outstanding shares immediately before the issuance.

5. The facts being otherwise as stated in Illustration 4, each share of the preferred stock is convertible into 1.2 shares of the Class A voting common stock. The proposed issuance does not require shareholder approval under section 6.21(f) because neither the voting power of the shares to be issued at the outset (200,000) nor the voting power of the shares that would be outstanding after giving effect to the common stock issuable upon conversion of the preferred shares (a total of 320,000) constitutes more than 20% of the voting power of C's outstanding shares immediately before the issuance.

6. The facts being otherwise as stated in Illustration 1, C proposes to acquire businesses from Corporations G, H, and I for 200,000, 300,000, and 400,000 shares of Class A voting common stock, respectively, within a short period of time. None of the transactions is conditioned on the negotiation or completion of the other transactions. The proposed issuance of voting shares does not require shareholder approval, because the three transactions are not integrated within the meaning of section 6.21(f), and none of the transactions individually involves the issuance of more than 20% of the voting power of C's outstanding shares immediately before each issuance.

§ 30-29-622. Liability of shareholders. — (a) A purchaser from a corporation of the corporation's own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued or specified in the subscription agreement.

(b) A shareholder of a corporation is not personally liable for any liabilities of the corporation, including liabilities arising from acts of the corporation, except to the extent provided in a provision of the articles of incorporation permitted by section 30-29-202(b)(2)(v), Idaho Code, and that a shareholder may become personally liable by reason of the shareholder's own acts or conduct.

History.

I.C., § 30-29-622, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 33, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-622.

CASE NOTES

Piercing Corporate Veil.

Stock ownership, while important, is not a necessary prerequisite to pierce the corporate veil — it is merely one factor to consider. There are several factors a court of equity may consider when determining whether to pierce the corporate veil. When a claimant seeks to hold a non-shareholder liable for corporate debts, the court may look to a range of evidence to consider whether fairness dictates allowing recovery against a non-

shareholder-officer, with the primary consideration being the element of control or influence exercised by that person in the affairs of the corporation. Lunneborg v. My Fun Life, 163 Idaho 856, 421 P.3d 187 (2018).

Official Comment The sole obligation of a purchaser of shares from the corporation is to pay the consideration determined by the board of directors (or the consideration specified in the subscription agreement, in the case of preincorporation subscriptions). Upon the transfer to the corporation of the consideration so determined or specified, the shareholder has no further responsibility to the corporation or its creditors "with respect to the shares," although the shareholder may have continuing obligations under a contract or promissory note entered into in connection with the acquisition of shares.

Section 6.22(a) [this section] deals only with the responsibility for payment by the purchaser of shares from the corporation. The Act leaves to the Uniform Commercial Code questions with respect to the rights of subsequent purchasers of shares if the consideration is not paid when due. See sections 8-202 and 8-302 [§§ 28-8-202 and 28-8-302] of the Uniform Commercial Code.

Section 6.22(b) sets forth the basic rule of nonliability of shareholders for corporate acts or debts that underlies corporation law. Unless such liability is provided for in the articles of incorporation (see section 2.02(b)(2)(v) [§ 30-29-202]), shareholders are not liable for corporate obligations, although the last clause of section 6.22(b) recognizes that such liability may be assumed voluntarily or by other conduct.

§ 30-29-623. Share dividends. — (a) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one (1) or more classes or series of shares. An issuance of shares under this subsection is a share dividend.

(b) Shares of one (1) class or series may not be issued as a share dividend in respect of shares of another class or series unless: (1) The articles of incorporation so authorize; (2) A majority of the votes entitled to be cast by the class or series to be issued approve the issue; or (3) There are no outstanding shares of the class or series to be issued.

(c) The board of directors may fix the record date for determining shareholders entitled to a share dividend, which date may not be retroactive.

(d) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, the record date is the date the board of directors authorizes the share dividend.

History.

I.C., § 30-29-623, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 34, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; inserted "of shares" at the end of the first sentence in subsection (a); added subsection (c); and substituted "the record date is the date" for "it is the date" near the middle of subsection (d).

Compiler's Notes.

This section is derived from former § 30-1- 623.

Official Comment

A share dividend is solely a paper transaction: no assets are received by the corporation for the shares and any "dividend" paid in shares does not involve the distribution of property by the corporation to its shareholders. Section 6.23 [this section] therefore recognizes that such a transaction involves the issuance of shares "without consideration," and section 1.40 [§ 30-29-140] excludes it from the definition of a "distribution."

§ 30-29-624. Share rights, options, warrants, and awards. — (a) A corporation may issue rights, options, or warrants for the purchase of shares or other securities of the corporation. The board of directors shall determine:

(1) The terms and conditions upon which the rights, options, or warrants are issued; and

(2) The terms, including the consideration for which the shares or other securities are to be issued. The authorization by the board of directors for the corporation to issue such rights, options, or warrants constitutes authorization of the issuance of the shares or other securities for which the rights, options, or warrants are exercisable.

(b) The terms and conditions of such rights, options, or warrants may include restrictions or conditions that:

(1) Preclude or limit the exercise, transfer or receipt of such rights, options, or warrants by any person or persons owning or offering to acquire a specified number or percentage of the outstanding shares or other securities of the corporation or by any transferee or transferees of any such person or persons; or

(2) Invalidate or void such rights, options, or warrants held by any such person or persons or any such transferee or transferees.

(c) The board of directors may authorize one (1) or more officers to:

(1) Designate the recipients of rights, options, warrants, or other equity compensation awards that involve the issuance of shares; and

(2) Determine, within an amount and subject to any other limitations established by the board of directors and, if applicable, the shareholders, the number of such rights, options, warrants, or other equity compensation awards and the terms of such rights, options, warrants, or awards to be received by the recipients, provided that an officer may not use such authority to designate himself or herself or any other persons as the board of directors may specify as a recipient of such rights, options, warrants, or other equity compensation awards.

History.

I.C., § 30-29-624, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 35, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section heading, which formerly read: "Share options"; redesignated the existing paragraphs; inserted "and conditions" near the beginning of paragraph (a)(1); rewrote the introductory paragraph in subsection (b), which formerly read: "The terms and conditions of such rights, options or warrants, including those outstanding on July 1, 2004, may include, without limitation, restrictions or conditions that"; and added subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-624.

Official Comment

Section 6.24 [this section] specifically authorizes the creation of rights, options and warrants and confirms the broad discretion of the board of directors in determining the consideration to be received by the corporation for their issuance, including the creation of compensation plans for directors, officers, agents, and employees.

Section 6.24(a) does not require shareholder approval of rights, options, warrants or compensation plans. Of course, prior shareholder approval may be sought as a discretionary matter, or required to comply with the rules of national securities exchanges or to acquire federal income tax benefits that may be conditioned upon shareholder approval of such plans.

Section 6.24(b) confirms that the issuance of rights, options or warrants as part of a shareholder rights plan is permitted. The permissible scope of shareholder rights plans may, however, be limited by the courts.

Section 6.24(c) provides express authority for the delegation to officers of the designation of recipients of compensatory awards involving the issuance of shares, either directly or upon exercise of rights to acquire

shares, and the determination of the amount and other terms of the awards, subject to any applicable limitations established by the board of directors or the shareholders. A board of directors (or a board committee with authority delegated to it under section 8.25 [§ 30-29-825], typically a compensation committee) may decide whether to exercise the authority under section 6.24(c) and, to the extent it does so, the board must specify the total amount that may be awarded and may impose any other limits it desires as part of the board's oversight of the award process. A board or committee delegating authority under section 6.24(c) would typically include appropriate limits. These limits might include, for example, the amount or range of shares to be awarded to different classes of employees, the timing and pricing of awards, and the vesting terms or other variable provisions of awards.

§ 30-29-625. Form and content of certificates. — (a) Shares may but need not be represented by certificates. Unless this chapter or another statute expressly provides otherwise, the rights and obligations of shareholders are identical regardless of whether their shares are represented by certificates.

(b) At a minimum each share certificate must state on its face:

(1) The name of the corporation and that it is organized under the law of this state;

(2) The name of the person to whom issued; and

(3) The number and class of shares and the designation of the series, if any, the certificate represents.

(c) If the corporation is authorized to issue different classes of shares or series of shares within a class, the front or back of each certificate must summarize the rights, preferences, and limitations applicable to each class and series; any variations in rights, preferences, and limitations among the holders of the same class or series; and the authority of the board of directors to determine terms of future classes or series. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request in writing and without charge.

(d) Each share certificate must be signed by two (2) officers designated in the bylaws or by the board of directors.

(e) If the person who signed a share certificate no longer holds office when the certificate is issued, the certificate is nevertheless valid.

History.

I.C., § 30-29-625, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 36, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-625.

Official Comment

Section 6.25 [this section] sets forth the minimum requirements for share certificates. Shares without certificates are permitted under section 6.25(a) upon compliance with section 6.26 [§ 30-29-626]. There are no differences in the rights and obligations of shareholders by reason of shares being represented by certificates or not being represented by certificates, other than mechanical differences, such as the means by which instructions for transfer are communicated to the issuer, necessitated by the use or nonuse of certificates.

All signatures on a share certificate may be facsimiles. See the definition of "sign" in section 1.40 [§ 30-29-140]. This recognizes that a purchaser of publicly traded shares will rarely be in a position to determine whether a manual signature on a stock certificate is in fact the authorized signature of an officer or the transfer agent or registrar.

§ 30-29-626. Shares without certificates. — (a) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issuance of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(b) Within a reasonable time after the issuance or transfer of shares without certificates, the corporation shall deliver to the shareholder a written statement of the information required on certificates by section 30-29-625(b) and (c), Idaho Code, and, if applicable, section 30-29-627, Idaho Code.

History.

I.C., § 30-29-626, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 37, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1) and (2) as subsections (a) and (b); substituted "authorize the issuance" for "authorize the issue" near the middle of the first sentence in subsection (a); and, in subsection (b), substituted "issuance or transfer" for "issue or transfer" near the beginning, substituted "shall deliver to" for "shall send" near the middle, and substituted "section 30-29-625(b) and (c), Idaho Code" for "section 30-29-625(2) and (3), Idaho Code" near the end.

Compiler's Notes.

This section is derived from former § 30-1-626.

CASE NOTES

Piercing the Corporate Veil.

Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted, because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v. DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

Official Comment Section 6.26(a) authorizes the creation of shares without certificates either by original issue or in substitution for shares previously represented by certificates. This section gives the board of directors the widest discretion so that a particular class and series of shares might be entirely represented by certificates, entirely uncertificated, or represented partly by each. A corporation may not treat as uncertificated, and accordingly transferable on its books without due presentation of a certificate, any shares for which a certificate is outstanding.

The statement required by section 6.26(b) ensures that holders of shares without certificates will receive from the corporation the same information that the holders of certificates receive when certificates are issued. There is no requirement that this information be delivered to purchasers of shares without certificates before purchase.

§ 30-29-627. Restriction on transfer of shares. — (a) The articles of incorporation, the bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

(b) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by section 30-29-626(b), Idaho Code. Unless so noted or contained, a restriction is not enforceable against a person without knowledge of the restriction.

(c) A restriction on the transfer or registration of transfer of shares is authorized:

(1) To maintain the corporation's status when it is dependent on the number or identity of its shareholders;

(2) To preserve exemptions under federal or state securities law; or

(3) For any other reasonable purpose.

(d) A restriction on the transfer or registration of transfer of shares may:

(1) Obligate the shareholder first to offer the corporation or other persons, separately, consecutively, or simultaneously, an opportunity to acquire the restricted shares;

(2) Obligate the corporation or other persons, separately, consecutively, or simultaneously, to acquire the restricted shares;

(3) Require the corporation, the holders of any class or series of its shares, or other persons to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable; or

(4) Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable.

(e) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

History.

I.C., § 30-29-627, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 38, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; deleted "and other securities" from the end of the section heading; in subsection (b), substituted "section 30-29-625(b), Idaho Code" for "section 30-29-625(2), Idaho Code" at the end of the first sentence and inserted "or contained" near the beginning of the last sentence; and substituted "class or series of its shares, or other persons" for "class of its shares, or another person" near the beginning of paragraph (d)(3).

Compiler's Notes.

This section is derived from former § 30-1-627.

Official Comment

Share transfer restrictions are used by corporations for a variety of purposes. Section 6.27(c) [this section] enumerates certain purposes for which share transfer restrictions may be imposed, but does not limit the purposes given that section 6.27(c)(3) permits restrictions "for any other reasonable purpose." Examples of the "status" referred to in section 6.27(c)(1) include the subchapter S election under the Internal Revenue Code, and entitlement to a program or eligibility for a privilege administered by governmental agencies or national securities exchanges.

Examples of the uses of share transfer restrictions include:

• a corporation with few shareholders may impose share transfer restrictions to ensure that shareholders do not transfer their shares to a

person not acceptable to the corporation or other shareholders;

- a corporation with few shareholders may impose share transfer restrictions to establish the value of the shares of deceased shareholders;

- a professional corporation may impose share transfer restrictions to ensure that its treatment of departing, retiring or deceased shareholders is consistent with rules applicable to the profession in question;

- a corporation may impose share transfer restrictions to ensure that its election of subchapter S treatment under the Internal Revenue Code will not be unexpectedly terminated; and

- a corporation issuing securities pursuant to an exemption from federal or state securities registration may impose share transfer restrictions to ensure that subsequent transfers of shares will not result in the loss of the exemption being relied upon.

Section 6.27(d) describes the types of restrictions that may be imposed. The types of restrictions referred to in sections 6.27(d)(1) (rights of first offer) and (d)(2) (buy-sell agreements) are imposed as a matter of contractual negotiation and do not prohibit the outright transfer of shares. Rather, they designate to whom shares or other securities must be offered at a price established in the agreement or by a formula or method agreed to in advance. By contrast, the restrictions described in clauses sections 6.27(d)(3) and (d)(4) may permanently limit the market for shares by disqualifying all or some potential purchasers. The restrictions imposed by these two provisions must not be "manifestly unreasonable."

§ 30-29-628. Expense of issue. [Repealed.]

Repealed by S.L. 2019, ch. 90, § 39, effective July 1, 2019.

History.

I.C., § 30-29-628, as added by 2015, ch. 243, § 61, p. 758.

§ 30-29-629. Reserved.

History.

I.C., § 30-29-629, as added by 2015, ch. 243, § 61, p. 758.

§ 30-29-630. Shareholders' preemptive rights. — (a) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide.

(b) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights," or words of similar effect, means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them.

(2) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(3) There is no preemptive right with respect to:

(i) Shares issued as compensation to directors, officers, agents or employees of the corporation, its subsidiaries or affiliates;

(ii) Shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents or employees of the corporation, its subsidiaries or affiliates;

(iii) Shares authorized in the articles of incorporation that are issued within six (6) months from the effective date of incorporation; or

(iv) Shares sold otherwise than for cash.

(4) Holders of shares of any class or series without voting power but with preferential rights to distributions have no preemptive rights with respect to shares of any class or series.

(5) Holders of shares of any class or series with voting power but without preferential rights to distributions have no preemptive rights with respect to shares of any class or series with preferential rights to distributions

unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire the shares without preferential rights.

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person for a period of one (1) year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of one (1) year is subject to the shareholders' preemptive rights.

(c) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

History.

I.C., § 30-29-630, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 40, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (b), substituted "similar effect" for "similar import" near the middle of the introductory paragraph, deleted "rights" following "conversion" near the beginning of paragraph (3)(ii); and substituted "cash" for "money" at the end of paragraph (3)(iv), rewrote paragraph (4), which formerly read: "Holders of shares of any class without general voting rights but with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class", and, in paragraph (5), substituted "class or series with voting power" for "class with general voting rights" near the beginning, deleted "or assets" following "distributions" twice near the middle, and inserted "or series" following "shares of any class" also near the middle.

Compiler's Notes.

This section is derived from former § 30-1-630.

Official Comment

Section 6.30(a) [this section] adopts an “opt in” provision for preemptive rights: unless an affirmative reference to these rights appears in the articles of incorporation, no preemptive rights exist.

Section 6.30(b) provides a standard model for preemptive rights if the corporation desires to exercise the “opt in” alternative of section 6.30(a). A corporation may qualify or limit any of the rules set forth in this section by express provisions in the articles of incorporation. The purposes of this standard model for preemptive rights are (i) to simplify drafting articles of incorporation and (ii) to provide a simple checklist of business considerations for the benefit of attorneys who are considering the inclusion of preemptive rights in articles of incorporation.

Section 6.30(b) establishes rules for most of the problems involving preemptive rights. Subsection (b)(1) defines the general scope of the preemptive right giving appropriate recognition to the discretion of the board of directors in establishing the terms and conditions for exercise of that right. Subsection (b)(2) creates rules with respect to the waiver of these rights. Subsection (b)(3) lists the principal exceptions to preemptive rights, including a six-month period during which initial capital can be raised by a newly-formed corporation without regard to the preemptive rights of persons who have previously acquired shares. Subsections (b)(4) and (b)(5) provide rules for problems created when preemptive rights are recognized in corporations with more than a single class or series of shares. These problems are discussed further below. Subsection (b)(6) defines the status of preemptive rights after a shareholder has elected not to exercise a proffered preemptive right.

Preemptive rights can protect the voting power and equity participation of shareholders. This combination of functions creates no problem in a corporation that has authorized only a single class of shares but may occasionally create problems in corporations with more complex capital structures. In many capital structures, the issuance of additional shares of one class or series typically does not adversely affect other classes or series. For example, the issuance of additional shares with voting power but without preferential rights normally does not affect either the limited voting power or equity participation of holders of shares with preferential rights; holders of shares with preferential equity participation rights but without voting power should therefore have no preemptive rights with respect to

shares with voting power but without preferential rights. See sections 6.30(b)(4) and (b)(5). Classes or series of shares that may give rise to possible conflict between the protection of voting interests and equity participation when the board of directors desires to issue additional shares include classes or series of nonvoting shares without preferential rights and classes or series of shares with both voting power and preferential rights to distributions. These conflicts can be dealt with by specific provisions in the articles of incorporation.

§ 30-29-631. Corporation's acquisition of its own shares. — (a) A corporation may acquire its own shares. Unless a resolution of the board of directors or the corporation's articles of incorporation provide otherwise, shares so acquired constitute authorized but unissued shares.

(b) If the articles of incorporation prohibit the reissue of the acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation pursuant to section 30-29-1005(f), Idaho Code.

(c) A corporation has authority to use, hold, acquire, cancel and dispose of treasury shares.

(d) Unless the board of directors adopts an amendment to the corporation's articles of incorporation to reduce the number of authorized shares, treasury shares of the corporation that are canceled shall be treated as authorized but unissued shares.

History.

I.C., § 30-29-631, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 41, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; and substituted "section 30-39-1005(f), Idaho Code" for "section 30-29-1005(6), Idaho Code" at the end of subsection (b).

Compiler's Notes.

This section is derived from former § 30-1-631.

Official Comment

Shares that are acquired by the corporation become authorized but unissued shares under section 6.31 [this section] unless the articles of

incorporation prohibit reissue, in which event the shares are cancelled and the number of authorized shares is automatically reduced.

If the number of authorized shares of a class is reduced as a result of the operation of section 6.31(b), the board of directors should amend the articles of incorporation under section 10.05(f) [§ 30-29-1005] to reflect that reduction. If there are no remaining authorized shares in a class as a result of the operation of section 6.31, the board should amend the articles of incorporation under section 10.05(g) to delete the class from the classes of shares authorized by the articles of incorporation.

§ 30-29-632 through 30-29-639. Reserved.

History.

I.C., § 30-29-632, as added by 2015, ch. 243, § 61, p. 758.

§ 30-29-640. Distributions to shareholders. — (a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c) of this section.

(b) The board of directors may fix the record date for determining shareholders entitled to a distribution, which date may not be retroactive. If the board of directors does not fix a record date for determining shareholders entitled to a distribution, other than one involving a purchase, redemption, or other acquisition of the corporation's shares, the record date is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) of this section either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(e) Except as provided in subsection (g) of this section, the effect of a distribution under subsection (c) of this section is measured:

(1) In the case of distribution by purchase, redemption or other acquisition of the corporation's shares, as of the earlier of:

(i) The date cash or other property is transferred or debt to a shareholder is incurred by the corporation; or

(ii) The date the shareholder ceases to be a shareholder with respect to the acquired shares;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) In all other cases, as of:

(i) The date the distribution is authorized if the payment occurs within one hundred twenty (120) days after the date of authorization; or

(ii) The date the payment is made if it occurs more than one hundred twenty (120) days after the date of authorization.

(f) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement.

(g) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under subsection (c) of this section if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. If such indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made.

(h) This section shall not apply to distributions in liquidation under part 14 of this chapter.

History.

I.C., § 30-29-640, as added by 2015, ch. 243, § 61, p. 758; am. 2019, ch. 90, § 42, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "subsection (c) of this section" for "subsection (3) of this section" at the end of subsection (a); rewrote subsection (b), which formerly

read: “If the board of directors does not fix the record date for determining shareholders entitled to a distribution, other than one involving a purchase, redemption or other acquisition of the corporation’s shares, it is the date the board of directors authorizes the distribution”; substituted “subsection (c) of this section” for “subsection (3) of this section” near the beginning of subsection (d); in subsection (e), substituted “subsection (g) of this section” for “subsection (7) of this section” and substituted “subsection (c) of this section” for “subsection (3) of this section” in the introductory paragraph, substituted “cash” for “money” near the beginning and inserted “to a shareholder is” near the middle of paragraph (1)(i); and added subsection (h).

Compiler’s Notes.

This section is derived from former § 30-1-640.

Official Comment

1. The Scope of Section 6.40.

Section 6.40 [this section] imposes a single, uniform test on all distributions other than distributions in liquidation under chapter [part] 14. Section 1.40 [§ 30-29-140] defines “distribution” broadly to include transfers of cash and other property (excluding a corporation’s own shares) to a shareholder in respect of the corporation’s shares. Examples of such transfers are cash or property dividends, payments by a corporation to purchase its own shares, and distributions of promissory notes or indebtedness. The financial provisions of the Act do not use the concept of surplus but do have restrictions on distributions built around both equity insolvency and balance sheet tests.

2. Equity Insolvency Test.

In most cases involving a corporation operating as a going concern in the normal course, it will be apparent from information generally available that no particular inquiry concerning the equity insolvency test in section 6.40(c)(1) is needed. Although neither a balance sheet nor an income statement can be conclusive as to this test, the existence of significant shareholders’ equity and normal operating conditions are of themselves a strong indication that no issue should arise under that test. In the case of a

corporation having regularly audited financial statements, the absence of any qualification in the most recent auditor's opinion as to the corporation's status as a "going concern," coupled with a lack of subsequent adverse events, would normally be decisive.

It is only when circumstances indicate that the corporation is encountering difficulties or is in an uncertain position concerning its liquidity and operations that the board of directors or, more commonly, the officers or others upon whom they may place reliance under section 8.30(d) [§ 30-29-830], may need to address the issue. Because of the overall judgment required in evaluating the equity insolvency test, no "bright line" test is provided. However, in determining whether the equity insolvency test has been met, certain judgments or assumptions as to the future course of the corporation's business are customarily justified, absent clear evidence to the contrary. These include the likelihood that (i) based on existing and contemplated demand for the corporation's products or services, it will be able to generate funds over a period of time sufficient to satisfy its existing and reasonably anticipated obligations as they mature, and (ii) indebtedness which matures in the near-term will be refinanced where, on the basis of the corporation's financial condition and future prospects and the general availability of credit to businesses similarly situated, it is reasonable to assume that such refinancing may be accomplished. To the extent that the corporation may be subject to asserted or unasserted contingent liabilities, reasonable judgments as to the likelihood, amount, and time of any recovery against the corporation, after giving consideration to the extent to which the corporation is insured or otherwise protected against loss, may be utilized. There may be occasions when it would be useful to consider a cash flow analysis, based on a business forecast and budget, covering a sufficient period of time to permit a conclusion that known obligations of the corporation can reasonably be expected to be satisfied over the period of time that they will mature.

In exercising their judgment, the directors are entitled to rely, as provided in section 8.30(e), on information, opinions, reports, and statements prepared by others. Ordinarily, they should not be expected to become involved in the details of the various analyses or market or economic projections that may be relevant.

3. Balance Sheet Test.

The determination of a corporation's assets and liabilities for purposes of the balance sheet test of section 6.40(c)(2) and the choice of the permissible basis on which to do so are left to the judgment of its board of directors. In making a judgment under section 6.40(d), the board may rely as provided in section 8.30(e) upon information, opinions, reports, and statements, including financial statements and other financial data, prepared or presented by public accountants or others.

Section 6.40 does not utilize particular accounting terminology of a technical nature or specify particular accounting concepts. In making determinations under this section, the board of directors may make judgments about accounting matters.

In a corporation with subsidiaries, the board of directors may rely on unconsolidated statements prepared on the basis of the equity method of accounting as to the corporation's investee corporations, including corporate joint ventures and subsidiaries, although other evidence would be relevant in the total determination. The board of directors is entitled to rely as provided by section 8.30(e) upon reasonably current financial statements in determining whether the balance sheet test of section 6.40(c)(2) has been met, unless the board has knowledge that makes such reliance unwarranted. Section 6.40 does not mandate the use of generally accepted accounting principles; it only requires the use of accounting practices and principles that are reasonable in the circumstances. Although corporations subject to registration under the Securities Exchange Act of 1934 must, and many other corporations in fact do, use financial statements prepared on the basis of generally accepted accounting principles, a great number of smaller or closely held corporations do not. Some of these corporations maintain records solely on a tax accounting basis and their financial statements are of necessity prepared on that basis. Others prepare financial statements that substantially reflect generally accepted accounting principles but may depart from them in some respects (*e.g.*, footnote disclosure). A statutory standard of reasonableness, rather than stipulating generally accepted accounting principles as the normative standard, is appropriate to achieve a reasonable degree of flexibility and to accommodate the needs of the many different types of business corporations which might be subject to these provisions, including in particular closely held corporations.

Section 6.40(d) specifically permits determinations to be made under section 6.40(c)(2) on the basis of a fair valuation or other method that is reasonable in the circumstances. The statute authorizes departures from historical cost accounting and permits the use of appraisal and current value methods to determine the amount available for distribution. No particular method of valuation is prescribed in the statute, as different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. In most cases, a fair valuation method or a going concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Ordinarily a corporation should not selectively revalue assets. It should consider the value of all of its material assets, regardless of whether they are reflected in the financial statements (*e.g.*, a valuable executory contract). Likewise, all of a corporation's material obligations should be considered and revalued to the extent appropriate and possible. In any event, section 6.40(d) calls for the application under section 6.40(c)(2) of a method of determining the aggregate amount of assets and liabilities that is reasonable in the circumstances.

The phrase "other method that is reasonable in the circumstances means that under section 6.40(c)(2) a wide variety of methods may be considered reasonable in a particular case even if any such method might not be a "fair valuation" or "current value" method.

4. Relationship to the Federal Bankruptcy Code and Other Fraudulent Conveyance Statutes.

The Act establishes the validity of distributions from the corporate law standpoint under section 6.40 and determines the potential liability of directors for improper distributions under sections 8.30 and 8.32 [§ 30-29-832]. The federal bankruptcy laws and state fraudulent conveyance statutes, on the other hand, are designed to enable the trustee or other representative to recapture for the benefit of creditors funds distributed to others in some circumstances. Accordingly, the tests of section 6.40 are different from the tests for insolvency under those statutes.

5. Preferential Dissolution Rights and the Balance Sheet Test.

Section 6.40(c)(2) treats preferential dissolution rights of shares for distribution purposes as if they were liabilities for the sole purpose of determining the amount available for distributions. In making the calculation of the amount that must be added to the liabilities of the corporation to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be established pursuant to the articles of incorporation as of the date of the distribution or proposed distribution. The amount so determined must include arrearages in preferential dividends if the articles of incorporation require that they be paid upon the dissolution of the corporation. In the case of shares having both preferential rights upon dissolution and other nonpreferential rights, only the preferential rights should be taken into account. The treatment of preferential dissolution rights of classes or series of shares set forth in section 6.40(c)(2) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of section 6.40(c)(1). The treatment of preferential rights mandated by section 6.40(c)(2) may always be eliminated by an appropriate provision in the articles of incorporation.

6. Application to Acquisition of Shares.

In an acquisition of its shares, a corporation may transfer property or incur debt to the former holder of the shares. Share repurchase agreements involving payment for shares over a period of time are of special importance in closely held corporations. Section 6.40(e) provides a clear rule for this situation: the legality of the distribution must be measured at the time of the issuance or incurrence of the debt, not at a later date when the debt is actually paid, except as provided in section 6.40(g).

Section 6.40(g) provides that indebtedness need not be taken into account as a liability in determining whether the tests of section 6.40(c) have been met if the terms of the indebtedness provide that payments of principal or interest can be made only if and to the extent that payment of a distribution could then be made under section 6.40. This has the effect of making the holder of the indebtedness junior to all other creditors but senior to the holders of shares, not only during the time the corporation is operating but also upon dissolution and liquidation. It should be noted that the creation of such indebtedness, and the related limitations on payments of principal and interest, may create tax problems or raise other legal questions.

Although section 6.40(g) is applicable to all indebtedness meeting its tests, regardless of the circumstances of its issuance, it is anticipated that it will apply most frequently to permit the reacquisition of shares of the corporation at a time when the deferred purchase price exceeds the net worth of the corporation. This type of reacquisition may be necessary in the case of businesses in early stages of development or service businesses whose value derives principally from existing or prospective net income or cash flow rather than from net asset value. In such situations, net worth will usually be anticipated to grow over time from operations so that when payments in respect of the indebtedness are to be made the two insolvency tests will be satisfied. In the meantime, the fact that the indebtedness is outstanding will not prevent distributions that could be made under section 6.40(c) if the indebtedness were not counted in making the determination.

Part 7
Shareholders

Idaho Code § 30-29-701

§ 30-29-701. Annual meeting. — (a) Unless directors are elected by written consent in lieu of an annual meeting as permitted by section 30-29-704, Idaho Code, a corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws at which directors shall be elected.

(b) Annual meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is so stated or fixed, annual meetings shall be held at the corporation's principal office.

(c) The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action.

History.

I.C., § 30-29-701, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 43, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote subsection (a), which formerly read: "A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws" and, in subsection (b), deleted "shareholders'" following "Annual" at the beginning and substituted "place is so stated or fixed" for "place is stated in or fixed in accordance with the bylaws" near the middle.

Compiler's Notes.

This section is derived from former § 30-1-701.

CASE NOTES

Piercing the Corporate Veil.

Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v. DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

Official Comment The principal action to be taken at the annual meeting is the election of directors pursuant to section 8.03 [§ 30-29-803], but the purposes of the annual meeting are not limited by the Act. The requirement of section 7.01(a) [this section] that an annual meeting be held is phrased in mandatory terms to ensure that every shareholder entitled to participate in an annual meeting has the unqualified rights to (i) demand that an annual meeting be held and (ii) compel the holding of the meeting under section 7.03 [§ 30-29-703] if the corporation does not promptly hold the meeting and if the shareholders have not elected directors by written consent.

Many corporations, such as nonpublic subsidiaries and closely held corporations, do not regularly hold annual meetings and, if no shareholder objects or action has been taken by written consent, that practice creates no problem under section 7.01, because section 7.01(c) provides that failure to hold an annual meeting does not affect the validity of any corporate action. The shareholders may act by unanimous written consent under section 7.04 [§ 30-29-704] (or by less than unanimous written consent if the articles of incorporation so provide). Directors, once duly elected, remain in office until their successors are elected or they resign or are removed. See sections 8.05 and 8.07 through 8.09 [§§ 30-29-805 and 30-29-807 through 30-29-809].

The time and place, if any, of the annual meeting may be "stated in or fixed in accordance with the bylaws." If the bylaws do not themselves state a time and place for the annual meeting, authority to fix them may be delegated to the board of directors or to a specified officer. If the bylaws do not fix, or state the method of fixing, the place of the meeting, or the place

of the meetings has not been so fixed, the place of the meeting, if any, must be the "principal office" of the corporation as defined in section 1.40 [§ 30-29-140], which may or may not be its registered office under section 5.01 [see § 30-21-403]. This section thus gives corporations the flexibility to hold annual meetings in varying places at varying times as convenience may dictate. Alternatively, acting pursuant to section 7.09(c) [§ 30-29-709], the board of directors may choose to hold the meeting solely by means of remote communication without a place, unless the bylaws require the meeting to be held at a place.

§ 30-29-702. Special meeting. — (a) A corporation shall hold a special meeting of shareholders:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(2) If shareholders holding at least twenty percent (20%) of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date and deliver to the corporation one (1) or more written demands for the meeting describing the purpose or purposes for which it is to be held, provided that the articles of incorporation may fix a lower percentage or a higher percentage not exceeding thirty-three and one-third percent (33 1/3%) of all the votes entitled to be cast on any issue proposed to be considered. Unless otherwise provided in the articles of incorporation, a written demand for a special meeting may be revoked by a writing to that effect received by the corporation before the receipt by the corporation of demands sufficient in number to require the holding of a special meeting.

(b) If not otherwise fixed under section 30-29-703 or 30-29-707, Idaho Code, the record date for determining shareholders entitled to demand a special meeting shall be the first date on which a signed shareholder demand is delivered to the corporation. No written demand for a special meeting shall be effective unless, within sixty (60) days of the earliest date on which such a demand delivered to the corporation as required by this section was signed, written demands signed by shareholders holding at least the percentage of votes specified in or fixed in accordance with subsection (a)(2) of this section have been delivered to the corporation.

(c) Special meetings of shareholders may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is so stated or fixed, special meetings shall be held at the corporation's principal office.

(d) Only business within the purpose or purposes described in the meeting notice required by section 30-29-705(c), Idaho Code, may be conducted at a special meeting of shareholders.

History.

I.C., § 30-29-702, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 44, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), substituted "shareholders holding" for "the holders of" near the beginning of the first sentence and substituted "before" for "prior to" near the end of the last sentence in paragraph (2); rewrote subsection (b), which formerly read: "If not otherwise fixed under section 30-29-703 or 30-29-707, Idaho Code, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand"; in subsection (c), substituted "Special meetings of shareholders" for "Special shareholders' meetings" at the beginning of the first sentence and substituted "so stated or fixed" for "stated or fixed in accordance with the bylaws" near the end; and, in subsection (d), substituted "section 30-29-705(c), Idaho Code" for "section 30-29-705(3), Idaho Code" near the middle and substituted "special meeting of shareholders" for "special shareholders' meeting" at the end.

Compiler's Notes.

This section is derived from former § 30-1-702.

Official Comment

Any meeting other than an annual meeting is a special meeting under section 7.02 [this section]. The principal differences between an annual meeting and a special meeting are that at an annual meeting directors are elected and, subject to any applicable special notice requirement prescribed by the Act or by the articles of incorporation, any relevant issue pertaining to the corporation may be considered, while at a special meeting only matters within the specific purposes for which the meeting is called may be considered.

1. Who May Call a Special Meeting.

A special meeting may be called by the board of directors, a person or persons authorized to do so by the articles of incorporation or bylaws, or upon written demand by shareholders as described below. Typically, the person or persons holding certain designated offices within the corporation, *e.g.*, the president, chairman of the board of directors, or chief executive officer, are given authority to call special meetings of the shareholders. In addition, the shareholders holding at least 10% of all the votes entitled to be cast on a proposed issue at the special meeting may require the corporation to hold a special meeting by signing, dating, and delivering one or more writings that demand a special meeting and set forth the purpose or purposes of the desired meeting. That percentage may be decreased or increased (but to not more than 25%) by a provision in the articles of incorporation fixing a different percentage. Shareholders demanding a special meeting do not have to sign a single document, but the writings signed must all describe essentially the same purpose or purposes. Revocations of written demands will be effective if delivered to the corporation in the manner contemplated by section 1.41 [§ 30-29-141] and received before the corporation receives the requisite number of demands requiring that a special meeting be called. Revocations received after that time will have no effect. Upon receipt of demands from holders with the requisite number of votes, the corporation (through an appropriate officer) must call the special meeting at a reasonable time and place (unless the meeting is to be held solely by means of remote communication as provided in section 7.09(c) [§ 30-29-709]). The shareholders' demand may suggest a time and place but the final decision on the particular time and place belongs to the corporation. If no meeting is held within the time periods specified in section 7.03 [§ 30-29-703], a shareholder, as defined in section 7.03(c), who signed the demand may seek judicial relief under that section requiring that the meeting be held.

2. The Business That May Be Conducted at a Special Meeting.

Section 7.05(c) [§ 30-29-705] provides that a notice of a special meeting must include a "description of the purpose or purposes for which the meeting is called." Section 7.02(d) states that only business that is "within" that purpose or those purposes may be conducted at the special meeting. The word "within" was chosen, rather than a broader phrase like "reasonably related to," to describe the relationship between the notice and

the authorized business to assure a shareholder who does not attend a special meeting that new or unexpected matters will not be considered in the shareholder’s absence.

§ 30-29-703. Court-ordered meeting. — (a) The Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, may summarily order a meeting to be held:

(1) On application of any shareholder of the corporation if an annual meeting was not held or action by written consent in lieu of an annual meeting did not become effective within the earlier of six (6) months after the end of the corporation's fiscal year or fifteen (15) months after its last annual meeting; or

(2) On application of one (1) or more shareholders who signed a demand for a special meeting valid under section 30-29-702, Idaho Code, if:

(i) Notice of the special meeting was not given within thirty (30) days after the first day on which the requisite number of such demands have been delivered to the corporation; or

(ii) The special meeting was not held in accordance with the notice.

(b) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date or dates for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the shares represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

(c) For purposes of subsection (a)(1) of this section, "shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

History.

I.C., § 30-29-703, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 45, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), rewrote paragraph (1), which formerly read: "On application of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held within fifteen (15) months after its last annual meeting; or", in paragraph (2), substituted "one (1) or more shareholders" for "a shareholder" near the beginning of the introductory paragraph, and rewrote paragraph (i), which formerly read: "Notice of the special meeting was not given within thirty (30) days after the date the demand was delivered to the corporation's secretary; or"; in subsection (b), inserted "or dates" near the beginning, and substituted "shares represented" for "votes represented" near the end; and added subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-703.

Official Comment

Section 7.03 [this section] provides the remedy for shareholders if the corporation refuses or fails to hold a shareholders' meeting as required by section 7.01 or 7.02 [§§ 30-29-701 or 30-29-702]. Because a meeting must be held within 60 days of the notice date under section 7.05 [§ 30-29-705], the maximum delay between the demand for a special meeting and the right to petition a court for a summary order is 90 days.

1. The Discretion of the Court to Order a Meeting.

The court has broad discretion under section 7.03 whether to order that a meeting be held, since the language of the statute is that the court "may summarily order" that a meeting be held. A court, for example, may refuse to order a special meeting if the specified purpose is repetitive of the purpose of a special meeting held in the recent past. Alternatively, the court may view the demand as a good faith request for reconsideration of an action taken in the recent past and may order a meeting to be held. Similarly, even though a demand for an annual meeting is not a formal prerequisite for an application for a summary order under this section, the court may withhold setting a time and date for the annual meeting for a reasonably short period to permit the corporation to do so.

2. Notice, Time, Place, and Quorum and Other Requirements.

If the court orders that a meeting be held, the court has wide discretion over the terms of the order, including the matters set forth in section 7.03(b). The discretion of the court with respect to quorum requirements prevents a holder of the majority of the votes (who may not desire that a meeting be held) from frustrating the court-ordered meeting by not attending to prevent the existence of a quorum. To prevent misunderstanding about a special quorum requirement, if one is imposed, it is appropriate for the court to order that the notice of the meeting state specifically and conspicuously that a special quorum requirement is applicable to the court-ordered meeting. The court may also enter orders overriding the articles of incorporation or bylaws relating to matters such as notice (including advance notice requirements), and time and place of the meeting.

3. Status as Annual Meeting.

The court may provide that a meeting it has ordered is to be the annual meeting. If so provided, the meeting should be viewed as compliance with section 7.01, precluding all other shareholder requests for an annual meeting for that year.

§ 30-29-704. Action without meeting. — (a) Action required or permitted by this chapter to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action must be evidenced by one (1) or more written consents bearing the date of signature and describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for filing by the corporation with the minutes or corporate records.

(b) The articles of incorporation may provide that any action required or permitted by this chapter to be taken at a shareholders' meeting may be taken without a meeting, and without prior notice, if consents in writing setting forth the action so taken are signed by the holders of outstanding shares having not less than the minimum number of votes that would be required to authorize or take the action at a meeting at which all shares entitled to vote on the action were present and voted; provided, however, that if a corporation's articles of incorporation authorize shareholders to cumulate their votes when electing directors pursuant to section 30-29-728, Idaho Code, directors may not be elected by less than unanimous written consent. A written consent must bear the date of signature of the shareholder who signs the consent and be delivered to the corporation for filing by the corporation with the minutes or corporate records.

(c) If not otherwise fixed under section 30-29-707, Idaho Code, and if prior action by the board of directors is not required respecting the action to be taken without a meeting, the record date for determining the shareholders entitled to take action without a meeting shall be the first date on which a signed written consent is delivered to the corporation. If not otherwise fixed under section 30-29-707, Idaho Code, and if prior action by the board of directors is required respecting the action to be taken without a meeting, the record date shall be the close of business on the day the resolution of the board of directors taking such prior action is adopted. No written consent shall be effective to take the corporate action referred to therein unless, within sixty (60) days of the earliest date on which a consent delivered to the corporation as required by this section was signed, written consents signed by sufficient shareholders to take the action have been

delivered to the corporation. A written consent may be revoked by a writing to that effect delivered to the corporation before unrevoked written consents sufficient in number to take the corporate action have been delivered to the corporation.

(d) A consent signed pursuant to the provisions of this section has the effect of a vote taken at a meeting and may be described as such in any document. Unless the articles of incorporation, bylaws, or a resolution of the board of directors provides for a reasonable delay to permit tabulation of written consents, the action taken by written consent shall be effective when written consents signed by sufficient shareholders to take the action have been delivered to the corporation.

(e) If this chapter requires that notice of a proposed action be given to nonvoting shareholders and the action is to be taken by written consent of the voting shareholders, the corporation shall give its nonvoting shareholders written notice of the action not more than ten (10) days after written consents sufficient to take the action have been delivered to the corporation or such later date that tabulation of consents is completed pursuant to an authorization under subsection (d) of this section. The notice must reasonably describe the action taken and contain or be accompanied by the same material that, under any provision of this chapter, would have been required to be sent to nonvoting shareholders in a notice of a meeting at which the proposed action would have been submitted to the shareholders for action.

(f) If action is taken by less than unanimous written consent of the voting shareholders, the corporation shall give its nonconsenting voting shareholders written notice of the action not more than ten (10) days after written consents sufficient to take the action have been delivered to the corporation or such later date that tabulation of consents is completed pursuant to an authorization under subsection (d) of this section. The notice must reasonably describe the action taken and contain or be accompanied by the same material that, under any provision of this chapter, would have been required to be sent to voting shareholders in a notice of a meeting at which the action would have been submitted to the shareholders for action.

(g) The notice requirements in subsections (e) and (f) of this section shall not delay the effectiveness of actions taken by written consent, and a failure

to comply with such notice requirements shall not invalidate actions taken by written consent, provided that this subsection shall not be deemed to limit judicial power to fashion any appropriate remedy in favor of a shareholder adversely affected by a failure to give such notice within the required time period.

History.

I.C., § 30-29-704, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 46, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-704.

Official Comment

Section 7.04(a) [this section] permits shareholders to act by unanimous written consent without holding a meeting. This applies to any shareholder action, including election of directors, approval of mergers, domestications, conversions, sales of the corporation's assets requiring shareholder approval, amendments of articles of incorporation, and dissolution. Unanimous written consent is generally obtainable only for matters on which there are relatively few shareholders entitled to vote and is thus generally not used by public corporations. Under section 7.04(b), however, a corporation may include in its articles of incorporation a provision that permits shareholder action by less than unanimous written consent except with respect to the election of directors by written consent where cumulative voting applies. See section 7.28 [§ 30-29-728]. If the articles of incorporation permit action by less than unanimous written consent, they may also limit or otherwise specify the shareholder actions that may be approved by less than unanimous consent.

1. Form of Written Consent.

To be effective, consents must be in writing, dated and sent to the corporation in any manner authorized by section 1.41 [§ 30-29-141], including electronic transmission if the applicable conditions of section 1.41 are met.

A shareholder or proxy may use an electronic transmission to consent to an action. If an electronic transmission is used to consent to an action, the corporation must be able to determine from the transmission the date of the signature and that the consent was authorized by the shareholder or a person authorized to act for the shareholder. See sections 1.40 [§ 30-29-140] ("electronic," "sign," and "signature") and 1.41(d).

In some cases, more votes may be required to approve an action by less than unanimous written consent than would be required to approve the same action at a meeting that is not attended by all shareholders. For example, for a corporation with 1,000 shares eligible to vote, unrevoked consents from the holders of at least 501 shares are necessary to take action by written consent under the default quorum and voting requirement provisions of section 7.25 [§ 30-29-725]. In contrast, at a meeting at which the minimum quorum is present, the same action could be taken with the vote of the holders of 251 shares, or even fewer if not all shares present are voted. Where the Act or a corporation's articles of incorporation provide for a greater voting requirement, however, the number of shares required to consent to an action may be the same as the number of shares required to approve the action at a meeting of shareholders.

The phrase "one or more written consents" in section 7.04 makes it clear that shareholders do not need to sign the same document. To minimize the possibility that action by written consent will be authorized by action of persons who may no longer be shareholders at the time the action is taken, section 7.04(c) requires that all consents be signed within 60 days of the earliest signature date of the consents delivered to the corporation.

2. Notice to Nonconsenting Shareholders.

When action is taken by less than unanimous written consent, section 7.04(f) requires that notice be given to nonconsenting shareholders entitled to vote on the matter. Section 7.04(e) also requires such notice to shareholders not entitled to vote on the matter if the Act requires that they be given notice of a proposed action. By requiring notice only after

shareholder action has been taken, the Act preserves the practical utility of the less than unanimous written consent when action needs to be taken quickly, without the delay that would result from a mandatory prior notice requirement. A corporation may provide for advance notice in its articles of incorporation.

3. Revocation of Consent.

Before shareholder action by written consent is effective, a shareholder may withdraw a consent by delivering a written revocation of the consent to the corporation.

§ 30-29-705. Notice of meeting. — (a) A corporation shall notify shareholders of the date, time and place of each annual and special shareholders' meeting no fewer than ten (10) nor more than sixty (60) days before the meeting date. If the board of directors has authorized participation by means of remote communication pursuant to section 30-29-709, Idaho Code, for holders of any class or series of shares, the notice to the holders of such class or series of shares must describe the means of remote communication to be used. The notice must include the record date for determining the shareholders entitled to vote at the meeting if such date is different from the record date for determining shareholders entitled to notice of the meeting. Unless this chapter or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting as of the record date for determining the shareholders entitled to notice of the meeting.

(b) Unless this chapter or the articles of incorporation require otherwise, the notice of an annual meeting of shareholders need not include a description of the purpose or purposes for which the meeting is called.

(c) Notice of a special meeting of shareholders must include a description of the purpose or purposes for which the meeting is called.

(d) If not otherwise fixed under section 30-29-703 or 30-29-707, Idaho Code, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the day before the first notice is delivered to shareholders.

(e) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 30-29-707, Idaho Code, however, notice of the adjourned meeting shall be given under this section to shareholders entitled to vote at such adjourned meeting as of the record date fixed for notice of such adjourned meeting.

History.

I.C., § 30-29-705, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 47, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote subsection (a), which formerly read: "A corporation shall notify shareholders of the date, time and place of each annual and special shareholders' meeting no fewer than ten (10) nor more than sixty (60) days before the meeting date. Unless this chapter or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting"; inserted "or shareholders" near the middle of subsection (b) and near the beginning of subsection (c); and rewrote the last sentence in subsection (e), which formerly read: "If a new record date for the adjourned meeting is or must be fixed under section 30-29-707, Idaho Code, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date."

Compiler's Notes.

This section is derived from former § 30-1-705.

Official Comment

The Act does not require that the notice of an annual meeting refer to any specific purpose or purposes, and any matter appropriate for shareholder action may be considered. Section 7.05(b) [this section] recognizes, however, that other provisions of the Act or the corporation's articles of incorporation may require that specific reference to a proposed action appear in the notice of meeting. See sections 9.21, 9.32, 10.03, 11.04, 12.02, and 14.02 [§§ 30-29-921, 30-29-932, 30-29-1003, 30-29-1104, 30-29-1202, and 30-29-1402]. In addition, as a condition to relying upon shareholder action to establish the safe harbor protection of section 8.61(b) [§ 30-29-861], section 8.63 [§ 30-29-863] requires notice to shareholders providing information regarding any director's conflict of interest in a transaction. If the board of directors chooses, a notice of an annual meeting

may contain references to purposes or proposals not required by statute. If a notice of an annual meeting refers specifically to one or more purposes, the meeting is not limited to those purposes. Although the corporation is not required to give notice of the purpose or purposes of an annual meeting unless the Act or the articles of incorporation so provide, a shareholder, in order to raise a matter at an annual meeting (for example, to nominate an individual for election as a director or to propose a resolution for adoption), may have to comply with any advance notice provisions in the corporation's articles of incorporation or bylaws. Such provisions might include requirements that shareholder nominations for election to the board of directors or resolutions intended to be voted on at the annual meeting be submitted in writing and received by the corporation a prescribed number of days in advance of the meeting.

The selection of the day before the notice is delivered as the catch-all record date under section 7.05(d) is intended to permit the corporation to deliver notices to shareholders on a given day without regard to any requests for transfer that may have been received during that day. For this reason, this section is consistent with the general principle set forth in section 7.07(b) [§ 30-29-707] that the board of directors may not fix a retroactive record date.

Section 7.05(e) provides rules for adjourned meetings and determines whether new notice must be given to shareholders. If a new record date is or must be fixed under section 7.07, the 10-to 60-day notice requirement and all other requirements of section 7.05 must be complied with because notice must be given to the persons who are shareholders as of the new record date. In such circumstances, a new quorum for the adjourned meeting must also be established. See section 7.25 [§ 30-29-725], which provides that if a quorum exists for a meeting, it is deemed to continue to exist automatically for an adjourned meeting unless a new record date is or must be set for the adjourned meeting.

§ 30-29-706. Waiver of notice. — (a) A shareholder may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for filing by the corporation with the minutes or corporate records.

(b) A shareholder's attendance at a meeting:

(1) Waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and

(2) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

History.

I.C., § 30-29-706, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 48, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; and substituted "corporation for filing by the corporation with the minutes or corporate records" for "corporation for inclusion in the minutes or filing with the corporate records" at the end of subsection (a).

Compiler's Notes.

This section is derived from former § 30-1-706.

Official Comment

A notice of shareholders' meeting serves two principal purposes: (i) it advises shareholders of the date, time, and place, if any, and means of

remote participation, if any, of the annual or special meeting, and (ii) in the case of a special shareholders' meeting (or an annual meeting at which fundamental changes may be made), it advises shareholders of the purposes of the meeting. Section 7.06(b)(1) [this section] provides that attendance at a meeting constitutes waiver of any failure to receive the notice or defects in the statement of the date, time, and place, if any, of any meeting. Defects waived by attendance for this purpose include a failure to send the notice altogether, delivery to the wrong address, a misstatement of the date, time, or place, if any, of the meeting, and a failure to notice the meeting within the time periods specified in section 7.05(a) [§ 30-29-705]. If a shareholder believes that the defect in or failure of notice was in some way prejudicial, the shareholder must state at the beginning of the meeting an objection to holding the meeting or transacting any business or the objection is waived. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or by obtaining written waivers of notice from all shareholders who did not receive the notice required by section 7.05.

For purposes of this section, "attendance" at a meeting involves the presence of the shareholder in person or by proxy or, if authorized in accordance with section 7.09(b) [§ 30-29-709], the shareholder or proxy may attend by means of remote communication. A shareholder who attends a meeting solely for the purpose of objecting to the notice is counted as present for purposes of determining whether a quorum is present. See section 7.25 [§ 30-29-725] and its Official Comment.

In the case of special shareholders' meetings, or annual meetings at which certain fundamental corporate changes are considered, a second purpose of the notice is to inform shareholders of the matters to be considered at the meeting. An objection that a particular matter is not within the stated purposes of the meeting cannot be raised until the matter is presented. Thus section 7.06(b)(2) provides that a shareholder waives this kind of objection by failing to object when the matter is presented. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or obtaining written waivers of notice from all shareholders. Whether a specific matter is within a stated purpose of a meeting is ultimately a matter for judicial determination, typically in a suit to invalidate action taken at the meeting

brought by a shareholder who was not present at the meeting or who was present at the meeting and preserved an objection under section 7.06(b).

The purpose of both waiver rules in section 7.06(b) is to require shareholders with technical objections to holding the meeting or considering a specific matter to raise them at the outset and not reserve them to be raised only if they are unhappy with the outcome of the meeting. The rules set forth in this section differ in some respects from the waiver rules for directors set forth in section 8.23 [§ 30-29-823] where a waiver is inferred if the director acquiesces in the action taken at a meeting even if the director raised a technical objection to the notice of a meeting at the outset.

Other sections of the Act require that shareholders who are not entitled to vote be given notice of meetings at which certain fundamental corporate changes are to be considered. See sections 9.21, 9.32, 10.03, 11.04, 12.02, and 14.02 [§ 30-29-921, 30-29-932, 30-29-1003, 30-39-1104, 30-29-1202, and 30-29-1402]. To obtain an effective waiver of notice for these meetings under this section, waivers must be obtained from the nonvoting shareholders who are entitled to notice but not entitled to vote, as well as from the shareholders entitled to vote.

§ 30-29-707. Record date for meeting. — (a) The bylaws may fix or provide the manner of fixing the record date or dates for one (1) or more voting groups to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors may fix the record date.

(b) A record date fixed under this section may not be more than seventy (70) days before the meeting or action requiring a determination of shareholders and may not be retroactive.

(c) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date or dates, which it shall do if the meeting is adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting, it may provide that the original record date or dates continue in effect or it may fix a new record date or dates.

(e) The record date or dates for a shareholders' meeting fixed by or in the manner provided in the bylaws or by the board of directors shall be the record date or dates for determining shareholders entitled both to notice of and to vote at the shareholders' meeting, unless in the case of a record date or dates fixed by the board of directors and to the extent not prohibited by the bylaws, the board, at the time it fixes the record date for shareholders entitled to notice of the meeting, fixes a later record date on or before the date of the meeting to determine the shareholders entitled to vote at the meeting.

History.

I.C., § 30-29-707, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 49, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; added “for meeting” at the end of the section heading; in subsection (a), substituted “record date or dates for one (1) or more voting groups to determine” for “record date for one (1) or more voting groups in order to determine” near the beginning of the first sentence, and substituted “directors may fix the record date” for “directors of the corporation may fix a future date as the record date” at the end of the last sentence; added “and may not be retroactive” at the end of subsection (b); substituted “record date or dates, which it shall do” for “record date, which it must do” near the middle of subsection (c); inserted “or dates” twice near the end of subsection (d); and added subsection (e).

Compiler’s Notes.

This section is derived from former § 30-1-707.

Official Comment

Section 7.07 [this section] authorizes the board of directors to fix record dates for determining shareholders entitled to take any action unless the bylaws themselves fix or otherwise provide for the fixing of a record date. A separate record date may be established for each voting group entitled to vote separately on a matter at a meeting, or a single record date may be established for all voting groups entitled to participate in the meeting. If neither the bylaws nor the board of directors fixes a record date for a specific action, the section of the Act that deals with that action itself fixes the record date. For example, section 7.05(d) [§ 30-29-705], relating to giving notice of a meeting, provides that the record date for determining who is entitled to notice of and to vote at a meeting (if not fixed by the directors or the bylaws) is the close of business on the day before the date the corporation first gives notice to shareholders of the meeting.

After a record date is fixed, if a new record date subsequently is or must be fixed under section 7.07, section 7.05 requires that new notice be given to the persons who are shareholders as of the new record date, and section 7.25 [§ 30-29-725] requires that a quorum be reestablished for that meeting.

Section 7.07(e) provides a board of directors with flexibility to align shareholders' voting and economic interests and addresses, in part, concerns over the separation of ownership and voting by permitting a board of directors to set a record date for voting closer to the meeting date. This provision does not restrict how close a record date for voting can be to the meeting date, but a board of directors would need to consider the practical issues in fixing the voting record date, including the requirement of section 7.20(c) [§ 30-29-720] that a list of shareholders entitled to vote be available at the meeting. The board may fix a separate record date for voting only at the time it fixes the record date for notice, and, as provided in section 7.05, notice of the separate record date must be included in the notice of meeting. If the board fixes separate record dates, section 16.02(e) [§ 30-29-1602] provides for shareholders entitled to vote at the meeting who were not shareholders on the record date for notice to have access to the information provided by the corporation to shareholders in connection with the meeting. If the board does not fix separate record dates, the normal provisions for fixing a single record date for notice and voting will apply.

§ 30-29-708. Conduct of meeting. — (a) At each meeting of shareholders, a chair shall preside. The chair shall be appointed as provided in the bylaws or, in the absence of such provision, by the board of directors.

(b) The chair, unless the articles of incorporation or bylaws provide otherwise, shall determine the order of business and shall have the authority to establish rules for the conduct of the meeting.

(c) Any rules adopted for, and the conduct of, the meeting shall be fair to shareholders.

(d) The chair of the meeting shall announce at the meeting when the polls close for each matter voted upon. If no announcement is made, the polls shall be deemed to have closed upon the final adjournment of the meeting. After the polls close, no ballots, proxies, or votes nor any revocations or changes to such ballots, proxies, or votes may be accepted.

History.

I.C., § 30-29-708, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 50, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; Added "of directors" at the end of subsection (a); in subsection (b), inserted "article of incorporation or" near the beginning and inserted "have the authority to" near the end; substituted "Any rules" for "The rules" at the beginning of subsection (c); and substituted "to such ballots, proxies, or votes may be accepted" for "thereto may be accepted" at the end of subsection (d).

Compiler's Notes.

This section is derived from former § 30-1-708.

Official Comment

Section 7.08 [this section] provides that, at any meeting of the shareholders, there shall be a chair who shall preside over the meeting. Inherent in the chair's power in section 7.08(b) to establish rules for the conduct of the meeting is the authority to require that the order of business be observed and that any discussion or comments from shareholders or their proxies be confined to the business item under discussion. The rules for conduct of the meeting may cover such subjects as the proper means for obtaining the floor, who shall have the right to address the meeting, the manner in which shareholders will be recognized to speak, time limits per speaker, the number of times a shareholder may address the meeting, and the person to whom questions should be addressed. The chair should be fair in determining the order of business and in establishing rules for the conduct of the meeting so as not to unfairly foreclose the right of shareholders — subject to the Act, the articles of incorporation and the bylaws — to raise items which are properly a subject for shareholder discussion or action at some point in the meeting before adjournment.

The Act provides that only business within the purpose or purposes described in the meeting notice may be conducted at a special shareholders' meeting. See sections 7.02(d) and 7.05(c) [§ 30-29-702 and 30-29-705]. In addition, in order to raise a matter at an annual meeting (for example, to nominate an individual for election as a director or to propose a resolution for adoption), a shareholder may be required to comply with any advance notice provision in the articles of incorporation or bylaws. See the Official Comment to section 7.05.

§ 30-29-709. Remote participation in shareholders' meetings. — (a) Shareholders of any class or series of shares may participate in any meeting of shareholders by means of remote communication to the extent the board of directors authorizes such participation for such class or series. Participation as a shareholder by means of remote communication shall be subject to such guidelines and procedures as the board of directors adopts, and shall be in conformity with subsection (b) of this section.

(b) Shareholders participating in a shareholders' meeting by means of remote communication shall be deemed present and may vote at such a meeting if the corporation has implemented reasonable measures:

(1) To verify that each person participating remotely as a shareholder is a shareholder; and

(2) To provide such shareholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to communicate, and to read or hear the proceedings of the meeting, substantially concurrent with such proceedings.

History.

I.C., § 30-29-709, as added by 2019, ch. 90, § 51, p. 220.

Official Comment

Section 7.09 [this section] authorizes the board of directors to permit shareholders to participate in annual and special shareholders' meetings by means of remote communication, such as over the Internet or through telephone conference calls, subject to the conditions set forth in section 7.09(b) and any other guidelines and procedures that the board of directors adopts. This would include the use of electronic ballots to the extent authorized by the board of directors. This authorization extends as well to anyone to whom such shareholder has granted a proxy appointment. Section 7.09(a) ensures that the board of directors has the sole discretion to determine whether to allow shareholders to participate by means of remote communication.

Section 7.09 allows the board of directors to limit participation by means of remote communication to all shareholders of a particular class or series, but does not permit the board of directors to limit such participation to particular shareholders within a class or series. Section 7.09 is not intended to expand the rights to participate in meetings or otherwise alter the ability of the board of directors or the chair to conduct meetings, pursuant to section 7.08 [§ 30-29-708], in a manner that is fair. For example, many corporations limit shareholder comments and, if such practice is fair to shareholders consistent with section 7.08, such practice is not changed by section 7.09. The two requirements under section 7.09(b) reflect the minimum deemed necessary to safeguard the integrity of the shareholders' meeting. Section 7.09 specifically gives the board of directors the flexibility and discretion to adopt additional guidelines and procedures for allowing shareholders to participate in a meeting by means of remote communication.

To give corporations the flexibility to choose the most efficient means of remote communication, under section 7.09(a), the board of directors may require that shareholders communicate their desire to participate by a certain date and, if remote participation is not to be the exclusive means of shareholders participating in the meeting, may condition the provision of remote communication or the form of communication to be used on the affirmative response of a certain number or proportion of shareholders eligible to participate. If the board of directors authorizes shareholder participation by means of remote communication pursuant to this section, such authorization and the process for participating by remote means of communication must be included in the meeting notice required by section 7.05 [§ 30-29-705]. Section 7.09(c) authorizes the board of directors to provide for a meeting of shareholders to be held solely by means of remote communication and to dispense with having a place for the meeting. This authority may be eliminated in a bylaw. If the bylaw is adopted by shareholders, it may only be amended by the shareholders unless the bylaw otherwise provides.

§ 30-29-710 through 30-29-719. Reserved.

History.

I.C., § 30-29-709, as added by 2015, ch. 243, § 62, p. 758.

§ 30-29-720. Shareholders' list for meeting. — (a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. If the board of directors fixes a different record date under section 30-29-707(e) to determine the shareholders entitled to vote at the meeting, a corporation also shall prepare an alphabetical list of the names of all its shareholders who are entitled to vote at the meeting. A list must be arranged by voting group, and within each voting group by class or series of shares, and show the address of and number of shares held by each shareholder. Nothing contained in this subsection shall require the corporation to include on such list the electronic mail address or other electronic contact information of a shareholder.

(b) The shareholders' list for notice shall be available for inspection by any shareholder, beginning two (2) business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholders' list for voting shall be similarly available for inspection promptly after the record date for voting. A shareholder or the shareholder's agent or attorney is entitled on written demand to inspect and, subject to the requirements of section 30-29-1602(c), Idaho Code, to copy a list, during regular business hours and at the shareholder's expense, during the period it is available for inspection.

(c) The corporation shall make the list of shareholders entitled to vote available at the meeting, and any shareholder or the shareholder's agent or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a shareholder or the shareholder's agent or attorney to inspect a shareholders' list before or at the meeting, or copy a list as permitted by subsection (b) of this section, the Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, on application of the shareholder, may summarily order the inspection or copying at the corporation's expense and

may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting.

History.

I.C., § 30-29-720, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 52, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-720.

Official Comment

The list of shareholders required by section 7.20 [this section] must include the names, addresses and number of shares of those shareholders entitled to vote at the meeting. The list must also include the names, addresses and number of shares of holders of nonvoting shares if they are entitled to notice of the meeting by reason of the nature of the actions proposed to be taken at the meeting. See section 7.05 [§ 30-29-705] and its Official Comment.

1. When the List Must Be Available.

Sections 7.20(b) and (c) govern when the list of shareholders must generally be available for inspection. The requirement of availability for continuous inspection permits the corporation and others soliciting votes to be on a relatively equal footing. If, however, notice of the meeting is waived by all the shareholders, the list need be available only at the meeting itself under section 7.20(c) unless one or more waivers are conditioned upon receipt of the list.

2. Where the List Must Be Maintained.

Sections 7.20(b) and (c) also govern where the corporation must maintain the list. If the corporation changes the location of the meeting, it thus may correspondingly change the location of the list under section 7.20(b). Alternatively, the corporation may choose to make the list available electronically and must make it available electronically during the meeting if the meeting is to be held solely by means of remote communication.

3. The Form in Which the List Is Maintained.

Section 7.20 does not require the list of shareholders to be in any particular form. It may be maintained, for example, in electronic form. If the list is maintained in other than written form, however, suitable equipment must be provided so that a comprehensible list may be inspected by a shareholder as permitted by section 7.20.

4. Consequences of Failing to Prepare the List or Refusal to Make It Available.

Section 7.20 creates a corporate obligation rather than an obligation imposed upon a corporate officer. If the corporation fails to prepare the list or refuses to permit a shareholder to inspect it, either before the meeting as required by section 7.20(b) or at the meeting itself as required by section 7.20(c), a shareholder may apply to the appropriate court for a summary order as contemplated by section 7.20(d). If the court orders a copy of the list to be provided to the shareholders, the copying is at the corporation's expense; if the corporation produces the list voluntarily pursuant to section 7.20(b) or (c), any inspection and copying are at the shareholder's expense.

This judicial remedy is the only sanction in the Act for violation of section 7.20 given that section 7.20(e) provides that the failure to prepare, maintain, or produce the list does not affect the validity of any action taken at the meeting.

5. The Right to Obtain a Copy of the List.

Section 7.20(b) permits shareholders to inspect the list without limitation, but permits the shareholder to copy the list only if the shareholder complies with the requirement of section 16.02(c) [§ 30-29-1602] that the demand be made in good faith and for a proper purpose. The right to copy the list may be satisfied at the corporation's option, if reasonable, by furnishing to the shareholder a copy of the list upon payment of a reasonable charge. See

sections 16.03(b) and (c) [§ 30-29-1603]. The distinction between inspection and copying set forth in section 7.20(b) reflects an accommodation between competing considerations of permitting shareholders access to the list before a meeting and possible misuse of the list.

6. Relationship to Right to Inspect Corporate Records Generally.

Section 7.20 creates a right of shareholders to inspect a list of shareholders in advance of and at a meeting that is independent of the right of shareholders to inspect corporate records under chapter [part] 16. A shareholder may obtain the right to inspect the list of shareholders as provided in chapter 16 without regard to the provisions relating to the pendency of a meeting in section 7.20, and similarly the limitations of chapter 16 are not applicable to the right of inspection created by section 7.20 except to the extent the shareholder seeks to copy the list in advance of the meeting.

The right to inspect under chapter 16 is also broader in the sense that the shareholder may make or receive copies of the documents the shareholder is entitled to inspect. See section 16.03.

§ 30-29-721. Voting entitlement of shares. — (a) Except as provided in subsections (b) and (d) of this section or unless the articles of incorporation provide otherwise, each outstanding share, regardless of class or series, is entitled to one (1) vote on each matter voted on at a shareholders' meeting. Only shares are entitled to vote.

(b) Shares of a corporation are not entitled to vote if they are owned by or otherwise belong to the corporation directly or indirectly through an entity of which a majority of the voting power is held directly or indirectly by the corporation or which is otherwise controlled by the corporation.

(c) Shares held by the corporation in a fiduciary capacity for the benefit of any person are entitled to vote unless they are held for the benefit of, or otherwise belong to, the corporation directly or indirectly through an entity of which a majority of the voting power is held directly or indirectly by the corporation or which is otherwise controlled by the corporation.

(d) Redeemable shares are not entitled to vote after delivery of written notice of redemption is effective and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares.

(e) For purposes of this section, "voting power" means the current power to vote in the election of directors of a corporation or to elect, select, or appoint governors of another entity.

(f) A corporation is not entitled to vote treasury shares.

History.

I.C., § 30-29-721, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 53, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-721.

Official Comment

1. Voting Power of Shares.

Section 7.21(a) [this section] provides that each outstanding share, regardless of class or series, is entitled to one vote per share unless otherwise provided in the articles of incorporation. The articles of incorporation may provide for multiple or fractional votes per share and may provide that some classes or series of shares are nonvoting on some or all matters, or that some classes or series have a single vote per share or different multiple or fractional votes per share, or that some classes or series constitute one or more separate voting groups and are entitled to vote separately on the matter. To reflect the possibility that shares may have multiple or fractional votes per share, the provisions relating to quorums, voting, and similar matters in the Act are phrased in terms of votes represented by shares.

2. Voting Power of Nonshareholders.

Under the last sentence of section 7.21(a), the power to vote may only be vested in shares. For example, bondholders may not be given the direct power to vote under the Act. They may, however, be given the power to vote by issuing them special classes or series of shares. See the Official Comment to section 7.22 [§ 30-29-722].

3. Circular Holdings.

The purpose of the prohibition in section 7.21(b) is to prevent a board of directors or management from using a corporate investment to perpetuate itself in power. While shares acquired by a corporation cease to be outstanding under section 6.31 [§ 30-29-631], except as provided in that section, and therefore are not entitled to vote, other arrangements may be devised seeking to obtain the benefits of ownership without actually acquiring the shares at all or not acquiring the shares at the time the right to

vote is determined. The concept of shares that "otherwise belong to" is included in addition to "owned by" to ensure that courts will have the flexibility to apply public policy considerations to arrangements under which shares are not technically "owned," or under which shares may or will be owned at a later time, but which have a similar effect. For example, if the corporation or a controlled entity has entered into a forward purchase contract for shares with the right to vote or direct the vote of the shares, a court could find that the shares belong to the corporation and are not entitled to be voted under section 7.21. Similarly, if the voting power is exercised by someone acting on behalf of the corporation or by a member of management of the corporation, a court could find that the shares otherwise belong to the corporation, and are not entitled to vote under section 7.21. Section 7.21(c), however, makes the prohibition of section 7.21(b) against voting of shares inapplicable to shares held in a fiduciary capacity where the beneficiaries are persons other than the corporation directly or through an entity controlled by the corporation.

4. Redeemable Shares.

Redeemable shares are often redeemed in connection with a transaction such as a merger or the issuance of a new senior class or series of shares that requires shareholder approval. Section 7.21(d) avoids subjecting a transaction to approval by a class or series of redeemable shares that will be redeemed as a result of the transaction if adequate provision has been made to ensure that the holders of the redeemable shares will in fact receive the amount payable to them on redemption.

§ 30-29-722. Proxies. — (a) A shareholder may vote the shareholder's shares in person or by proxy.

(b) A shareholder or the shareholder's agent or attorney-in-fact may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form, or by an electronic transmission. An electronic transmission must contain or be accompanied by information from which the recipient can determine the date of the transmission and that the transmission was authorized by the sender or the sender's agent or attorney-in-fact.

(c) An appointment of a proxy is effective when a signed appointment form or an electronic transmission of the appointment is received by the inspector of election or the officer or agent of the corporation authorized to count votes. An appointment is valid for the term provided in the appointment form and if no term is provided, is valid for eleven (11) months unless the appointment is irrevocable under subsection (d) of this section.

(d) An appointment of a proxy is revocable unless the appointment form or electronic transmission states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(1) A pledgee;

(2) A person who purchased or agreed to purchase the shares;

(3) A creditor of the corporation who extended it credit under terms requiring the appointment;

(4) An employee of the corporation whose employment contract requires the appointment; or

(5) A party to a voting agreement created under section 30-29-731, Idaho Code.

(e) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the inspector of election or

other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(f) An appointment made irrevocable under subsection (d) of this section is revoked when the interest with which it is coupled is extinguished.

(g) Unless it otherwise provides, an appointment made irrevocable under subsection (d) of this section continues in effect after a transfer of the shares and a transferee takes subject to the appointment, except that a transferee for value of shares subject to an irrevocable appointment may revoke the appointment if the transferee did not know of its existence when acquiring the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(h) Subject to section 30-29-724, Idaho Code, and to any express limitation on the proxy's authority stated in the appointment form or electronic transmission, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

History.

I.C., § 30-29-722, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 54, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-722.

Official Comment

1. Nomenclature.

The word "proxy" is often used ambiguously, sometimes referring to the grant of authority to vote, sometimes to the document granting the authority, and sometimes to the person to whom the authority is granted. In

the Act, the word "proxy" is used only in the last sense; the terms "proxy appointment," "appointment form" and "electronic transmission" are used to describe the document or communication appointing the proxy; and the word "appointment" is used to describe the grant of authority to vote.

Sections 7.22(b) [this section] and 1.41(d) [§ 30-29-141] permit the practice by which shareholders who have been provided in proxy materials with a personal identification number may submit their vote and identifying number to a person who, acting as the shareholder's agent, causes that information to be transmitted, directly or indirectly, to the inspector of election.

Sections 1.41(f) through (i) govern when an electronic transmission is "received" and "effective." If the appointment form or electronic transmission contains an express limitation on the power to vote or direction as to how to vote the shares on a particular matter the corporation must count the votes in a manner consistent with that limitation or direction. See section 7.22(h).

2. Duration of Appointment.

An appointment form that contains no expiration date is valid for 11 months unless it is irrevocable. See section 7.22(c). This ensures that in the normal course a new appointment will be solicited at least once every 12 months. An appointment form may validly specify its term if the parties agree, which may be longer or shorter than 11 months. An irrevocable appointment is valid for so long as it is irrevocable unless it terminates earlier in accordance with its terms.

The appointment of a proxy is essentially the appointment of an agent and is revocable in accordance with the principles of agency law unless it is "coupled with an interest." See section 7.22(d). An appointment may be revoked either expressly or by implication, as when a shareholder later signs a second appointment form inconsistent with an earlier one, or attends the meeting in person and seeks to vote on the shareholder's own behalf.

Although death or incapacity of the appointing shareholder revokes an agency appointment under common law principles, section 7.22(e) modifies the common law rule to provide that the corporation may accept the vote of the proxy until the appropriate corporate officer or agent receives notice of

the shareholder's death or incapacity. In view of the widespread dispersal of shareholders in many corporations, it is not feasible for the corporation to learn of these events independently of notice. On the other hand, section 7.22(e) does not affect the validity of the appointment or its manner of exercise as between the proxy and the personal representatives of the decedent or incompetent.

3. Irrevocable Appointment of Proxies.

Section 7.22(d) deals with the irrevocable appointment of a proxy. The general test adopted is the common law test that all appointments are revocable unless "coupled with an interest." Section 7.22(d) provides considerable certainty as it describes several accepted forms of relationship as examples of "proxies coupled with an interest." These examples are not exhaustive and other arrangements may also be "coupled with an interest."

Section 7.22(f) provides that an irrevocable appointment is revoked when the interest with which it was coupled is extinguished — for example, by repayment of the loan or release of the pledge.

Section 7.22(g) clarifies the default rule that an irrevocable appointment survives a transfer, but that the grantor may modify that rule. It also clarifies that both the appointment and the irrevocable nature of the appointment must conspicuously appear on the certificate or information statement to continue to be irrevocable against a transferee for value that does not know of the existence of the appointment.

§ 30-29-723. Shares held by intermediaries and nominees. — (a) A corporation's board of directors may establish a procedure under which a person on whose behalf shares are registered in the name of an intermediary or nominee may elect to be treated by the corporation as the record shareholder by filing with the corporation a beneficial ownership certificate. The terms, conditions, and limitations of this treatment shall be specified in the procedure. To the extent such person is treated under such procedure as having rights or privileges that the record shareholder otherwise would have, the record shareholder shall not have those rights or privileges.

(b) The procedure must specify:

(1) The types of intermediaries or nominees to which it applies;

(2) The rights or privileges that the corporation recognizes in a person with respect to whom a beneficial ownership certificate is filed;

(3) The manner in which the procedure is selected that must include that the beneficial ownership certificate be signed or assented to by or on behalf of the record shareholder and the person on whose behalf the shares are held;

(4) The information that must be provided when the procedure is selected;

(5) The period for which selection of the procedure is effective;

(6) Requirements for notice to the corporation with respect to the arrangement; and

(7) The form and contents of the beneficial ownership certificate.

(c) The procedure may specify any other aspects of the rights and duties created by the filing of a beneficial ownership certificate.

History.

I.C., § 30-29-723, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 55, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-723.

Official Comment

Traditionally, a corporation recognizes only the person in whose name shares are registered as the owner of the shares. It is a common practice for persons purchasing shares of a public company to hold them in "street name" through a broker-dealer or other financial institution. In addition, a securities depository system exists under which financial institutions deposit securities with the depository, whose nominee becomes the registered owner of the shares or the "record shareholder." Transfers between depository participants are accomplished by book entry of the depository. As a result, there may be several entities interposed between the corporation and the beneficial owner.

The purpose of section 7.23 [this section] is to facilitate direct communication between the corporation and the beneficial owner by authorizing the corporation to create a procedure for bypassing the depository and its intermediary participants or other intermediaries and nominees. The adoption of this procedure is discretionary with each corporation and affirmative action by the corporation's board of directors is necessary to accomplish it. The procedure is also discretionary with the ultimate beneficial owner, who must elect, and the intermediary or nominee who holds on behalf of the beneficial owner as record shareholder, who must assent to, the applicable procedure established by the corporation.

The signature or assent of the record shareholder and the person or persons on whose behalf the shares are held, as required by section 7.23(b)(3), can be provided on behalf of any such person by another person authorized to do so. In a typical situation where the record shareholder is Cede & Co., the nominee of Depository Trust Company, and the shares are ultimately beneficially owned by a shareholder who has an account with a broker-dealer that is a participant in the Depository Trust Company, a

beneficial ownership certificate could be signed by both the ultimate beneficial owner and the broker-dealer shown on the position list of Depository Trust Company, acting under authority granted to it by Cede & Co., as the record shareholder. The statute does not prescribe the notices that must be provided to the corporation, but provides that the procedure shall specify whatever notice provisions will be required. For example, the corporation may wish to include provisions for notice to it by the ultimate beneficial owner and the broker-dealer upon the sale or other disposition of the shares, which normally should be accompanied by notice to the corporation of termination or modification of the effect of the beneficial ownership certificate.

The corporation also may limit or qualify the procedure as it deems appropriate. For example, the corporation may:

• limit the procedure to certain classes of shareholders, such as depositories, broker-dealers and banks, and their nominees, or make the procedure available to all shareholders, and define requirements to be a beneficial owner eligible to use the procedure;

• permit a record shareholder and beneficial owner to adopt the procedure with respect to some but not all of the shares registered or held on behalf of the beneficial owner in the record shareholder's name (and in that case the record shareholder continues to be treated as the shareholder with respect to the balance);

• specify the purpose or purposes for which the beneficial ownership certificate is effective, *e.g.*, for giving notice of, and voting at, shareholders' meetings, for the distribution of proxy statements and annual reports, or for payment of cash dividends;

• specify the form of the beneficial ownership certificate, *e.g.*, a writing or an electronic record;

• specify the type of information that must be provided, *e.g.*, the name, address, and taxpayer identification number of the person for whose benefit a beneficial ownership certificate is filed, and the number of shares registered directly in the shareholder's name;

• establish deadlines for receipt of the beneficial ownership certificate in connection with the establishment of a record date by the corporation; or

- provide that a new beneficial ownership certificate is required in connection with each record date or that a beneficial ownership certificate as of a certain date may continue until changed by the certifying person or persons.

The validity of a procedure adopted under section 7.23 is to be determined by the terms of the section as in effect at the time the procedure is adopted.

The definition of "record shareholder" in section 1.40 [§ 30-29-140] includes beneficial owners to the extent they obtain the rights of record shareholders through the filing of a beneficial ownership certificate pursuant to the procedure authorized by section 7.23.

§ 30-29-724. Acceptance of votes and other instruments. — (a) If the name signed on a vote, ballot, consent, waiver, shareholder demand, or proxy appointment corresponds to the name of a shareholder, the corporation, if acting in good faith, is entitled to accept the vote, ballot, consent, waiver, shareholder demand, or proxy appointment and give it effect as the act of the shareholder.

(b) If the name signed on a vote, ballot, consent, waiver, shareholder demand, or proxy appointment does not correspond to the name of its shareholder, the corporation, if acting in good faith, is nevertheless entitled to accept the vote, ballot, consent, waiver, shareholder demand, or proxy appointment and give it effect as the act of the shareholder if:

(1) The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) The name signed purports to be that of an administrator, executor, guardian or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver, shareholder demand, or proxy appointment;

(3) The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver, shareholder demand, or proxy appointment;

(4) The name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, ballot, consent, waiver, shareholder demand, or proxy appointment; or

(5) Two (2) or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one (1) of the co-owners and the person signing appears to be acting on behalf of all the co-owners.

(c) The corporation is entitled to reject a vote, ballot, consent, waiver, shareholder demand, or proxy appointment if the person authorized to accept or reject such instrument, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder.

(d) Neither the corporation or any person authorized by it, nor an inspector of election appointed under section 30-29-729, Idaho Code, that accepts or rejects a vote, ballot, consent, waiver, shareholder demand, or proxy appointment in good faith and in accordance with the standards of this section or section 30-29-722(b), Idaho Code, is liable in damages to the shareholder for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, ballot, consent, waiver, shareholder demand, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise.

(f) If an inspector of election has been appointed under section 30-29-729, Idaho Code, the inspector of election also has the authority to request information and make determinations under subsections (a), (b), and (c) of this section. Any determination made by the inspector of election under those subsections is controlling.

History.

I.C., § 30-29-724, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 56, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-724.

Official Comment

Corporations are often asked to accept a written instrument as evidence of action by a shareholder. These instruments usually involve appointment forms for a proxy to vote the shares, but may also include ballots, waivers of notice, consents to action without a meeting, demands for a special meeting of shareholders, and other demands by shareholders. Usually the corporation or its officers will have no personal knowledge of the circumstances under which the instrument was executed and no way of verifying whether the signature on the instrument is in fact the signature of the shareholder. This problem is particularly acute in public corporations.

Section 7.24 [this section] establishes general rules permitting the corporation and any inspector of election appointed under section 7.29 [§ 30-29-729] to accept these instruments if they appear to be signed by the shareholder or by a person who has authority to sign the instrument for the shareholder and they are accompanied by whatever authenticating evidence is requested. Section 7.24 also establishes general rules for rejecting these instruments. The rules set forth in this section are not exclusive and may be supplemented by additional rules established by the corporation pursuant to section 2.06(b) [§ 30-29-206]. If an inspector of election has been appointed under section 7.29, the inspector has the authority under section 7.24, as well as the corporation. If there is a difference in a determination by the corporation and the inspector, the inspector's determination controls as against the corporation.

A purpose of section 7.24 is to protect the corporation and any inspector of election from liability for damages to the shareholder if action is taken in accordance with the section. Under section 7.24(d) there is no liability to the shareholder if the corporation or inspector of election, acting in good faith, accepts an instrument that meets the requirements of section 7.24(a) or (b) or accepts an electronic transmission authorized by section 7.22(b) [§ 30-29-722], even if it turns out that the signature or transmission was invalid or unauthorized. Similarly, no liability exists if an instrument is rejected in accordance with section 7.24(c) because the corporation or inspector of election, again acting in good faith, has a "reasonable basis for doubt," even though it turns out that the instrument was properly signed by the shareholder. This protection extends to officers and other persons who are authorized by the corporation to accept or reject an instrument identified in section 7.24. Section 7.24 does not, however, address the question

whether an action was properly taken or approved, and section 7.24(e) makes clear that the validity of corporate action is ultimately a matter for judicial resolution through review of the results of a vote in a suit to enjoin or compel corporate action. Section 7.49 [§ 30-29-749] provides a mechanism for seeking such judicial resolution. It is contemplated that any such proceeding will be brought promptly, typically before the corporate action is consummated or the corporation's position otherwise changes in reliance on the vote, and that any proceeding that is not brought promptly under the circumstances would normally be barred because of laches.

Similarly, section 7.24 does not address the liability of the proxy to the shareholder for exercising authority beyond that granted or for disobeying instructions. These matters are governed by the law of agency and not by section 7.24.

A corporation may wish to establish guidelines that it will follow in determining whether to accept a vote, ballot, consent, waiver, shareholder demand, or proxy appointment to provide consistency in the corporation's application of the general rules set forth in section 7.24.

§ 30-29-725. Quorum and voting requirements for voting groups. — (a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation provide otherwise, shares representing a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter. If the provisions of this chapter require a particular quorum for a specified action, the articles of incorporation may not provide for a lower quorum.

(b) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be fixed for that adjourned meeting.

(c) If a quorum exists, action on a matter, other than the election of directors, by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation require a greater number of affirmative votes.

(d) An amendment of the articles of incorporation adding, changing or deleting a quorum or voting requirement for a voting group greater than specified in subsection (a) or (c) of this section is governed by section 30-29-727, Idaho Code.

(e) The election of directors is governed by section 30-29-728, Idaho Code.

(f) If a provision of this chapter provides for voting of classes or series as separate voting groups, the rules provided in section 30-29-1004(c), Idaho Code, for amendments of the articles of incorporation shall apply to that provision.

History.

I.C., § 30-29-725, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 57, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), substituted "incorporation provide otherwise, shares representing" for "incorporation or this chapter provide otherwise" near the middle of the second sentence and added the last sentence; substituted "must be fixed" for "must be set" near the end of subsection (b); deleted "or this chapter" following "articles of incorporation" near the end of subsection (c); substituted "subsection (a) or (c) of this section" for "subsection (1) or (3) of this section" near the end of subsection (d); and added subsection (e).

Compiler's Notes.

This section is derived from former § 30-1-725.

Official Comment

Section 7.25 [this section] establishes general quorum and voting requirements for voting groups for purposes of the Act. As defined in section 1.40 [§ 30-29-140], a "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter (that is, all shares entitled to vote on the matter by the articles of incorporation or the Act that do not expressly have the right to be counted separately) are a single voting group. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 7.25. See section 7.26(a) [§ 30-29-726].

Section 7.25 covers quorum and voting requirements for all actions by the shareholders of a corporation with a single class of voting shares. It also covers quorum and voting requirements for a matter on which only a class or series of shares is entitled to vote under the articles of incorporation, for example, when a class with preferential rights may vote to elect directors because of a default in the payment of dividends (a vote which is often described as a "class vote"). Finally, section 7.25 also covers quorum and voting requirements for a matter on which both common and preferred shares or separate classes or series of common or preferred shares are

entitled to vote, either together as a single voting group under the articles of incorporation or separately as two or more voting groups under either the articles of incorporation or the Act. See section 7.26(b) [§ 30-29-726].

1. Determination of Voting Groups under the Act.

Under the Act, classes or series of shares are generally not entitled to vote separately by voting group except to the extent specifically authorized by the articles of incorporation. But sections 9.21, 9.32, 10.04, and 11.04 [§ 30-29-921, 30-29-932, 30-29-1004, and 30-29-1104] of the Act grant classes or series of shares the right to vote separately when fundamental changes are proposed that may adversely affect that class or series. Section 10.04(c) further provides that when two or more classes or series are affected by an amendment covered by section 10.04 in essentially the same way, the classes or series are grouped together and must vote as a single voting group rather than as multiple voting groups on the matter, unless otherwise provided in the articles of incorporation or required by the board of directors. Section 7.25(f) provides that the group voting rule of section 10.04(c), including the ability to vary that rule in the articles of incorporation or by action of the board of directors, also applies to the group voting provisions in sections 9.21, 9.32, and 11.04. Under the Act even a class or series of shares that is expressly described as nonvoting under the articles of incorporation may be entitled to vote separately on an amendment to the articles of incorporation that affects the class or series in a designated way. See section 10.04(d).

In addition to the provisions of the Act, separate voting by voting group may be authorized by the articles of incorporation (except that the statutory privilege of voting by separate voting groups cannot be diluted or reduced). On some matters, the board of directors may condition its submission of matters to shareholders on their approval by specific voting groups designated by the board of directors. Sections 7.25 and 7.26 establish the mechanics by which all voting by single or multiple voting groups is carried out.

In some situations, shares of a single class or series may be entitled to vote in two different voting groups. See the Official Comment to section 7.26.

2. Quorum and Voting Requirements in General.

A corporation's determination of the voting groups entitled to vote, and the quorum and voting requirements applicable to that determination, should be determined separately for each matter coming before a meeting. As a result, different quorum and voting requirements may be applicable to different portions of a meeting, depending on the matter being considered. In the normal case where only a single voting group is entitled to vote on all matters coming before a meeting of shareholders, a single quorum and voting requirement will usually be applicable to the entire meeting. To reflect the possibility that shares may have multiple or fractional votes per share, the provisions relating to quorums are phrased in terms of votes represented by shares.

3. Quorum Requirements for Action by Voting Group.

Under Section 7.25(b), once a share is present at a meeting, it is deemed present for quorum purposes throughout the meeting. Thus, a voting group may continue to act despite the withdrawal of persons having the power to vote one or more shares.

The shares owned by a shareholder who comes to the meeting to object on grounds of lack of notice are considered present for purposes of determining the presence of a quorum. Similarly, shares owned by a shareholder who attends a meeting solely for purposes of raising the objection that a quorum is not present are considered present for purposes of determining the presence of a quorum. Attendance at a meeting, however, does not constitute a waiver of other objections to the meeting such as the lack of notice. Such waivers are governed by section 7.06(b) [§ 30-29-706].

If a new record date is set, new notice must be given to holders of shares of a voting group and a quorum must be established from within the holders of shares of that voting group as of the new record date.

4. Voting Requirements for Approval by Voting Group.

Section 7.25(c) provides that an action (other than the election of directors, which is governed by section 7.28 [§ 30-29-728]) is approved by a voting group at a meeting at which a quorum is present if the votes cast in favor of the action exceed the votes cast opposing the action, unless the articles of incorporation require a greater number of votes. This default rule

differs from a formulation appearing in some state statutes that an action is approved at a meeting at which a quorum is present if it receives the affirmative vote of a majority of the shares represented at that meeting. That formulation in effect treats abstentions as negative votes; the Act treats them truly as abstentions. For example, if a corporation (that has not, through the articles of incorporation, modified quorum and voting requirements) has 1,000 shares of a single class outstanding, each share entitled to cast one vote, a quorum consists of 501 shares; if 600 shares are represented at the meeting and the vote on a proposed action is 280 in favor, 225 opposed, and 95 abstaining, the action would not be approved in a state following the formulation that treats abstentions as negative votes because fewer than a majority of the 600 shares attending voted in favor of the action. Under section 7.25(c) the action would be approved and not be defeated by the 95 abstaining votes.

5. Modification of Standard Requirements.

The articles of incorporation may modify the quorum and voting requirements of section 7.25 for a single voting group or for all voting groups entitled to vote on any matter. The articles of incorporation may increase the quorum and voting requirements to any extent desired up to and including unanimity, subject to section 7.27 [§ 30-29-727]. They may also require that shares of different classes or series are entitled to vote separately or together on specific issues or provide that actions are approved only if they receive the favorable vote of a majority of the shares of a voting group present at a meeting at which a quorum is present. The articles may also decrease the quorum requirement as desired, subject to section 7.25(a) and section 7.27.

§ 30-29-726. Action by single and multiple voting groups. — (a) If the articles of incorporation or this chapter provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in section 30-29-725, Idaho Code.

(b) If the articles of incorporation or this chapter provide for voting by two (2) or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in section 30-29-725, Idaho Code. Action may be taken by different voting groups on a matter at different times.

History.

I.C., § 30-29-726, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 58, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1) and (2) as subsections (a) and (b) and rewrote the last sentence in subsection (b), which formerly read: "Action may be taken by one (1) voting group on a matter even though no action is taken by another voting group entitled to vote on the matter."

Compiler's Notes.

This section is derived from former § 30-1-726.

Official Comment

Section 7.26(a) [this section] provides that when a matter is to be voted upon by a single voting group, action is taken when the voting group votes upon the action as provided in section 7.25 [§ 30-29-725]. In most instances, a single voting group will consist of all the shares of the class or classes or series entitled to vote by the articles of incorporation. Voting by two or more voting groups as contemplated by section 7.26(b) is the exceptional case.

Implicit in section 7.26(b) are the concepts that (i) different quorum and voting requirements may be applicable to different matters considered at a single meeting and (ii) different quorum and voting requirements may be applicable to different voting groups voting on the same matter. See the Official Comment to section 7.25. Each group entitled to vote must independently meet the quorum and voting requirements established by section 7.25. If a quorum is present for one or more voting groups but not for all voting groups, section 7.26(b) provides that the voting groups for which a quorum is present may vote upon the matter, even though their vote alone will not be sufficient for the matter to be approved.

A single meeting, furthermore, may consider matters on which action by several voting groups is required and also matters on which only a single voting group may act. Action may be taken on the matters on which the single voting group may act even though no quorum is present to take action on other matters. For example, in a corporation with one class of nonvoting shares with preferential rights ("preferred shares") and one class of general voting shares without preferential rights ("common shares"), a matter to be considered at the annual meeting might be a proposed amendment to the articles of incorporation that reduces the cumulative dividend right of the preferred shares (a matter on which the preferred shares have a statutory right to vote as a separate voting group). Other matters to be considered might include the election of directors and the ratification of the appointment of an auditor, both matters on which the preferred shares may have no vote. If a quorum of the voting group consisting of the common shares but no quorum of the voting group consisting of the preferred shares is present, the common shares may proceed to elect directors and ratify the appointment of the auditor. The common shares voting group may also vote to approve the proposed amendment to the articles of incorporation, but that amendment will not be approved until the preferred shares voting group also votes to approve the amendment, which could occur at a different time.

Normally, each class or series of shares will participate in only a single voting group. But because holders of shares entitled by the articles of incorporation to vote generally on a matter are always entitled to vote in the voting group consisting of the general voting shares, in some instances classes or series of shares may be entitled to be counted in two voting

groups. This will occur whenever a class or series of shares entitled to vote generally on a matter under the articles of incorporation is affected by the matter in a way that gives rise to the right to have its vote counted separately as an independent voting group under the Act. For example, assume that corporation Y has outstanding one class of common shares, 500 shares issued and outstanding, and one class of preferred shares, 100 shares issued and outstanding, that also have full voting rights under the articles of incorporation, *i.e.*, the preferred may vote for election of directors and on all other matters on which common may vote. The preferred and the common therefore are part of the general voting group. The directors propose to amend the articles of incorporation to change the preferential dividend rights of the preferred from cumulative to noncumulative. All shares are present at the meeting and they divide as follows on the proposal to adopt the amendment.

Yes Common 230

Preferred 80

No Common 270

Preferred 20

Both the preferred and the common are entitled to vote on the amendment to the articles of incorporation because they are part of a general voting group pursuant to the articles. But the vote of the preferred is also entitled to be counted separately on the proposal by section 10.04(a)(3) [§ 30-29-1004]. The result is that the proposal passes by a vote of 310 to 290 in the voting group consisting of the shares entitled to vote generally and 80 to 20 in the voting group consisting solely of the preferred shares.

In this situation, in the absence of a special quorum requirement, a meeting could approve the proposal to amend the articles of incorporation if — and only if — a quorum of each voting group is present, *i.e.*, at least 51 shares of preferred and 301 shares of common and preferred were represented at the meeting.

§ 30-29-727. Modifying quorum or voting requirements. — An amendment to the articles of incorporation that adds, changes, or deletes a quorum or voting requirement shall meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

History.

I.C., § 30-29-727, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 59, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, substituted "Modifying" for "Greater" at the beginning of the section heading; deleted former subsection (1), which read: "The articles of incorporation may provide for a greater quorum or voting requirement for shareholders, or voting groups of shareholders, than is provided for by this chapter"; and in former subsection (2), deleted the paragraph designator and substituted "adds, changes, or deletes a quorum or voting requirement shall meet" for "adds, changes or deletes a greater quorum or voting requirement must meet" near the beginning.

Compiler's Notes.

This section is derived from former § 30-1-727.

Official Comment Section 7.27 [this section] permits the articles of incorporation to change the quorum or voting requirements for approval of an action by shareholders up to any desired amount so long as the change is adopted in accordance with the requirements of section 7.27. For example, a supermajority provision that requires an 80% affirmative vote of all eligible votes of a voting group present at the meeting may not be removed from the articles of incorporation or reduced in any way except by an 80% affirmative vote. If the 80%

requirement is coupled with a quorum requirement for a voting group that shares representing two-thirds of the total votes must be present in person or by proxy, both the 80% voting requirement and the two-thirds quorum requirement are immune from reduction except at a meeting of the voting group at which the two-thirds quorum requirement is met and the reduction is approved by an 80% affirmative vote. If the proposal is to increase the 80% voting requirement to 90%, that proposal must be approved by a 90% affirmative vote at a meeting of the voting group at which the two-thirds quorum requirement is met; if the proposal is to increase the two-thirds quorum requirement to three-quarters without changing the 80% voting requirement, that proposal must be approved by an 80% affirmative vote at a meeting of the voting group at which a three-quarters quorum requirement is met.

§ 30-29-728. Voting for directors — Cumulative voting. — (a) Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(c) A statement included in the articles of incorporation that "[all] [a designated voting group of] shareholders are entitled to cumulate their votes for directors," or words of similar import, means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two (2) or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) The meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(2) A shareholder who has the right to cumulate the shareholder's votes gives notice to the corporation not less than forty-eight (48) hours before the time set for the meeting of the shareholder's intent to cumulate votes during the meeting, and if one (1) shareholder gives this notice, all other shareholders in the same voting group participating in the election are entitled to cumulate their votes without giving further notice.

History.

I.C., § 30-29-728, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 60, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs and added subsection (d).

Compiler's Notes.

This section is derived from former § 30-1-728.

The words enclosed in brackets so appeared in the law as enacted.

Official Comment

As used in section 7.28(a) [this section], election by a "plurality" means that the individuals with the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the election. In elections in which several factions are competing within a voting group, an individual may be elected with votes of fewer than a majority of the votes cast. The articles of incorporation of the corporation may, however, provide a different vote requirement for the election of directors and the bylaws may also do so to the extent provided in section 10.22 [§ 30-29-1022].

The entire board of directors may be elected by a single voting group or the articles of incorporation may provide that different voting groups are entitled to elect a designated number or fraction of the board of directors. See section 8.04 [§ 30-29-804]. Elections are contested only within specific voting groups.

Under section 7.28(b), each corporation may determine whether to elect its directors by cumulative voting. If directors are elected by different voting groups, the articles of incorporation may provide that specified voting groups are entitled to vote cumulatively while others are not. Cumulative voting affects the manner in which votes may be cast by shares participating in the election but does not affect the plurality principle set forth in section 7.28(a).

If a corporation has determined to elect directors by cumulative voting, such directors may not be elected by written consent unless that consent is unanimous. See section 7.04(b) [§ 30-29-704].

Section 7.28(c) describes the mechanics of cumulative voting. By casting all of the shareholder's votes for a single candidate or a limited number of candidates, a minority shareholder's voting power with respect to a given

candidate can be increased, and such shareholder may be able to elect one or more directors.

Section 7.28(d), which applies only if cumulative voting is potentially available under section 7.28(b), covers a notice designed to ensure that all shareholders participating in the election understand the rules and to avoid the distortions that may be created when some shareholders vote cumulatively while others do not. Cumulative voting will be employed if the notice of meeting or accompanying proxy statement conspicuously announces that a shareholder is entitled to cumulate votes or a shareholder who is entitled to vote gives notice to the corporation of such shareholder's intent to do so at least 48 hours before the meeting. If this notice is given by any shareholder, all other shareholders who are part of the same voting group are entitled to vote cumulatively without giving further notice.

§ 30-29-729. Inspectors of election. — (a) A corporation that has a class of equity securities registered pursuant to section 12 of the securities exchange act of 1934 shall, and any other corporation may, appoint one (1) or more inspectors to act at a meeting of shareholders in connection with determining voting results. Each inspector shall verify in writing that the inspector will faithfully execute the duties of inspector with strict impartiality and according to the best of the inspector's ability. An inspector may be an officer or employee of the corporation. The inspectors may appoint or retain other persons to assist the inspectors in the performance of the duties of inspector under subsection (b) of this section, and may rely on information provided by such persons and other persons, including those appointed to tabulate votes, unless the inspectors believe reliance is unwarranted.

(b) The inspectors shall:

(1) Ascertain the number of shares outstanding and the voting power of each; (2) Determine the shares represented at a meeting; (3) Determine the validity of proxy appointments and ballots; (4) Count the votes; and

(5) Make a written report of the results.

(c) In performing their duties, the inspectors may examine: (1) The proxy appointment forms and any other information provided in accordance with section 30-29-722(b), Idaho Code; (2) Any envelope or related writing submitted with those appointment forms; (3) Any ballots;

(4) Any evidence or other information specified in section 30-29-724, Idaho Code; and (5) The relevant books and records of the corporation relating to its shareholders and their entitlement to vote, including any securities position list provided by a depository clearing agency.

(d) The inspectors may also consider other information that they believe is relevant and reliable for the purpose of performing any of the duties assigned to them pursuant to subsection (b) of this section including for the purpose of evaluating inconsistent, incomplete, or erroneous information and reconciling information submitted on behalf of banks, brokers, their nominees, or similar persons that indicates more votes being cast than a

proxy authorized by the record shareholder is entitled to cast. If the inspectors consider other information allowed by this subsection, they shall in their report under subsection (b)of this section specify the information considered by them, including the purpose or purposes for which the information was considered, the person or persons from whom they obtained the information, when the information was obtained, the means by which the information was obtained, and the basis for the inspectors' belief that such information is relevant and reliable.

(e) Determinations of law by the inspectors of election are subject to de novo review by a court in a proceeding under section 30-29-749, Idaho Code, or other judicial proceeding.

History.

I.C., § 30-29-729, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 61, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-729.

Official Comment

"Street name" holdings, the use of a securities depository system and the involvement of intermediaries complicate the vote counting process. See Official Comment to section 7.23 [§ 30-29-723]. This complexity limits the role of inspectors of election in the case of corporations subject to the federal proxy rules. Such inspectors have a limited role because federal law requires multiple steps to be taken by various parties before shares are voted. The inspectors may not have access to information pertaining to each of those steps or from each of the parties involved in the process, such as the voting instruction forms given by beneficial shareholders that lead to voting by the record shareholders. For these reasons, section 7.29 [this

section] generally permits inspectors to rely on information provided by others.

The selection of inspectors of election should usually be made by responsible officers or by the directors, as authorized either generally or specifically in the corporation's bylaws. Alternate inspectors could also be designated to replace any inspector who is unable or fails to act. The requirement of a written report is to facilitate judicial review of determinations made by inspectors. The ability of inspectors to retain other persons to assist them does not limit the ability of the corporation also to appoint others, such as a vote tabulator to assist in the vote counting process.

In the case of corporations subject to the federal proxy rules, inspectors should generally be independent persons who are neither employees nor officers if there is a contested matter to be considered. The use of independent inspectors in these circumstances enhances shareholder perception of the fairness of the voting process, and the report of independent inspectors can be expected to be given greater evidentiary weight by any court reviewing a contested vote.

To determine the validity of proxy appointments and ballots, depending on the issues presented, the inspectors of election may be required to determine whether appointment forms have been validly executed by the record shareholder, to identify the latest executed appointment form and to determine whether the proxy cast more votes than the record shareholder was entitled to cast. The inspectors are expected to apply the provisions of chapter [part] 7 regarding acceptance of proxy appointments and voting, including those in sections 7.08(d), 7.22(h), and 7.24 [§§ 30-29-708, 30-29-722, and 30-29-724]. In the event of a challenge of any determination by the inspectors in a court of competent jurisdiction, including in a proceeding under section 7.49 [§ 30-29-749], the court should give such weight to determinations of fact by the inspectors as it deems appropriate, taking into account the relationship of the inspectors, if any, to the management of the company and other persons interested in the outcome of the vote, the evidence available to inspectors, whether their determinations appear to be consistent and reasonable, and such other circumstances as the court regards as relevant. As provided in section 7.29(e), the court may review de novo all determinations of law made by the inspectors.

Section 7.29(d) gives the inspectors broad discretion with respect to the information they may consider but does not require that they take any specific action with respect to such information other than to specify in their report the information they considered and the other details listed in section 7.29(d).

§ 30-29-730. Voting trusts. — (a) One (1) or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust, which may include anything consistent with its purpose, and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all voting trust beneficial owners, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation at its principal office.

(b) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name.

(c) Limits, if any, on the duration of a voting trust shall be as set forth in the voting trust. A voting trust that became effective when this chapter provided a ten (10) year limit on its duration remains governed by the provisions of this section concerning duration then in effect, unless the voting trust is amended to provide otherwise by unanimous agreement of the parties to the voting trust.

History.

I.C., § 30-29-730, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 62, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-730.

Official Comment A voting trust is a device by which one or more shareholders divorce the voting rights of their shares from the ownership, retaining the latter but transferring the former to one or

more trustees in whom the voting rights of all the shareholders who are parties to the trust are pooled. Section 7.30(a) [this section] provides a straightforward procedure for the creation of an enforceable voting trust and does not impose narrow or technical requirements. Typically, the voting trust provides that all attributes of beneficial ownership other than the power to vote are retained by the voting trust beneficial owners. In addition, the voting trustees may issue to the voting trust beneficial owners voting trust certificates which may be transferable in the same way as shares. Section 7.30 does not limit the duration of a voting trust, consistent with section 7.32 [§ 30-29-732] governing shareholder agreements generally. Section 7.30 permits participants to specify limits but does not establish an automatic sunset provision as a matter of law. Section 7.30(c) addresses voting trusts entered into when the Act limited their duration to 10 years.

§ 30-29-731. Voting agreements. — (a) Two (2) or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of section 30-29-730, Idaho Code.

(b) A voting agreement created under this section is specifically enforceable.

History.

I.C., § 30-29-731, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 63, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1) and (2) as subsections (a) and (b).

Compiler's Notes.

This section is derived from former § 30-1-731.

Official Comment Section 7.31(a) [this section] explicitly recognizes agreements among two or more shareholders as to the voting of shares and makes clear that these agreements are not subject to the rules relating to a voting trust. The only formal requirements are that they be in writing and signed by all the participating shareholders. In other respects their validity is to be judged like any other contract.

A voting agreement may provide its own enforcement mechanism, as by the appointment of a proxy to vote all shares subject to the agreement; the appointment may be made irrevocable under section 7.22 [§ 30-29-722]. If no enforcement mechanism is provided, a court may order specific enforcement of the agreement and order the votes cast as the agreement contemplates. Section 7.31(b) recognizes that damages are not likely to be an appropriate remedy for breach of a voting agreement.

§ 30-29-732. Shareholder agreements. — (a) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one (1) or more other provisions of this chapter in that it:

(1) Eliminates the board of directors or restricts the discretion or powers of the board of directors;

(2) Governs the authorization or making of distributions, regardless of whether they are in proportion to ownership of shares, subject to the limitations in section 30-29-640, Idaho Code;

(3) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(4) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(5) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(6) Transfers to one (1) or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) Requires dissolution of the corporation at the request of one (1) or more of the shareholders or upon the occurrence of a specified event or contingency; or

(8) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

(b) An agreement authorized by this section shall be:

(1) As set forth:

(i) In the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or

(ii) In a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation; and

(2) Subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise.

(c) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by section 30-29-626(b), Idaho Code. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase.

A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or before the time of purchase of the shares. An action to enforce the right of rescission authorized by this subsection shall be commenced within the earlier of ninety (90) days after discovery of the existence of the agreement or two (2) years after the time of purchase of the shares.

(d) If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

(e) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(f) The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(g) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

(h) Limits, if any, on the duration of an agreement authorized by this section must be set forth in the agreement. An agreement that became effective when this chapter provided for a limit of ten (10) years on duration of shareholder agreements, unless the agreement provided otherwise, remains governed by the provisions of this section concerning duration then in effect.

History.

I.C., § 30-29-732, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 64, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "distributions, regardless of whether they are" for "distributions whether or not" near the beginning of paragraph (a)(2); added "As" at the beginning of paragraph (b)(1); deleted former subsection (c), which read: "Valid for ten (10) years, unless the agreement provides otherwise"; substituted "section 30-29-626(b), Idaho Code" for "section 30-29-626(2), Idaho Code" near the end of the first sentence in present subsection (c); deleted the first former sentence in subsection (d), which read: "An

agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one (1) or more members of a national or affiliated securities association"; and added subsection (h).

Compiler's Notes.

This section is derived from former § 30-1-732.

Official Comment

Shareholders of some corporations, especially those that are closely held, frequently enter into agreements that govern the operation of the enterprise.

Section 7.32 [this section] provides, within the context of the traditional corporate structure, legal certainty to such agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs. The subject matter of these arrangements includes governance of the entity, allocation of the economic return from the business, and other aspects of the relationships among shareholders, directors, and the corporation which are part of the business arrangement. Section 7.32 also recognizes that many of the corporate norms contained in the Act were designed with an eye towards corporations whose management and share ownership are distinct. These functions are often conjoined in some corporations, such as the close corporation. Thus, section 7.32 validates agreements among shareholders even when the agreements are inconsistent with the statutory norms contained in the Act.

Importantly, section 7.32 only addresses the parties to the shareholder agreement, their transferees, and the corporation, and does not have any binding legal effect on the state, creditors, or other third persons.

Section 7.32 supplements the other provisions of the Act. If an agreement is not in conflict with another section of the Act, no resort need be made to section 7.32 with its requirement of unanimity. For example, special provisions may be included in the articles of incorporation or bylaws with less than unanimous shareholder agreement so long as such provisions are not in conflict with other provisions of the Act. Similarly, section 7.32 would not have to be relied upon to validate typical buy-sell agreements among two or more shareholders or the covenants and other terms of a

stock purchase agreement entered into in connection with the issuance of shares by a corporation.

1. Section 7.32(a).

An agreement authorized by section 7.32 is "not inconsistent with law" within the meaning of sections 2.02(b)(2) and 2.06(b) [§§ 30-29-202 and 30-29-206] of the Act.

The range of agreements validated by section 7.32(a) is expansive though not unlimited. Section 7.32 defines the types of agreements that can be validated largely by illustration. The seven specific categories that are listed are designed to cover some of the most frequently used arrangements. There are numerous other arrangements that may be made, and section 7.32(a)(8) provides an additional category for any provisions that, in a manner inconsistent with any other provision of the Act, otherwise govern the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship between and among the shareholders, the directors, and the corporation or any of them, and are not contrary to public policy.

Section 7.32(a) validates virtually all types of shareholder agreements that, in practice, normally concern shareholders and their advisors. Given that breadth, any provision that may be contained in the articles of incorporation with a majority vote under sections 2.02(b)(2)(ii) and (iii), as well as under section 2.02(b)(4), may also be effective if contained in a shareholder agreement that complies with section 7.32.

The provisions of a shareholder agreement authorized by section 7.32(a) will often, in operation, conflict with the language of more than one section of the Act, and courts should in such cases construe all related sections of the Act flexibly and in a manner consistent with the underlying intent of the shareholder agreement. Thus, for example, in the case of an agreement that provides for weighted voting by directors, every reference in the Act to a majority or other proportion of directors should be construed to refer to a majority or other proportion of the votes of the directors.

Although the limits of section 7.32(a)(8) are left uncertain, there are provisions of the Act that may not be overridden if they reflect core principles of public policy with respect to corporate affairs. For example, a

provision of a shareholder agreement that purports to eliminate all of the standards of conduct established under section 8.30 [§ 30-29-830] might be viewed as contrary to public policy and thus not validated under section 7.32(a)(8). Similarly, a provision that exculpates directors from liability more broadly than permitted by section 2.02(b)(4), or indemnifies them more broadly than permitted by section 2.02(b)(5), might not be validated under section 7.32 because of strong public policy reasons for the statutory limitations on the right to exculpate directors from liability and to indemnify them. The validity of some provisions may depend upon the circumstances. For example, a provision of a shareholder agreement that limited inspection rights under section 16.02 [§ 30-29-1602] or the right to financial statements under section 16.20 [§ 30-29-1620] might, as a general matter, be valid, but that provision might not be given effect if it prevented shareholders from obtaining information necessary to determine whether directors of the corporation have satisfied the standards of conduct under section 8.30. The foregoing are examples and are not intended to be exclusive.

As noted above, shareholder agreements otherwise validated by section 7.32 are not legally binding on the state, on creditors, or on other third parties. For example, an agreement that dispenses with the need to make corporate filings required by the Act would be ineffective. Similarly, an agreement among shareholders that provides that only the president has authority to enter into contracts for the corporation would not, without more, be binding against third parties, and ordinary principles of agency, including the concept of apparent authority, would continue to apply.

2. Section 7.32(b).

Section 7.32 minimizes the formal requirements for a shareholder agreement so as not to restrict unduly the shareholders' ability to take advantage of the flexibility the section provides. Thus, it is not necessary to "opt in" to a special class of close corporations to obtain the benefits of section 7.32. An agreement can be validated under section 7.32 whether it is set forth in the articles of incorporation, the bylaws or in a separate agreement, and regardless of whether section 7.32 is specifically referenced in the agreement. Where the corporation has a single shareholder, the requirement of an "agreement among the shareholders" is satisfied by the unilateral action of the shareholder in establishing the terms of the

agreement, evidenced by provisions in the articles of incorporation or bylaws, or in a writing signed by the sole shareholder. Although a writing signed by all the shareholders is not required where the agreement is contained in articles of incorporation or bylaws unanimously approved, it may be desirable to have all the shareholders actually sign the instrument to establish unequivocally their agreement. Similarly, although transferees are bound by a valid shareholder agreement, subject to section 7.32(c), it may be desirable to obtain the affirmative written assent of the transferee at the time of the transfer. Section 7.32(b) also establishes and permits amendments by less than unanimous agreement if the shareholder agreement so provides.

Section 7.32(b) requires unanimous shareholder approval of the shareholder agreement regardless of entitlement to vote. Unanimity is required because an agreement authorized by section 7.32 can effect material organic changes in the corporation's operation and structure, and in the rights and obligations of shareholders.

The requirement that the shareholder agreement be made known to the corporation is the predicate for the requirement in section 7.32(c) that share certificates or information statements be legended to note the existence of the agreement. No specific form of notification is required and the agreement need not be filed with the corporation. In the case of shareholder agreements in the articles of incorporation or bylaws, the corporation will necessarily have notice. In the case of a shareholder agreement outside the articles of incorporation or bylaws, the requirement of signatures by all of the shareholders should in virtually all cases be sufficient to make the corporation aware of the agreement, as one or more signatories will normally also be a director or an officer.

3. Section 7.32(c).

Section 7.32(c) addresses the effect of a shareholder agreement on subsequent purchasers or transferees of shares. Typically, corporations with shareholder agreements also have restrictions on the transferability of the shares as authorized by section 6.27 [§ 30-29-27], thus lessening the practical effects of the problem in the context of voluntary transferees. Transferees of shares without knowledge of the agreement or those acquiring shares upon the death of an original participant in a close

corporation may, however, be heavily affected. Weighing the burdens on transferees against the burdens on the remaining shareholders in the enterprise, section 7.32(c) affirms the continued validity of the shareholder agreement on all transferees, whether by purchase, gift, operation of law, or otherwise. Unlike restrictions on transfer, it may be impossible to enforce a shareholder agreement against less than all of the shareholders. Thus, under section 7.32, one who inherits shares subject to a shareholder agreement must continue to abide by the agreement. If that is not the desired result, care must be exercised at the initiation of the shareholder agreement to ensure a different outcome, such as providing for a buy-back upon death.

Where shares are transferred to a purchaser without knowledge of a shareholder agreement, the validity of the agreement is similarly unaffected, but the purchaser is afforded a rescission remedy against the seller. Under section 7.32(c), the time at which notice to a purchaser is relevant for purposes of determining entitlement to rescission is the time when a purchaser acquires the shares rather than when a commitment is made to acquire the shares. If the purchaser learns of the agreement after committing to purchase but before acquiring the shares, the purchaser may not proceed with the purchase and still obtain the benefit of the remedies in section 7.32(c). Under contract principles and the securities laws, a failure to disclose the existence of a shareholder agreement may constitute the omission of a material fact and may excuse performance of the commitment to purchase. The term "purchaser" includes a person acquiring shares upon initial issue or by transfer, and also includes a pledgee, for whom the time of purchase is the time the shares are pledged.

Section 7.32 addresses the underlying rights of shares and shareholders and the validity of shareholder action which redefines those rights, as contrasted with questions regarding entitlement to ownership of the security, competing ownership claims, and disclosure issues. Consistent with this dichotomy, the rights and remedies available to purchasers under section 7.32(c) are independent of those provided by contract law, Article 8 of the Uniform Commercial Code, the securities laws, and other laws outside the Act.

With respect to the related subject of restrictions on transferability of shares, note that section 7.32 does not directly address or validate such restrictions, which are governed instead by section 6.27 of the Act.

However, if such restrictions are adopted as a part of a shareholder agreement that complies with the requirements of section 7.32, a court should apply the concept of reasonableness under section 6.27 in determining the validity of such restrictions.

Section 7.32(c) contains an affirmative requirement that the share certificate or information statement for the shares be legended to note the existence of a shareholder agreement. No specified form of legend is required, and a simple statement that "[t]he shares represented by this certificate are subject to a shareholder agreement" is sufficient. At that point, a purchaser must obtain a copy of the shareholder agreement from the transferor or proceed at the purchaser's peril. In the event a corporation fails to legend share certificates or information statements, a court may, in an appropriate case, imply a cause of action against the corporation in favor of an injured purchaser without knowledge of a shareholder agreement. The circumstances under which such a remedy would be implied, the proper measure of damages, and other attributes of and limitations on such an implied remedy are left to development in the courts.

A purchaser who has no actual knowledge of a shareholder agreement and is not charged with knowledge by virtue of a legend on the certificate or information statement has a rescission remedy against the transferor (which would be the corporation in the case of a new issue of shares).

If the shares are certificated and duly legended, a purchaser is charged with notice of the shareholder agreement even if the purchaser never saw the certificate. In the case of uncertificated shares, however, the purchaser is not charged with notice of the shareholder agreement unless a duly-legended information statement is delivered to the purchaser at or before the time of purchase. This different rule for uncertificated shares is intended to provide an additional safeguard to protect innocent purchasers, and is necessary because section 6.26(b) [§§ 30-29-626] of the Act and Article 8 of the Uniform Commercial Code permit delivery of statements after a transfer of shares.

4. Section 7.32(d).

Section 7.32(d) recognizes that the terms of a shareholder agreement may provide for its termination upon the happening of a specified event or condition. An example may be when the corporation undergoes an initial

public offering. This approach is consistent with the broad freedom of contract provided to participants in such enterprises.

5. Sections 7.32(e) through (g).

Section 7.32(e) provides a shift of liability from the directors to any person or persons in whom the discretion or powers otherwise exercised by the board of directors are vested under the shareholder agreement. A shareholder agreement which provides for such a shift of responsibility, with the concomitant shift of liability provided by subsection (e), could also provide for exculpation from that liability to the extent otherwise authorized by the Act. The transfer of liability provided by subsection (e) covers liabilities imposed on directors "by law," which is intended to include liabilities arising under the Act, the common law, and statutory law outside the Act.

Section 7.32(f) provides that shareholders shall not have personal liability for the debts of a corporation arising out of acts or omissions taken pursuant to a shareholder agreement validated by section 7.32. Section 7.32(g) authorizes shareholder agreements for corporations that are in the process of being organized and do not yet have shareholders.

6. Section 7.32(h).

Section 7.32 does not limit the duration of a shareholder agreement. This approach is consistent with the wide freedom of contract provided to participants in such enterprises. For agreements entered into during a time that section 7.32 provided for a 10-year term if no other time limit was specified, section 7.32(h) provides that its duration will be governed by the provisions of section 7.32 concerning duration in force at the time the agreement became effective. This would include, for example, both the default termination rule and the authority under former section 7.32(b)(2) that such an agreement's automatic 10-year term could be amended by all shareholders (unless the agreement had prohibited such amendment).

§ 30-29-733 through 30-29-739. Reserved.

History.

I.C., § 30-29-733, as added by 2015, ch. 243, § 62, p. 758.

§ 30-29-740. Part definitions. — As used in sections 30-29-741 through 30-29-747, Idaho Code:

(1) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in section 30-29-747, Idaho Code, in the right of a foreign corporation.

(2) "Shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

History.

I.C., § 30-29-740, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 65, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, added "Part" at the beginning of the section heading; added the subsection (1) designator to the existing paragraph, and added subsection (2).

Compiler's Notes.

This section is derived from former § 30-1-740.

Official Comment The definition of "shareholder," for purposes of chapter 7D [§§ 30-29-740 to 30-29-747], extends the right to bring a derivative proceeding to a beneficial shareholder and an unrestricted voting trust beneficial owner. The inclusion of beneficial shareholder and unrestricted voting trust beneficial owner recognizes that these persons have or hold on behalf of others an economic interest in the shares.

§ 30-29-741. Standing. — A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(a) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one (1) who was a shareholder at that time; and (b) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

History.

I.C., § 30-29-741, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 66, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1) and (2) as subsections (a) and (b).

Compiler's Notes.

This section is derived from former § 30-1-741.

CASE NOTES

Lack of Standing.

Creditor, who sued his debtors' attorneys, could not amend pursuant to Idaho R. Civ. P. 15(a) to assert derivative claims because he was not a shareholder of the debtor entities and, thus, lacked standing. Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642 (2010).

Official Comment Section 7.41 [this section] requires (i) the plaintiff to be a shareholder and therefore does not permit, for example, creditors or holders of options, warrants, or conversion rights to commence a derivative proceeding, and (ii) that the plaintiff fairly and adequately represent the interests of *the corporation*, rather than *shareholders*

***similarly situated* as provided in some rules of procedure, because the reference to the corporation more clearly reflects the nature of the derivative suit.**

The introductory language of section 7.41 refers both to the commencement and maintenance of the proceeding to make it clear that the proceeding should be dismissed if, after commencement, the plaintiff ceases to be a shareholder or a fair and adequate representative. The latter would occur, for example, if the plaintiff were using the proceeding for personal advantage. If a plaintiff no longer has standing, courts have in a number of instances provided an opportunity for one or more other shareholders to intervene.

§ 30-29-742. Demand. — No shareholder may commence a derivative proceeding until:

(a) A written demand has been made upon the corporation to take suitable action; and (b) Ninety (90) days have expired from the date delivery of the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety (90) day period.

History.

I.C., § 30-29-742, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 67, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated subsections (1) and (2) as subsections (a) and (b) and inserted "delivery of" near the beginning of subsection (b).

Compiler's Notes.

This section is derived from former § 30-1-742.

CASE NOTES

Applicability.

Where the actions of a corporation and its directors have an effect on an individual shareholder above and beyond the effect of every other shareholder and there is evidence that that shareholder may have been the target of a squeeze-out, an action by that shareholder may be an individual,

not derivative, proceeding and not be governed by the notice requirement of this section. McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012).

Demand Requirement.

A shareholder's claims that stock was improperly redeemed, that the redeeming shareholder breached the duty of good faith and committed fraud, and that improprieties existed in the sale of vehicles and inventory were properly characterized as derivative, and the shareholder must make a written demand on the corporation before bringing suit. Kugler v. Nelson, 160 Idaho 408, 374 P.3d 571 (2016).

Form of Demand.

Merely sending of a letter to the president of the corporation or the service upon the corporation's attorney of a demand that the corporation take legal action in connection with a transaction complained of did not meet the demand requirement of this section to maintain a shareholder derivative action. McCann v. McCann, 138 Idaho 228, 61 P.3d 585 (2002).

Demand on the directors under this section need not assume a particular form nor include any special language; however, the stockholder had to make a sincere effort to induce the directors to take remedial action in the corporate name, and statements should have been presented to the directors showing the wrong complained of, accompanied by sufficient responsible data which would enable the directors to determine whether litigation could be engaged in with some hope of success. McCann v. McCann, 138 Idaho 228, 61 P.3d 585 (2002).

Official Comment

Section 7.42 [this section] requires a written demand for two reasons. First, even though no director may be "qualified" (see section 1.43 [§ 30-29-143]), the demand will give the corporation the opportunity to re-examine the act complained of in the light of a potential lawsuit and take corrective action. Requiring a demand in all cases does not impose an onerous burden given the relatively short waiting period and that this period may be shortened if irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

1. Form of Demand.

Section 7.42 specifies only that the demand shall be in writing. Detailed pleading is not required given that the corporation can contact the shareholder for clarification if there are any questions, and cases have noted that a demand which sets forth the facts concerning share ownership and is sufficiently specific should apprise the corporation of the action sought to be taken and the grounds for that action so that the demand can be evaluated.

2. Upon Whom Demand Should Be Made.

To ensure that the demand reaches the appropriate person for review, it should be addressed to the board of directors, chief executive officer, or secretary at the corporation's principal office. In most cases the board of directors will be the appropriate body to review the demand but there may be instances, such as a decision to sue a third party for an injury to the corporation, in which the taking of, or refusal to take, action would fall within the authority of an officer of the corporation.

3. The 90-Day Period.

The 90-day period in section 7.42 was chosen as a reasonable time within which the board of directors can meet, conduct the necessary inquiry into the charges, receive the results of the inquiry and make its decision. A fixed time period also eliminates litigation over what is or is not a reasonable time. If additional time is needed, the corporation may request counsel for the shareholder to delay filing suit until the inquiry has been completed or, if suit is commenced, the corporation can apply to the court for a stay under section 7.43 [§n 30-29-743].

Two exceptions are provided to the 90-day waiting period. The first exception is the situation where the shareholder has been notified of the rejection of the demand before the end of the 90 days. The standard under the second exception for irreparable injury to the corporation is intended to be the same as that governing the entry of a preliminary injunction. Other factors may also be considered, such as the possible expiration of the statute of limitations, although this would depend on the period of time during which the shareholder was aware of the grounds for the proceeding.

The shareholder bringing suit does not necessarily have to be the person making the demand. Only one demand need be made in order for the

corporation to consider whether to take corrective action.

4. Response by the Corporation.

There is no obligation on the part of the corporation to respond to the demand. However, if the corporation, after receiving the demand, decides to institute litigation or, after a derivative proceeding has commenced, decides to assume control of the litigation, the shareholder's right to commence or control the proceeding normally ends unless it can be shown that the corporation will not adequately pursue the matter.

§ 30-29-743. Stay of proceedings. — If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for such period as the court deems appropriate.

History.

I.C., § 30-29-743, as added by 2015, ch. 243, § 62, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-1-743.

Official Comment A stay may be appropriate where, for example, the complaint is filed 90 days after demand but the inquiry into matters raised by the demand has not been completed or where a demand has not been investigated but the corporation commences the inquiry after the complaint has been filed. In any case, the court will likely monitor the course of the inquiry to ensure that the corporation is proceeding expeditiously and in good faith.

§ 30-29-744. Dismissal. — (a) A derivative proceeding shall be dismissed by the court on motion by the corporation if one (1) of the groups specified in subsection (b) or (e) of this section has determined in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation.

(b) Unless a panel is appointed pursuant to subsection (e) of this section, the determination in subsection (a) of this section shall be made by:

(1) A majority vote of qualified directors present at a meeting of the board of directors if the qualified directors constitute a quorum; or

(2) A majority vote of a committee consisting of two (2) or more qualified directors appointed by majority vote of qualified directors present at a meeting of the board of directors, regardless of whether such qualified directors constitute a quorum.

(c) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing either:

(1) That a majority of the board of directors did not consist of independent directors at the time the determination was made; or

(2) That the requirements of subsection (a) of this section have not been met.

(d) If a majority of the board of directors consisted of qualified directors at the time the determination was made, the plaintiff shall have the burden of proving that the requirements of subsection (a) of this section have been met; if not, the corporation shall have the burden of proving that the requirements of subsection (a) of this section have been met.

(e) Upon motion by the corporation, the court may appoint a panel of one (1) or more individuals to make a determination whether the maintenance of the derivative proceeding is in the best interests of the corporation. In such case, the plaintiff shall have the burden of proving that the requirements of subsection (a) of this section have not been met.

History.

I.C., § 30-29-744, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 68, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-744.

Official Comment

The procedures set forth in section 7.44 [this section] are not intended to be exclusive. Discretion is left with the courts to determine when a derivative action should be dismissed under circumstances other than those set forth in section 7.44. For example, as noted in the comment to section 7.42 [§ 30-29-743], there may be instances where a decision to commence an action falls within the authority of an officer of the corporation, depending upon the amount of the claim and the identity of the potential defendants.

1. The Persons Making the Determination and Timing.

The determination under section 7.44(b) that the maintenance of the proceeding is not in the best interests of the corporation can be made before commencement of the derivative action in response to a demand or after commencement of the action upon examination of the allegations of the complaint. Section 7.44(b) allows the determination to be made by "qualified directors" as defined in section 1.43 [§ 30-29-143]. These provisions parallel the mechanics for authorizing an officer's pursuit of a business opportunity pursuant to a provision in the articles of incorporation (section 2.02(b)(6) [§ 30-29-202]), for determining entitlement to indemnification (section 8.55 [§ 30-29-855]), for authorizing directors' conflicting interest transactions (section 8.62 [§ 30-29-862]), and for renunciation of the corporation's interests in a business opportunity (section

8.70 [§ 30-29-870]). Section 7.44(e) provides for the appointment of a panel only upon motion by the corporation. This would not, however, prevent the court on its own initiative from appointing a special master if permitted under applicable state rules of procedure.

This panel procedure may be desirable in a number of circumstances, particularly if there are no qualified directors available. In addition, even if there are qualified directors, they may not be in a position to conduct the inquiry.

2. Standards to Be Applied.

Section 7.44(a) contemplates that the court will examine the "good faith" of the persons making the determination. Both the determination and the inquiry in section 7.44(a) must be made in "good faith." Section 7.44(a) does not authorize the court to review the reasonableness of the determination to reject a demand or seek a dismissal. The "good faith" standard, which is also found in section 8.30 [§ 30-29-830] (general standards of conduct for directors) and 8.51 [§ 30-29-851] (authority to indemnify), is a subjective one, meaning "honestly or in an honest manner."

The word "inquiry" — rather than "investigation" — has been used to make it clear that the scope of the inquiry will depend upon the issues raised and the knowledge of the group making the determination with respect to those issues. In some cases, the issues may be within the knowledge of the group so that extensive additional investigation is not necessary. In other cases, the group may need to engage counsel and possibly other professionals to conduct an investigation and assist the group in its evaluation of the issues.

The phrase "upon which its conclusions are based" requires that the conclusions follow logically from the inquiry. The burden of convincing the court about this issue lies with whichever party has the burden under section 7.44(d). This phrase does not require the persons making the determination to prepare a written report that sets forth their determination and its bases, as circumstances will vary as to the need for such a report.

Section 7.44 is not intended to modify the general standards of conduct for directors set forth in section 8.30 but rather to make those standards more explicit in the derivative proceeding context. In this regard, the

qualified directors making the determination would be entitled to rely on information and reports from other persons in accordance with section 8.30.

§ 30-29-745. Discontinuance or settlement. — A derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class or series of shareholders, the court shall direct that notice be given to the shareholders affected.

History.

I.C., § 30-29-745, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 69, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, inserted "or series" near the end of the last sentence.

Compiler's Notes.

This section is derived from former § 30-1-745.

Official Comment Section 7.45's [this section's] requirement that all proposed settlements and discontinuances receive judicial approval supports the proposition that a derivative suit is brought for the benefit of all shareholders and thus should not be settled privately.

By requiring that notice be given to all affected shareholders if the court determines that the proposed settlement may substantially affect their interests, section 7.45 permits the court to decide whether notice to shareholders (or holders of a class or series of shares) need be given. For example, the court may decide not to require notice of dismissal if, in the court's judgment, the proceeding is frivolous or has become moot. Section 7.45 also makes a distinction between classes or series of shareholders, an approach that could be used, for example, to eliminate the costs of notice to preferred shareholders where the settlement does not have an effect on their rights, such as their rights to dividends or a liquidation preference.

Section 7.45 does not address the issue of which party should bear the cost of giving this notice, which is left to the discretion of the court reviewing the proposed settlement.

§ 30-29-746. Payment of expenses. — On termination of the derivative proceeding the court may:

(a) Order the corporation to pay the plaintiff's expenses incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation;

(b) Order the plaintiff to pay any defendant's expenses incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or

(c) Order a party to pay an opposing party's expenses incurred because of the filing of a pleading, motion or other paper, if it finds that the pleading, motion or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

History.

I.C., § 30-29-746, as added by 2015, ch. 243, § 62, p. 758; am. 2019, ch. 90, § 70, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1), (2), and (3) as subsections (a), (b), and (c); substituted "expenses incurred" for "reasonable expenses, including counsel fees, incurred" near the beginning of subsections (a), (b) and (c); and substituted "existing law or was interposed" for "existing law and was interposed" near the end of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-746.

CASE NOTES

Applicability.

Attorney fees were properly awarded by the trial court against a creditor who brought a frivolous suit against his debtors' attorneys, and fees on appeal also were warranted thereunder because the appeal was brought spuriously and without foundation, for the purpose of harassment. This section was inapplicable, however, because the district court's denial of leave to amend to assert derivative causes of action meant that the derivative claims were never before the court. Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642 (2010).

Because the beneficiary's claim stated a claim for an individual rather than a derivative action, this section did not apply, and the district court properly denied the corporation and majority shareholders' motion for attorney fees. McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012).

Official Comment

The requirement in section 7.46(a) [this section] that the court may order the corporation to pay the plaintiff's expenses if it finds that the proceeding has resulted in a "substantial" benefit to the corporation, should discourage a plaintiff from proposing inconsequential matters to justify the payment of counsel fees. The provision does not specify the method for calculating attorneys' fees given that there is a substantial body of case law that delineates this issue, which usually includes taking into account the amount or character of the benefit to the corporation.

The standard under section 7.46(b) for the court to require the plaintiff to pay the defendants' expenses if the action was commenced without reasonable cause or for an improper purpose is intended to discourage proceedings brought for the sole purpose of obtaining early settlement payments by defendants to avoid significant defense costs, while also protecting plaintiffs whose suits have a reasonable foundation. This test is similar to but not identical to the test utilized in section 13.31 [§ 30-29-1331], relating to dissenters' rights, where the standard for award of expenses is that dissenters "acted arbitrarily, vexatiously or not in good faith" in demanding a judicial appraisal of their shares. The derivative action situation is sufficiently different from the dissenters' rights situation to justify a different and less onerous test for imposing costs on the plaintiff.

Section 7.46(c) addresses other abuses in the conduct of derivative litigation which may occur on the part of the defendants and their counsel as well as by the plaintiffs and their counsel. This provision may be unnecessary if these abuses are already addressed under applicable rules of civil procedure.

§ 30-29-747. Applicability to foreign corporations. — In any derivative proceeding in the right of a foreign corporation, the matters covered by sections 30-29-740 through 30-29-746, Idaho Code, shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for sections 30-29-743, 30-29-745 and 30-29-746, Idaho Code.

History.

I.C., § 30-29-747, as added by 2015, ch. 243, § 62, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-1-747.

Official Comment Section 7.47 [this section] clarifies the application of the provisions of chapter 7D [§§ 30-29-740 to 30-29-747] to foreign corporations by setting forth a choice of law provision for derivative proceedings involving foreign corporations. It provides, subject to three exceptions, that the matters covered by the chapter 7D shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation.

The three exceptions to the general rule are areas which are traditionally part of the forum's oversight of the litigation process: section 7.43 [§ 30-29-743], dealing with the ability of the court to stay proceedings; section 7.45 [§ 30-29-745], setting forth the procedure for settling a proceeding; and section 7.46 [§ 30-29-746], providing for the assessment of reasonable expenses (including counsel fees) in certain situations.

§ 30-29-748. Shareholder action to appoint a custodian or receiver. — (a) The Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, may appoint one (1) or more persons to be custodians, or, if the corporation is insolvent, to be receivers, of and for a corporation in a proceeding by a shareholder where it is established that:

(1) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered; or

(2) The directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered.

(b) The court:

(1) May issue injunctions, appoint a temporary custodian or temporary receiver with all the powers and duties the court directs, take other action to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing is held;

(2) Shall hold a full hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a custodian or receiver; and

(3) Has jurisdiction over the corporation and all of its property, wherever located.

(c) The court may appoint an individual, or domestic or foreign corporation registered to do business in this state, as a custodian or receiver and may require the custodian or receiver to post bond, with or without sureties, in an amount the court directs.

(d) The court shall describe the powers and duties of the custodian or receiver in its appointing order, which may be amended from time to time. Among other powers:

(1) A custodian may exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary to

manage the business and affairs of the corporation; and

(2) A receiver may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and may sue and defend in the receiver's own name as receiver in all courts of this state.

(e) The court during a custodianship may redesignate the custodian a receiver, and during a receivership may redesignate the receiver a custodian, if doing so is in the best interests of the corporation.

(f) The court from time to time during the custodianship or receivership may order compensation paid and expense disbursements or reimbursements made to the custodian or receiver from the assets of the corporation or proceeds from the sale of its assets.

(g) As used in this section, "shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

History.

I.C., § 30-29-748, as added by 2019, ch. 90, § 71, p. 220.

Official Comment

Section 7.48 [this section] provides procedures for shareholders to bring an action for the appointment of a custodian or receiver in two situations, both requiring a showing of actual or threatened irreparable injury, as specified in section 7.48(a)(1) and (2). These two grounds are narrower than those found in a shareholder's action for judicial dissolution of a nonpublic corporation under section 14.30(a)(2) [§ 30-29-1430]. See the Official Comment to section 14.30(a)(2). Section 7.48 is in addition to other shareholder remedies provided by the Act and could, for example, be relied upon by a shareholder of a nonpublic corporation in lieu of involuntary dissolution under section 14.30(a)(2).

Section 7.48(g) extends the right to seek court appointment of a custodian or receiver to a beneficial shareholder and an unrestricted voting trust beneficial owner. This recognizes that these persons have or hold on behalf of others an economic interest in the shares.

§ 30-29-749. Judicial determination of corporate offices and review of elections and shareholder votes. — (a) Upon application of or in a proceeding commenced by a person specified in subsection (b) of this section, the Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, may determine:

(1) The result or validity of the election, appointment, removal, or resignation of a director or officer of the corporation;

(2) The right of an individual to hold the office of director or officer of the corporation;

(3) The result or validity of any vote by the shareholders of the corporation;

(4) The right of a director to membership on a committee of the board of directors; and

(5) The right of a person to nominate, or an individual to be nominated, as a candidate for election or appointment as a director of the corporation and any right under a bylaw adopted pursuant to section 30-29-206(c), Idaho Code, or any comparable right under any provision of the articles of incorporation, contract, or applicable law.

(b) An application or proceeding pursuant to subsection (a) of this section may be filed or commenced by any of the following persons:

(1) The corporation;

(2) Any record shareholder, beneficial shareholder, or unrestricted voting trust beneficial owner of the corporation;

(3) A director of the corporation, an individual claiming the office of director, or a director whose membership on a committee of the board of directors is contested, in each case who is seeking a determination of his or her right to such office or membership;

(4) An officer of the corporation or an individual claiming to be an officer of the corporation, in each case who is seeking a determination of his or

her right to such office; and

(5) A person claiming a right covered by subsection (a)(5) of this section and who is seeking a determination of such right.

(c) In connection with any application or proceeding under subsection (a) of this section, the following shall be named as defendants, unless such person made the application or commenced the proceeding:

(1) The corporation;

(2) Any individual whose right to office or membership on a committee of the board of directors is contested;

(3) Any individual claiming the office or membership at issue; and

(4) Any person claiming a right covered by subsection (a)(5) that is at issue.

(d) In connection with any application or proceeding under subsection (a) of this section, service of process may be made upon each of the persons specified in subsection (c) of this section either by:

(1) Service of process on the corporation addressed to such person in any manner provided by statute of this state or by rule of the applicable court for service on the corporation; or

(2) Service of process on the person in any manner provided by statute of this state or by rule of the applicable court.

(e) When service of process is made upon a person other than the corporation by service upon the corporation pursuant to subsection (d)(1) of this section, the plaintiff and the corporation or its registered agent shall promptly provide written notice of such service, together with copies of all process and the application or complaint, to the person at the person's last known residence or business address, or as permitted by statute of this state or by rule of the applicable court.

(f) In connection with any application or proceeding under subsection (a) of this section, the court shall dispose of the application or proceeding on an expedited basis and also may:

(1) Order such additional or further notice as the court deems proper under the circumstances;

(2) Order that additional persons be joined as parties to the proceeding if the court determines that such joinder is necessary for a just adjudication of matters before the court;

(3) Order an election or meeting be held in accordance with the provisions of section 30-29-703(b) or otherwise;

(4) Appoint a master to conduct an election or meeting;

(5) Enter temporary, preliminary, or permanent injunctive relief;

(6) Resolve, solely for the purpose of this proceeding, any legal or factual issues necessary for the resolution of any of the matters specified in subsection (a) of this section, including the right and power of persons claiming to own shares to vote at any meeting of the shareholders; and

(7) Order such other relief as the court determines is equitable, just, and proper.

(g) It is not necessary to make shareholders a party to a proceeding or application pursuant to this section unless the shareholder is a required defendant under subsection (c)(4) of this section, relief is sought against the shareholder individually, or the court orders joinder pursuant to subsection (f)(2) of this section.

(h) Nothing in this section limits, restricts, or abolishes the subject matter jurisdiction or powers of the court as existed before the enactment of this section, and an application or proceeding pursuant to this section is not the exclusive remedy or proceeding available with respect to the matters specified in subsection (a) of this section.

History.

I.C., § 30-29-749, as added by 2019, ch. 90, § 72, p. 220.

Official Comment

Section 7.49 [this section] establishes a procedure for judicial resolution of disputes with respect to the identity of the corporation's directors or officers, the identity of the members of any committee of its board of directors, the validity of nominations for director or the results or validity of shareholder votes. It confers subject matter jurisdiction on the specified

court to resolve these disputes. That jurisdiction may be exercised either in a new proceeding or by an application made in an already pending proceeding. Section 7.49 also requires an expedited review of disputes to prevent them from immobilizing the corporation.

1. The Court with Jurisdiction to Administer Section 7.49.

Subject to any special rules that may be adopted by the specified court, a proceeding instituted pursuant to section 7.49 is governed by the otherwise applicable rules of civil procedure that apply in the specified court, including rules relating to the filing or initiation of an action, service of process, discovery, injunctive relief, motions, and judgments.

The grant of jurisdiction under section 7.49 is permissive, not mandatory. The court has the discretion to decline to resolve a matter, for example, because a justiciable controversy is not present, the court lacks jurisdiction over a party that the court determines is necessary to the resolution of the dispute, a prior action seeking the same relief is pending in another forum, or for other reasons generally applicable under the law of the enacting state. In view of the section's purpose to provide a prompt remedy for corporate governance disputes, the court ought to decline to exercise the jurisdiction provided under section 7.49 only in a rare and unusual case.

An action under section 7.49 should be promptly filed. A delay in resolving disputes concerning corporate governance can result in prejudice to the corporation and its shareholders. The doctrine of laches provides an appropriate basis for determining whether there has been an unreasonable delay in commencing an action, and that doctrine should be applicable to an action pursuant to this section.

2. The Matters or Disputes Covered.

Section 7.49(a) specifies five types of disputes that the court will have jurisdiction to resolve. Section 7.49(a)(3) relates to disputes concerning the result or validity of any shareholder vote on any matter, which would include election of directors, a merger, dissolution, amendment to the articles of incorporation, or any other matter on which a shareholder vote is required or held. A shareholder vote would be taken at a meeting or by written consent. Section 7.49(a)(5) covers disputes concerning the right to nominate or be nominated for election or appointment as a director, which

includes whether an individual meets any applicable qualifications to be nominated or serve as a director established under the authority of section 8.02 [§ 30-29-802]. Section 7.49(a)(5) also extends to disputes concerning rights under a bylaw adopted pursuant to section 2.06(c) [§ 30-29-206] to have a nominee appear on the corporation's proxy appointment form or to be reimbursed for expenses incurred in a proxy contest or any comparable rights under any provision of the articles of incorporation, contracts, or applicable law.

The ability to resolve disputes under section 7.49 over who shall serve as a director or officer of the corporation is not intended to reach a dispute concerning an employment contract relating to one of those positions, such as a claim for money damages for breach of the contract, because resolution of a contractual dispute generally will not affect who is entitled to serve as a director or an officer.

3. Person Who May Initiate a Proceeding.

Section 7.49(b) specifies that the corporation or a shareholder of the corporation has standing to seek resolution of any of the disputes covered by the section. The standing of any other person is limited to a dispute in which that person's rights are directly at issue. For example, directors or officers of the corporation, or an individual claiming the right to be a director or officer of the corporation, may only initiate a proceeding under section 7.49 with respect to a claim to resolve his or her right to such office or, in the case of directors, his or her right to membership on a committee of the board of directors. A director, officer, or an individual claiming the right to be a director or officer does not have standing as a director or officer to bring an action seeking the resolution of a contest over the right of some other director or officer to serve, the right of some other individual claiming some other office, or the result or validity of any shareholder vote unrelated to the individual's own election. Similarly, a person who has a disputed right to nominate someone for election will not have standing to initiate a proceeding under section 7.49 to resolve some other dispute covered by this section unless that person has standing to raise that other matter, such as where the person also is a shareholder. Similarly, a person who has a disputed right to nominate someone for election will not have standing to initiate a proceeding under section 7.49 to resolve some other dispute

covered by this section unless that person has standing to raise that other matter separately, such as where the person also is a shareholder.

4. Necessary Defendants.

Section 7.49(c) specifies the persons that must be named as defendants in an action pursuant to section 7.49. The corporation whose affairs are at issue must always be named as a defendant in the action unless the corporation initiates the proceeding. If the corporation initiates a proceeding to resolve the result or validity of a shareholder vote, section 7.49(c) does not require that any particular person be named as a defendant. There is no assurance that whoever is named as the defendant will take a position adverse to the corporation. The court, therefore-pursuant to its power under section 7.49(f)(2) — may order that some adverse party be added as a defendant to assure that the requisite adversity between parties exists and that both sides of any dispute are fairly presented. Section 7.49(d) does not provide a method for serving process on a shareholder who is named as a defendant in an action under section 7.49. Consequently, any shareholder joined as a defendant either will be required to consent to the personal jurisdiction of the court or be subject to service of process pursuant to some other statute of the state or rule of the applicable court.

Section 7.49(g) provides that it is unnecessary to make shareholders a party except, among other circumstances, when relief is sought against any of the shareholders individually. A proceeding to resolve a shareholder vote, for instance, does not mean that relief is being sought against the shareholders individually, even where the vote of particular shareholders may be the determinative factor, so long as the resolution of any issues pertaining to that vote are solely for the purpose of resolving a governance issue under section 7.49 and are not binding on the shareholder individually. Nonetheless, the court has the power to order the joinder of a shareholder whose vote is at issue if the court determines the joinder is necessary for the just adjudication of the matter. If the shareholder is not subject to the personal jurisdiction of the court, the usual rules of the court will apply in determining whether the shareholder is an indispensable party whose absence requires the dismissal of the action. In determining whether such a shareholder is indispensable party whose absence requires the dismissal of the action, a relevant factor for the court to consider is that any judicial determinations — such as a resolution of share ownership — are solely for

the purpose of resolving the result or validity of the vote or election and will not be binding on the absent shareholder for any other purpose.

5. Service of Process on and Notice to Required Defendants.

Section 7.49(d) provides the methods to serve process on those persons who are required to be joined as defendants under section 7.49(c) and, among other things, permits service upon specified persons by service upon the corporation. If service is accomplished by service on the corporation, notice must be provided to the defendant as required by section 7.49(e) and must be provided both by the plaintiff and by the corporation or its registered agent. This duplicative requirement is intended to increase the likelihood that the defendant receives actual notice of the filing of the lawsuit. Under section 7.49(f)(1), the court may require additional notice.

Section 7.49(e) does not specify the manner by which written notice must be delivered or communicated to the defendant. Section 1.41 [§ 30-29-141] contains various provisions dealing with notice and will be applicable to notice pursuant to section 7.49(e) except to the extent that section specifies certain requirements, in which case those requirements will govern. Although section 1.41 provides that notice must be in writing unless oral notice is reasonable under the circumstances, the requirement in subsection (e) that notice be in writing will govern. Section 1.41 also provides that electronic transmission constitutes written notice and contains various other provisions concerning notice.

6. Powers of the Court.

Section 7.49(f) lists various nonexclusive powers of the court in connection with a proceeding under section 7.49. Powers of the court provided by statute, rule, or applicable law may also be available in a proceeding under section 7.49. Section 7.49(f) requires that a proceeding be expedited, but the degree of expedition will be determined by the court and may vary depending upon the circumstances of the corporation and the nature of the dispute.

One of the powers granted to the court under section 7.49(f)(6) is to resolve legal or factual issues necessary to the resolution of the corporate governance dispute at issue. The resolution of the disputes specified in section 7.49(a) may require the court to resolve related legal or factual

issues, such as whether a shareholder who voted the shares at a meeting is the rightful owner of the shares. However, the determination of such legal or factual matters must be “necessary” for the resolution of the dispute over which the court is granted subject matter jurisdiction in section 7.49(a), and the resolution of these issues must be “solely for the purpose of” the proceeding pursuant to this section. Consequently, for example, the resolution of the rightful owner of shares will be controlling with respect to a section 7.49 determination of the result of the shareholder vote, but that resolution will not be binding on the shareholder whose shares are at issue, unless that shareholder is properly subject to the personal jurisdiction of the court and is made a party to the proceeding. Such a shareholder would not, however, need to be made a party to the proceeding to determine whether the shares were properly voted or counted.

The types of legal or factual issues that it may be necessary for the court to determine to resolve a matter specified in section 7.49(a) may be quite varied. The proper scope of a proceeding under this section is a case-specific inquiry not subject to precise statutory rules. Those issues may include, for example, the interpretation of the bylaws or articles of incorporation, the validity of a share issuance, the validity of a proxy appointment, voting rights pursuant to a contract between shareholders, the power of a beneficial shareholder to direct the voting of shares, the right of the record shareholder to vote shares without direction from the beneficial shareholder, the voting rights of preferred shareholders, whether notice and quorum requirements have been met, and the propriety of the inspectors’ tabulation of the vote.

The issues “necessary” to resolve a matter specified in section 7.49(a) may turn upon the type of claim or contest made or identified by the plaintiff in the action. A proceeding under section 7.49 must be pursued primarily to resolve a matter specified in subsection (a) and not to seek adjudication of an issue that is not covered by the section. Issues not covered by section 7.49 might include breach of duty claims against directors (unless those claims are central to the vote, election, appointment, or resignation at issue), claims that persons elected intend to breach their duties in the future, and breach of duty claims in connection with the approval of a particular transaction.

The court's power under sections 7.49(f)(1) and (2) to order additional or further notice may be used to assure that persons with a particular interest in the matter being adjudicated have notice of the proceeding and are given the opportunity to intervene. The court's power to order joinder of additional parties may be used to assure adversity of the parties or to join a person who is directly affected by the resolution of subsidiary legal or factual issues under section 7.49(f)(6).

Although the issues presented in a proceeding under section 7.49 may not require a new meeting or election, in some situations the court may be unable to determine the proper result without conducting a new election or meeting or the matter may be so uncertain that a new meeting or election is the fairest means of resolving the dispute. Sections 7.49(f)(3) and (4) permit the court to order a new meeting or election without necessarily determining that the prior meeting or election was invalid. The new meeting or election may be held in accordance with the provisions of section 7.03(b) [§ 30-29-703] or otherwise. Under section 7.03(b), the court, among other matters, may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify the record date, prescribe the notice of the meeting, set the quorum and "enter other orders necessary to accomplish the purpose or purposes of the meeting." However, the court's power to control a new meeting or election is not limited to the powers specified in section 7.03(b).

The court might use its injunctive power under section 7.49(f)(5) to address a wide variety of circumstances. It might, for example, (i) enter a temporary or preliminary injunction against action outside the ordinary course unless the opposing parties consent to the action or the court approves, thereby maintaining the status quo until the proceeding can be resolved, (ii) delay a meeting or election until issues can be resolved in advance of the meeting, (iii) delay the closing of a transaction subject to a shareholder vote until the result of the vote is determined, or (iv) restrain a person from exercising the powers of a director or officer until the person's claim to office can be resolved. Once the dispute is resolved, the court may need to enter permanent injunctive relief to implement its decision.

Under section 7.49(f)(7), the court, for example, may consider relief to assure that the shareholder franchise is not improperly manipulated and that

the vote of the shareholders is counted and implemented in accordance with the wishes of those entitled to vote or direct the voting of the shares.

Part 8
Directors and Officers

Idaho Code § 30-29-801

§ 30-29-801. Requirement for and duties of board of directors. — (a) Except as may be provided in an agreement authorized under section 30-29-732, Idaho Code, each corporation shall have a board of directors.

(b) Except as may be provided in an agreement authorized under section 30-29-732, Idaho Code, and subject to any limitation in the articles of incorporation permitted by section 30-29-202(b), Idaho Code, all corporate powers shall be exercised by or under the authority of the board of directors, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight of the board of directors.

History.

I.C., § 30-29-801, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 73, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-801.

Official Comment

As provided in Section 8.01(a) [this section], the board of directors is the traditional form of governance, but the shareholders of a corporation may, in an agreement that satisfies the requirements of section 7.32 [§ 30-29-732], dispense with a board of directors and structure the corporation's management and governance to address specific needs of the enterprise.

In section 8.01(b), the phrase “by or under the direction, and subject to the oversight, of” encompasses the varying functions of boards of directors of different corporations. In some corporations, particularly closely held corporations, the board of directors may be involved in the day-to-day business and affairs and it may be reasonable to describe management as being “by” the board of directors. In many other corporations, including most public corporations, the business and affairs are managed “under the direction, and subject to the oversight, of” the board of directors, and operational management is delegated to executive officers and other professional managers.

Section 8.01(b) often is considered to constitute the heart of the governance provisions of the Act. Giving the board of directors the power, and the responsibility, to oversee and direct the business of the corporation permits separation of ownership of the corporation from control of its oversight and direction. The Act’s broad grant of authority and responsibility to the board of directors constitutes the rejection of the concept that the directors, having been elected by the shareholders, merely serve as agents to implement the will of the shareholders. See section 8.30 [§ 30-29-830].

Section 8.01(b), in providing for corporate powers to be exercised under the direction of the board of directors, allows the board of directors to delegate to appropriate officers, employees or agents of the corporation authority to exercise powers and perform functions not required by law to be exercised or performed by the board of directors itself. Although such delegation does not relieve the board of directors from its responsibility to oversee the business and affairs of the corporation, directors are not personally responsible for actions or omissions of officers, employees, or agents of the corporation so long as the directors have relied reasonably and in good faith upon these officers, employees, or agents. See sections 8.30 and 8.31 [§ 30-29-831] and their Official Comments.

The scope of the board’s oversight responsibility will vary depending on the nature of the corporation and its business. At least for public corporations, the board’s responsibilities generally include oversight of the following:

- business performance, plans and strategy;

• management's assessment of major risks to which the corporation is or may be exposed;

• the performance and compensation of executive officers;

• policies and practices to foster the corporation's compliance with law and ethical conduct;

• management's preparation of the corporation's financial statements;

• management's design and assessment of effectiveness of the corporation's internal controls;

• plans for the succession of the chief executive officer and other executive officers;

• the composition of the board and of board committees; and

• whether the corporation has information and reporting systems in place to provide directors with appropriate information in a timely manner.

In giving attention to the composition of the board, directors of public corporations should consider the corporation's processes for obtaining and evaluating the views of shareholders, including processes for considering individuals proposed by shareholders as nominees for election as directors. Directors of public corporations also should take into account the important role of independent directors. When ownership is separated from responsibility for oversight and direction, as is the case with public corporations, having nonmanagement independent directors who participate actively in the board's oversight functions increases the likelihood that actions taken by the board, if challenged, will be given deference by the courts. The listing standards of most public securities markets have requirements for independent directors to serve on boards; in many cases, they must constitute a majority of the board, and certain board committees must be composed entirely of independent directors. The listing standards have differing rules as to what constitutes an independent director. The Act does not attempt to define "independent director." Ordinarily, an independent director may not be a present or recent member of senior management and must be free of significant professional, financial or similar relationships with the corporation, and the director and members of the director's immediate family must be free of similar relationships with the corporation's senior management. Judgment is required to determine

independence in light of the particular circumstances, subject to any specific requirements of a listing standard. The qualifications for disinterestedness required of directors for specific purposes under the Act are similar, but not necessarily identical, to those that are prerequisites to independence. For the requirements for a director to be considered disinterested and qualified to act in those specified situations, see section 1.43 [§ 30-29-143]. An individual who is an independent director may not be eligible to act in a particular case under those other provisions of the Act. Conversely, a director who is not independent (for example, a member of management) may be disinterested and qualified to act in a particular case.

Section 8.01(b) recognizes that the powers of the board of directors may be limited by express provisions in the articles of incorporation and in an agreement among all shareholders under section 7.32. In an agreement under section 7.32, board powers also may be assigned to others. Because all of the shareholders must approve a section 7.32 agreement, the only restriction on limiting or assigning board powers is that any limitation or assignment must be provided for in sections 7.32(a)(1) through (a)(7) or must not be contrary to public policy under section 7.32(a)(8). In contrast, as is provided in section 2.02(b)(2) [§ 30-29-202], any limitation on board powers in the articles of incorporation cannot be "inconsistent with law." As a result of this difference in standards, any such limitation under section 2.02 should not, for example, be inconsistent with requirements of section 8.30 regarding standards of conduct for directors or otherwise preclude the directors from fulfilling their duties to the corporation.

§ 30-29-802. Qualifications of directors. — (a) The articles of incorporation or bylaws may prescribe qualifications for directors or for nominees for directors. Qualifications must be reasonable as applied to the corporation and be lawful.

(b) A requirement that is based on a past, prospective, or current action, or expression of opinion, by a nominee or director that could limit the ability of a nominee or director to discharge his or her duties as a director is not a permissible qualification under this section. Notwithstanding the foregoing, qualifications may include not being or having been subject to specified criminal, civil, or regulatory sanctions or not having been removed as a director by judicial action or for cause.

(c) A director need not be a resident of this state or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

(d) A qualification for nomination for director prescribed before a person's nomination shall apply to such person at the time of nomination. A qualification for nomination for director prescribed after a person's nomination shall not apply to such person with respect to such nomination.

(e) A qualification for director prescribed before a director has been elected or appointed may apply only at the time an individual becomes a director or may apply during a director's term. A qualification prescribed after a director has been elected or appointed shall not apply to that director before the end of that director's term.

History.

I.C., § 30-29-802, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 74, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-802.

Official Comment

Some corporations have adopted qualifications for individuals to be directors or to be nominated as directors. One use of qualifications may be by closely held corporations, to ensure representation and voting power on the board of directors. Other provisions of the Act also are designed to accomplish these purposes. See, for example, section 7.32 [§ 30-29-732] providing for shareholder agreements. See also section 2.02(b) [§ 30-29-202].

Qualifications may apply to all board members or to a specified percentage or number of directors. An example of a qualification applying to fewer than all directors would be a requirement that at least two directors must have specified business or professional experience or a particular educational degree or background. Careful consideration should be given to the intended effect of the application of any qualification that applies to fewer than all directors in the context of an election contest in which only some of the nominees satisfy this qualification. In the event that specified qualifications for some or all directors are not satisfied, remedial steps could be addressed in the articles of incorporation or bylaws, or can be left to other mechanisms available to a corporation and its board and shareholders, such as the provisions permitting changes in the number of directors and providing for the filling of vacancies on the board. See sections 8.03 and 8.10 [§§ 30-29-803 and 30-29-810].

The purpose of section 8.02(a) [this section] is to permit qualifications that may benefit the corporation by enhancing the board's ability to perform its role effectively. However, this needs to be balanced against the risk that qualifications could be misused for entrenchment purposes by incumbents or for other improper purposes. To address these concerns, section 8.02(a) requires that qualifications must be reasonable as applied to the corporation and must be lawful. For example, a qualification that seeks to favor incumbent directors or distinguish between a director elected from the slate nominated by a corporation's board and a director elected as the result of being nominated by one or more shareholders, including under a bylaw

adopted pursuant to section 2.06(c) [§ 30-29-206], would not ordinarily be reasonable and thus not ordinarily authorized by section 8.02(a). An example of a qualification that would not be lawful would be a requirement that is impermissibly discriminatory under the Civil Rights Act of 1964.

1. Scope of Permitted Qualifications.

Examples of qualifications that may be permissible under section 8.02 are eligibility requirements based on residence, shareholdings, age, length of service, experience, expertise, and professional licenses or certifications.

Under section 8.02(b) a qualification that is based on a past, current, or prospective action, or expression of opinion, by a nominee or director that could limit the ability of a nominee or director to discharge his or her duties as a director is not a permissible qualification. The discharge of duties of a director is referenced in section 8.30 [§ 30-29-830]. A requirement based on a director's having voted for or against, or expressed an intent to vote for or against, a particular type of resolution, such as a resolution in favor of or against a bylaw pursuant to section 2.06(c) or a resolution in favor of or against a shareholder rights plan, would be impermissible.

A shareholder agreement that meets the requirements of section 7.32 could override the terms of section 8.02, including with respect to the requirement of reasonableness in section 8.02(a) and the limitation on permitted qualifications in section 8.02(b).

2. Timing and Applicability of Qualifications.

Sections 8.02(d) and (e) prohibit "springing" qualifications. A qualification for a director that is prescribed during the term of that director shall, assuming it remains in effect, apply to that director upon the start of any additional term of that director.

To avoid ambiguity as to whether a qualification for director only applies at the start of a term or applies during the term, a qualification provision should provide clearly when it applies. In the event that a qualification provision does not so specify, customary principles of interpretation and construction will apply. Examples of qualifications the nature of which would generally indicate an intent that they apply throughout a term would be a citizenship or residence qualification or a qualification that a director have a particular license or government clearance.

A director who ceases to meet a qualification that applies during a term will not satisfy that qualification at that time. For example, if a bylaw provision that is in effect at the start of a director's term requires that all directors be residents of state X during their terms, and that director at the start of his or her term is a resident of state X but during the term becomes a resident of state Y, then that director would cease to satisfy the qualification and, therefore, cease to be a director at the time the director becomes a resident of state Y.

§ 30-29-803. Number and election of directors. — (a) A board of directors shall consist of one (1) or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or bylaws.

(c) Directors are elected at the first annual shareholders' meeting and at each annual shareholders' meeting thereafter unless elected by written consent in lieu of an annual meeting as permitted by section 30-29-704, Idaho Code, or unless their terms are staggered under section 30-29-806, Idaho Code.

History.

I.C., § 30-29-803, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 75, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; and rewrote subsection (c), which formerly read: "Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under section 30-29-806, Idaho Code."

Compiler's Notes.

This section is derived from former § 30-1-803.

Official Comment

Section 8.03 [this section] prescribes rules for (i) the determination of the size of the board of directors of corporations, and (ii) changes in the number of directors once the board's size has been established.

1. Number of Directors.

Under section 8.03(a), the size of the board of directors may be fixed initially in one or more of the fundamental corporate documents, or the decision as to the size of the initial board of directors may be made thereafter in the manner authorized in those documents.

2. Changes in the Size of the Board of Directors.

Section 8.03(b) provides a corporation with the freedom to design its articles of incorporation and bylaw provisions relating to the size of its board with a view to achieving the combination of flexibility for the board of directors and protection for shareholders that it deems appropriate. The articles of incorporation could provide for a specified number of directors or a board size within a range from a minimum to a maximum, or an unlimited size not fewer than one as determined by the board or the shareholders. If the shareholders or the board of directors want to change the specified size of the board, to change the range established for the size of the board or to change from a board size within a range or of unlimited size to a specified board size or vice versa, board of directors and shareholder action would be required to make those changes by amending the articles of incorporation. Alternatively, the bylaws could provide for a specified number of directors or a size within a stated range or unlimited size, with the number to be fixed by the board of directors. Any change would be made in the manner provided by the bylaws. The bylaws could permit amendment by the board of directors or the bylaws could require that any amendment, in whole or in part, be made only by the shareholders in accordance with section 10.20(a) [§ 30-29-1020]. Typically, the board of directors would be permitted to change the board size within the established range. If a corporation wishes to ensure that any change in the number of directors be approved by shareholders, then an appropriate restriction would have to be included in the articles of incorporation or bylaws.

The board's power to change the number of directors, like all other board powers, is subject to compliance with applicable standards governing director conduct. In particular, it may be inappropriate to change the size of the board for the primary purpose of maintaining control or defeating particular candidates for the board.

In many closely held corporations, shareholder approval for a change in the size of the board of directors may be readily accomplished if that is

desired. In many closely held corporations a board of directors of a fixed size may be an essential part of a control arrangement. In these situations, an increase or decrease in the size of the board of directors by even a single member may significantly affect control. To maintain control arrangements dependent on a board of directors of a fixed size, the power of the board of directors to change its own size must be negated. This may be accomplished by fixing the size of the board of directors in the articles of incorporation or by expressly negating the power of the board of directors to change the size of the board, whether by amendment of the bylaws or otherwise. See section 10.20(a).

§ 30-29-804. Election of directors by certain classes or series of shares. — If the articles of incorporation or action by the board of directors pursuant to section 30-29-602, Idaho Code, authorizes dividing the shares into classes or series, the articles of incorporation may also authorize the election of all or a specified number of directors by the holders of one (1) or more authorized classes or series of shares. A class or series, or multiple classes or series, of shares entitled to elect one (1) or more directors is a separate voting group for purposes of the election of directors.

History.

I.C., § 30-29-804, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 76, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section, which formerly read: "**Election of directors by certain classes of shareholder.** If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a specified number of directors by the holders of one (1) or more authorized classes of shares. A class, or classes, of shares entitled to elect one (1) or more directors is a separate voting group for purposes of the election of directors."

Compiler's Notes.

This section is derived from former § 30-1-804.

Official Comment Provisions allowing separate classes or series of shares each to elect a specified number of directors are often used in corporations to effect an agreed upon allocation of control, for example, to ensure representation on the board of directors by particular shareholders by issuing to those shareholders a class or series of shares entitled to elect one or more directors. Each class or series (or multiple classes or series) entitled to elect separately one or more directors constitutes a separate voting group for this purpose, and

the quorum and voting requirements must be separately met by each voting group as provided in sections 7.25, 7.26 and 7.28 [§§ 30-29-725, 30-29-726 and 30-29-728].

§ 30-29-805. Terms of directors generally. — (a) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(b) The terms of all other directors expire at the next, or if their terms are staggered in accordance with section 30-29-806, Idaho Code, at the applicable second or third annual shareholders' meeting following their election except to the extent provided in section 30-29-1022, Idaho Code, if a bylaw electing to be governed by that section is in effect or if a shorter term is specified in the articles of incorporation in the event of a director nominee failing to receive a specified vote for election.

(c) A decrease in the number of directors does not shorten an incumbent director's term.

(d) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.

(e) Except to the extent otherwise provided in the articles of incorporation or under section 30-29-1022, Idaho Code, if a bylaw electing to be governed by that section is in effect, despite the expiration of a director's term, the director continues to serve until the director's successor is elected and qualifies or there is a decrease in the number of directors.

History.

I.C., § 30-29-805, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 77, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-805.

Official Comment

Section 8.05 [this section] provides for the annual election of directors at the annual shareholders' meeting with the single exception that terms may be staggered as permitted in section 8.06 [§ 30-29-806].

Under section 8.05(d), if terms are staggered, the term of a director elected to fill a vacant term with more than a year to run is shorter than the term of the director's predecessor. The board of directors may take appropriate steps, by designation of short terms or otherwise, to return the rotation of election of directors to the original staggered terms established or fixed by the articles of incorporation or bylaws.

Section 8.05(e), with two exceptions, provides for "holdover" directors so that directorships do not automatically become vacant at the expiration of their terms. This means that the power of the board of directors to act continues uninterrupted even if an annual shareholders' meeting is not held or the shareholders are deadlocked or otherwise do not elect directors at the meeting. The articles of incorporation may modify or eliminate this holdover concept. Also, if a bylaw is adopted invoking section 10.22 [§ 30-29-1022], the effect will be that directors who are elected by a plurality vote but receive more votes against than for their election will not hold over past the abbreviated 90-day term of office specified in section 10.22.

§ 30-29-806. Staggered terms for directors. — The articles of incorporation may provide for staggering the terms of directors by dividing the total number of directors into two (2) or three (3) groups, with each group containing one-half (½) or one-third (1/3) of the total, as near as may be practicable. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be elected for a term of two (2) years or three (3) years, as the case may be, to succeed those whose terms expire.

History.

I.C., § 30-29-806, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 78, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, inserted "practicable" at the end of the first sentence and substituted "elected for a term of two (2) years or three (3) years" for "chosen for a term of two (2) or three (3) years" in the last sentence.

Compiler's Notes.

This section is derived from former § 30-1-806.

Official Comment Section 8.06 [this section] permits the practice of "classifying" the board or "staggering" the terms of directors. The requirement that these provisions be in the articles of incorporation ensures that, unless included in the corporation's original articles, a staggered board may only be implemented with shareholder approval.

§ 30-29-807. Resignation of directors. — (a) A director may resign at any time by delivering a written notice of resignation to the board of directors, its chair, or the secretary.

(b) A resignation is effective as provided in section 30-29-141(i), Idaho Code, unless the resignation provides for a delayed effectiveness, including effectiveness determined upon a future event or events. A resignation that is conditioned upon failing to receive a specified vote for election as a director may provide that it is irrevocable.

History.

I.C., § 30-29-807, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 79, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-807.

Official Comment In addition to permitting resignations effective at a date later than the date of delivery of the resignation, section 8.07(b) [this section] permits a director resignation to be conditioned upon "future events," which might include the director failing to achieve a specified vote for reelection, e.g., more votes "for" than "against" coupled with board acceptance of the resignation. Corporations and individual directors may thus give effect, in a manner subsequently enforceable by the corporation, to voting standards for the election of directors that exceed the plurality default standard in section 7.28 [§ 30-29-728]. Section 8.07(b) also makes it clear that such arrangements do not contravene public policy. The express reference to the failure to receive a specified vote is not to be construed to address or negate the

possible validity of other appropriate conditions for an irrevocable resignation.

Under section 8.10 [§ 30-29-810], a vacancy that will occur at a specific later date by reason of a resignation effective at a later date may be filled before the vacancy occurs, but the new director may not take office until the vacancy occurs. Because the individual tendering that resignation is still a member of the board, he or she may participate in all decisions until the specified date, including the choice of his or her successor under section 8.10.

§ 30-29-808. Removal of directors by shareholders. — (a) The shareholders may remove one (1) or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove that director.

(c) A director may be removed if the number of votes cast to remove exceeds the number of votes cast not to remove the director, except to the extent the articles of incorporation or bylaws require a greater number; provided that if cumulative voting is authorized, a director may not be removed if, in the case of a meeting, the number of votes sufficient to elect the director under cumulative voting is voted against removal and, if action is taken by less than unanimous written consent, voting shareholders entitled to the number of votes sufficient to elect the director under cumulative voting do not consent to the removal.

(d) A director may be removed by the shareholders only at a meeting called for the purpose of removing the director and the meeting notice must state that removal of the director is a purpose of the meeting.

History.

I.C., § 30-29-808, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 80, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote subsection (c), which formerly read: “If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to

remove him"; and substituted "the meeting notice must state that removal of the director is a purpose of the meeting" for "the meeting notice must state that the purpose, or one (1) of the purposes, of the meeting is removal of the director" at the end of subsection (d).

Compiler's Notes.

This section is derived from former § 30-1-808.

Official Comment

Section 8.08(a) [this section] provides a default rule that shareholders have the power to change the directors at will. However, that section permits the power to remove directors without cause to be eliminated by a provision in the articles of incorporation. Section 8.08(c) assures that a minority faction with sufficient votes to guarantee the election of a director under cumulative voting will be able to protect that director from removal by the remaining shareholders. In computing whether a director elected by cumulative voting is protected from removal under that section, the votes should be counted as though (i) the vote to remove the director occurred in an election to elect the number of directors normally elected by the relevant voting group along with the director whose removal is sought, (ii) the number of votes cast cumulatively against removal had been cast for election of the director, and (iii) all votes cast for removal of the director had been cast cumulatively in an efficient pattern for the election of a sufficient number of candidates so as to deprive the director whose removal is being sought of the director's office.

Although sections 8.08(b) and (c) have specific requirements with respect to removal of directors elected by particular voting groups or by cumulative voting, such directors nevertheless may be removed by court proceeding under section 8.09 [§ 30-29-809]. Section 8.08(d) acknowledges the seriousness of director removal by requiring the meeting notice to state that removal of specific directors will be proposed. Section 8.08(d) governs removal of directors at a meeting of shareholders, but does not preclude removal by means of shareholder action by written consent under section 7.04 [§ 30-29-704]. Unless cumulative voting is authorized, and in the absence of a greater vote requirement in the articles of incorporation or bylaws, removal of a director by less than unanimous written consent would

require that a majority of the outstanding shares of the relevant voting group consent to the removal.

§ 30-29-809. Removal of directors by judicial proceeding. — (a) The Idaho district court of the county where a corporation's principal office is located, or, if none in this state, Ada county, may remove a director from office or may order other relief, including barring the director from reelection for a period prescribed by the court, in a proceeding commenced by or in the right of the corporation if the court finds that:

(1) The director engaged in fraudulent conduct with respect to the corporation or its shareholders, grossly abused the position of director, or intentionally inflicted harm on the corporation; and

(2) Considering the director's course of conduct and the inadequacy of other available remedies, removal, or other such relief would be in the best interest of the corporation.

(b) A shareholder proceeding on behalf of the corporation under subsection (a) of this section shall comply with all of the requirements of sections 30-29-740 through 30-29-747, Idaho Code, except section 30-29-741(a), Idaho Code.

History.

I.C., § 30-29-809, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 81, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), substituted "remove a director from office or may order other relief, including barring the director from reelection for a period prescribed by the court" for "remove a director of the corporation from office" near the middle of the introductory paragraph, and inserted "or other such relief" near the end of paragraph (2); rewrote subsection (b), which formerly read: "A shareholder proceeding on behalf of the corporation under subsection (1) of this section shall comply with all the requirements of sections 30-29-741 through 30-29-747, Idaho Code, except section 30-

29-741(1), Idaho Code" and deleted former subsections (3) and (4), which read: "(3) The court, in addition to removing the director, may bar the director from reelection for a period prescribed by the court. (4) Nothing in this section limits the equitable powers of the court to order other relief."

Compiler's Notes.

This section is derived from former § 30-1-809.

Official Comment

Section 8.09 [this section] is designed to operate in the limited circumstance where other remedies are inadequate to address serious misconduct by a director and it is impracticable for shareholders to invoke removal under section 8.08 [§ 30-29-808]. A proceeding under section 8.09 may be brought by the corporation or by a shareholder suing derivatively. If an action is brought derivatively, all of the provisions of chapter 7D [§§ 30-29-740 to 30-29-747], including dismissal under section 7.44 [§ 30-29-744], are applicable to the action with the exception of the contemporaneous ownership requirement of clause (i) of section 7.41 [§ 30-29-741]. This extraordinary remedy of judicial removal is only for the kind of misconduct described in clause (i) of section 8.09(a) and does not reach matters falling within an individual director's lawful exercise of business judgment.

The court may determine that the director's continuation in office is inimical to the best interest of the corporation. Judicial removal might be the most appropriate remedy if shareholder removal under section 8.08 is impracticable because of situations such as the following:

• The director charged with serious misconduct personally owns or controls sufficient shares to block removal.

• The director was elected by voting group or cumulative voting, and the shareholders with voting power to prevent removal will exercise that power despite the director's serious misconduct and without regard to what the court deems to be the best interest of the corporation.

• A shareholders' meeting to consider removal under section 8.08 will entail considerable expense and a period of delay that will be contrary to the corporation's best interest.

§ 30-29-810. Vacancy on board of directors. — (a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) The shareholders may fill the vacancy; (2) The board of directors may fill the vacancy; or (3) If the directors remaining in office are fewer than a quorum, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(b) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group are entitled to vote to fill the vacancy if it is filled by the shareholders, and only the remaining directors elected by that voting group, even if fewer than a quorum, are entitled to fill the vacancy if it is filled by the directors.

(c) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under section 30-29-807(b), Idaho Code, or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

History.

I.C., § 30-29-810, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 82, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, added "of directors" at the end of the section heading; redesignated the existing paragraphs; substituted "office are fewer than a quorum" for "office constitute fewer than a quorum of the board" near the beginning of paragraph (a)(3); added "and only the remaining directors elected by that voting group, even if fewer than a quorum, are entitled to fill the vacancy if it is filled by the directors" at the end of subsection (b); and substituted "section 30-29-807(b), Idaho Code" for "section 30-29-807(2), Idaho Code" near the middle of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-810.

Official Comment

Section 8.10(a)(3) [this section] allows the directors remaining in office to fill director vacancies even though they do not constitute a quorum. The test for the exercise of this power is whether the directors remaining in office are less than a quorum, not whether the directors seeking to act are less than a quorum. For example, on a board of six directors where a quorum is four, if there are two vacancies, they may not be filled under section 8.10(a)(3) at a "meeting" attended by only three directors. Even though the three directors are less than a quorum, section 8.10(a)(3) is not applicable because the number of directors remaining in office — four — is not less than a quorum.

Section 8.10(b) is part of the consistent treatment of directors elected by a voting group of shareholders. See sections 1.40, 7.25, 7.26, 7.28, 8.04 and 8.08(b) [§§ 30-29-140, 30-29-725, 30-29-726, 30-29-728, 30-29-804 and 30-29-808].

Under section 8.10(c), the director in the office that will become vacant may participate in the selection of a successor. Such a vacancy typically arises when there is a resignation by a director that is effective at a later date; it may also arise in connection with retirements or with prospective amendments to bylaws. In a closely held corporation with a balance of power on the board of directors that was reached by agreement, a prospective resignation followed by the appointment of a successor under this section permits the board to act on the replacement before the change in balance of power the resignation would otherwise cause.

§ 30-29-811. Compensation of directors. — Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

History.

I.C., § 30-29-811, as added by 2015, ch. 243, § 63, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-1-811.

Official Comment Section 8.11 [this section] reflects the view that director compensation is an appropriate function of the board of directors. Board action on directors' compensation and benefits is a director's conflicting interest transaction subject to chapter 8F [§§ 30-29-860 to 30-29-863]. See Official Comment to section 8.61 [§ 30-29-861], Note on Directors' Compensation.

§ 30-29-812 through 30-29-819. Reserved.

History.

I.C., § 30-29-812, as added by 2015, ch. 243, § 63, p. 758.

§ 30-29-820. Meetings. — (a) The board of directors may hold regular or special meetings in or out of this state.

(b) Unless restricted by the articles of incorporation or bylaws, any or all directors may participate in any meeting of the board of directors through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

History.

I.C., § 30-29-820, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 83, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; and rewrote the first sentence in subsection (b), which formerly read: "Unless the articles of incorporation or bylaws provide otherwise, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting."

Compiler's Notes.

This section is derived from former § 30-1-820.

Official Comment Section 8.20 [this section] provides flexibility with respect to holding meetings of directors. Under section 8.20, a meeting in which any or all of the directors participate through any means of communication that complies with section 8.20(b) will meet the statutory requirements. Depending on the nature of the matters to be considered at the meeting, however, a board of directors may wish to consider whether holding an in-person meeting at which some or all

directors are physically present provides greater opportunity for interchange.

§ 30-29-821. Action without meeting. — (a) Except to the extent that the articles of incorporation or bylaws require that action by the board of directors be taken at a meeting, action required or permitted by this chapter to be taken by the board of directors may be taken without a meeting if each director signs a consent describing the action to be taken and delivers it to the corporation.

(b) Action taken under this section is the act of the board of directors when one (1) or more consents signed by all the directors are delivered to the corporation. The consent may specify a later time as the time at which the action taken is to be effective. A director's consent may be withdrawn by a revocation signed by the director and delivered to the corporation before delivery to the corporation of unrevoked written consents signed by all the directors.

(c) A consent signed under this section has the effect of action taken at a meeting of the board of directors and may be described as such in any document.

History.

I.C., § 30-29-821, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 84, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "this chapter" for "this act" near the middle of subsection (a); and, in subsection (b), substituted "a later time as the time at which the action taken is to be effective" for "the time at which the action taken thereunder is to be effective" at the end of the first sentence.

Compiler's Notes.

This section is derived from former § 30-1-821.

CASE NOTES

Waiver of Claims.

Where a physician sued medical center for wrongful termination, but had entered into agreements with all the directors, in which the medical center bought out the physician's stock in the corporation, the physician argued that the procedural irregularities (the same conduct the district judge found the physician waived) impacted the physician's claims for breach of good faith and fair dealing, interference with an existing contract, and interference with an economic advantage, and this section; because these claims were barred by waiver, there was no error in dismissing them as well. Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 61 P.3d 557 (2002).

Official Comment Directors may take action by written consent without a meeting only when approval of an action is unanimous. Accordingly, if a director abstains, is recused or withholds consent on an action, the action could not be authorized by consent, and a meeting would need to be held for the action to be approved.

§ 30-29-822. Notice of meeting. — (a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place or purpose of the meeting.

(b) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors shall be preceded by at least two (2) days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

History.

I.C., § 30-29-822, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 85, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; and substituted "directors shall" for "director must" near the middle of the first sentence in subsection (b).

Compiler's Notes.

This section is derived from former § 30-1-822.

Official Comment Unlike regular meetings of the board of directors, special meetings always require notice, the timing of which may be varied by the articles of incorporation or bylaws. The notice may be written, or oral if oral notice is reasonable in the circumstances. See section 1.41(a) [§ 30-29-141]. No statement of the purpose of any meeting of the board of directors is necessary in the notice unless required by the articles of incorporation or bylaws. These requirements differ from the requirements applicable to meetings of shareholders because of the fundamental differences in the roles and involvement of directors and shareholders.

§ 30-29-823. Waiver of notice. — (a) A director may waive any notice required by this chapter, the articles of incorporation, or the bylaws before or after the date and time stated in the notice. Except as provided by subsection (b) of this section, the waiver must be in writing, signed by the director entitled to the notice, and delivered to the corporation for filing by the corporation with the minutes or corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless the director at the beginning of the meeting, or promptly upon arrival, objects to holding the meeting or transacting business at the meeting and does not after objecting vote for or assent to action taken at the meeting.

History.

I.C., § 30-29-823, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 86, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote the last sentence in subsection (a), which formerly read: "Except as provided by subsection (2) of this section, the waiver must be filed in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records"; and, in subsection (b), substituted "after objecting vote" for "thereafter vote" near the end.

Compiler's Notes.

This section is derived from former § 30-1-823.

Official Comment If a director actually attends the meeting, section 8.23(b) [this section] generally provides the director may not subsequently raise an objection based on lack of notice. If a director does wish to object, he or she must call attention to the lack of notice at the outset of the meeting or promptly upon arriving and not vote for

any action taken at the meeting. That director may then attack the validity of any action taken at the meeting on the grounds of lack of notice, as may any other director who was not given notice and was not present at the meeting.

§ 30-29-824. Quorum and voting. — (a) Unless the articles of incorporation or bylaws provide for a greater or fewer number or unless otherwise expressly provided in this chapter, a quorum of a board of directors consists of a majority of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The quorum of the board of directors specified in or fixed in accordance with the articles of incorporation or bylaws may not consist of fewer than one-third (1/3) of the specified or fixed number of directors.

(c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors or unless otherwise expressly provided in this chapter.

(d) A director who is present at a meeting of the board of directors or a committee when corporate action is taken is deemed to have assented to the action taken unless:

(1) The director objects at the beginning of the meeting, or promptly upon arrival, to holding it or transacting business at the meeting;

(2) The dissent or abstention from the action taken is entered in the minutes of the meeting; or

(3) The director delivers written notice of the director's dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

History.

I.C., § 30-29-824, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 87, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote former subsections (1) and (2), which formerly read: "(1) Unless the articles of incorporation or bylaws require a greater number or unless otherwise specifically provided in this chapter, a quorum of a board of directors consists of: (a) A majority of the fixed number of directors if the corporation has a fixed board size; or (b) A majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variable-range size board. (2) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third (1/3) of the fixed or prescribed number of directors determined under subsection (1) of this section"; inserted "or unless otherwise expressly provided in this chapter" at the end of subsection (c); and, in subsection (d), deleted "of the board of directors" following "or a committee" near the middle of the introductory paragraph.

Compiler's Notes.

This section is derived from former § 30-1-824.

CASE NOTES

Waiver of Claims.

Where a physician sued medical center for wrongful termination, but had entered into agreements with all the directors, in which the medical center bought out the physician's stock in the corporation, the physician argued that the procedural irregularities (the same conduct the district judge found the physician waived) impacted the physician's claims for breach of good faith and fair dealing, interference with an existing contract, and interference with an economic advantage, and § 30-1-821; because these claims were barred by waiver, there was no error in dismissing them as well. Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 61 P.3d 557 (2002).

Official Comment

In the absence of a provision in the articles of incorporation or bylaws, a quorum is a majority of the total number of directors specified (*e.g.*, "the

number of directors shall be X") in or fixed (*e.g.*, "the number of directors shall be not less than Y or more than Z as determined by the board of directors") in accordance with the articles of incorporation or the bylaws.

Section 8.24(a) [this section] recognizes that the Act itself may provide for a different quorum in certain specified situations. See sections 8.53(c)(1) and 8.55(b)(1) [§§ 30-29-853 and 30-29-855].

Section 8.24 allows the articles of incorporation or bylaws to decrease the required quorum (but not below one-third) or to increase the quorum or the vote necessary to take action up to and including unanimity. The articles of incorporation or bylaws may also establish quorum or voting requirements with respect to directors elected by voting groups of shareholders pursuant to section 8.04 [§ 30-29-804]. The options to increase the quorum and vote requirements might be used, for example, in closely held corporations where a greater degree of participation is thought appropriate or where a minority participant in the venture seeks to obtain a veto power over corporate action.

The phrase "when the vote is taken" in section 8.24(c) is designed to make clear that the board of directors may act only when a quorum is present. If directors leave during the course of a meeting, the board of directors may not act after the number of directors present is reduced to less than a quorum.

If a director who is present at a meeting wishes to object or abstain with respect to action taken by the board of directors or a committee, that director must make his or her position clear in one of the ways described in section 8.24(d). If objection is made in the form of a written dissent under clause (iii) of section 8.24(d), it may be transmitted by any form of delivery authorized by the definition of that term in section 1.40 [§ 30-29-140], including electronic transmission, if authorized by section 1.41 [§ 30-29-141]. Section 8.24(d) serves the important purpose of bringing the position of the dissenting director clearly to the attention of the other directors. The provision that a director who is present is deemed to have assented unless an objection is noted also prevents a director from later seeking to avoid responsibility because of unexpressed doubts about the wisdom of the action taken.

Section 8.24(d) applies only to directors who are present at the meeting. Directors who are not present are not deemed to have assented to any action taken at the meeting in their absence.

§ 30-29-825. Board committees. — (a) Unless this chapter, the articles of incorporation, or the bylaws provide otherwise, a board of directors may establish one (1) or more board committees composed exclusively of one (1) or more directors to perform functions of the board of directors.

(b) The establishment of a board committee and appointment of members to it shall be approved by the greater of:

(1) A majority of all the directors in office when the action is taken; or

(2) The number of directors required by the articles of incorporation or bylaws to take action under section 30-29-824, Idaho Code, unless, in either case, this chapter or the articles of incorporation provide otherwise.

(c) Sections 30-29-820 through 30-29-824, Idaho Code, apply to board committees and their members.

(d) A board committee may exercise the powers of the board of directors under section 30-29-801, Idaho Code, to the extent specified by the board of directors or in the articles of incorporation or bylaws, except that a board committee may not:

(1) Authorize or approve distributions, except according to a formula or method, or within limits, prescribed by the board of directors;

(2) Approve or propose to shareholders action that this chapter requires be approved by shareholders;

(3) Fill vacancies on the board of directors or, subject to subsection (e) of this section, on any board committees; or

(4) Adopt, amend, or repeal bylaws.

(e) The board of directors may appoint one (1) or more directors as alternate members of any board committee to replace any absent or disqualified member during the member's absence or disqualification. If the articles of incorporation, the bylaws, or the resolution creating the board committee so provide, the member or members present at any board committee meeting and not disqualified from voting may, by unanimous

action, appoint another director to act in place of an absent or disqualified member during that member's absence or disqualification.

History.

I.C., § 30-29-825, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 88, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-825.

Official Comment

Section 8.25 [this section] deals only with board committees authorized to perform functions of the board of directors. The board of directors or management, independently of section 8.25, may establish non-board committees composed in whole or in part of directors, employees, or others to address matters in ways that do not constitute performing functions required to be performed by the board of directors under section 8.01 [§ 30-29-801], including acting in an advisory capacity.

Under section 8.25(a), except as otherwise provided by the Act, the articles of incorporation or the bylaws, a board committee may consist of a single director. This accommodates situations in which only one director may be present or available to make a decision on short notice, as well as situations in which it is unnecessary or inconvenient to have more than one member on a board committee or where only one board member is disinterested or independent with respect to a matter. Various other sections of the Act require the participation or approval of at least two qualified directors in order for the decision of the board or committee to have effect. (For the definition of "qualified director," see section 1.43 [§ 30-29-143].) These include a determination that maintenance of a derivative suit is not in the corporation's best interests (section 7.44(b)(2) [§ 30-29-744]), a

determination that indemnification is permissible (section 8.55(b)(1) [§ 30-29-855]), an approval of a director's conflicting interest transaction (section 8.62(a) [§ 30-29-862]), and disclaimer of the corporation's interest in a business opportunity (section 8.70(a) [§ 30-29-870]).

The requirement of section 8.25(b) that, unless the Act or the articles of incorporation otherwise provide, a board committee may be created only by the affirmative vote of a majority of the board of directors then in office, or, if greater, by the number of directors required to take action by the articles of incorporation or bylaws, reflects the importance of the decision to invest board committees with power to act under section 8.25. Sections 7.44(b), 8.55(b), 8.62(a) and 8.70 contain exceptions to this rule.

The limitations in section 8.25(d)(1) through (4) are based on the principle that the listed actions so substantially affect the rights of shareholders or are so fundamental to the governance of the corporation that they should be determined by the full board and not delegated to a committee. On the other hand, section 8.25(d) allows board committees to take many actions that may be material, such as the authorization of long-term debt and capital investment or the issuance of shares.

Although section 8.25(d)(1) generally makes nondelegable the decision whether to authorize or approve distributions, including dividends, it does permit the delegation to a board committee of power to approve a distribution pursuant to a formula or method or within limits prescribed by the board of directors. Therefore, the board of directors could set a dollar range and timeframe for a prospective dividend and delegate to a board committee the authority to determine the exact amount and record and payment dates of the dividend. The board of directors also could establish certain conditions to the payment of a distribution and delegate to a board committee the power to determine whether the conditions have been satisfied.

Section 8.25(e) is a rule of convenience that permits the board of directors or the other board committee members to replace an absent or disqualified member during the time that the member is absent or disqualified. Unless otherwise provided or unless a quorum is no longer present, replacement of an absent or disqualified member of a committee is

not necessary to permit the other committee members to continue to perform their duties.

§ 30-29-826. Submission of matters for shareholder vote. — A corporation may agree to submit a matter to a vote of its shareholders even if, after approving the matter, the board of directors determines it no longer recommends the matter.

History.

I.C., § 30-29-826, as added by 2019, ch. 90, § 89, p. 220.

Official Comment

Section 8.26 [this section] authorizes a corporation to enter into an agreement, such as a merger agreement, containing a provision that requires a shareholder vote on the matter despite a subsequent change in the recommendation of the board of directors. Otherwise, a board is not required to submit a matter to the shareholders, even if it has been approved by the board. Section 8.26 also applies to the provisions of the Act that require the board of directors to approve a matter before recommending that the shareholders vote to approve it. Section 8.26 does not change the standards of conduct or liability applicable when considering whether to authorize such agreement by the corporation.

§ 30-29-827 through 30-29-829. Reserved.

History.

I.C., § 30-29-826, as added by 2015, ch. 243, § 63, p. 758.

§ 30-29-830. Standards of conduct for directors. — (a) Each member of the board of directors, when discharging the duties of a director, shall act:

(1) In good faith; and

(2) In a manner the director reasonably believes to be in the best interests of the corporation.

(b) The members of the board of directors or a board committee, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

(c) In discharging board or board committee duties, a director shall disclose, or cause to be disclosed, to the other board or committee members information not already known by them but known by the director to be material to the discharge of their decision-making or oversight functions, except that disclosure is not required to the extent that the director reasonably believes that doing so would violate a duty imposed under law, a legally enforceable obligation of confidentiality, or a professional ethics rule.

(d) In discharging board or board committee duties, a director who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subsection (f)(1) or (3) of this section to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one (1) or more of the board's functions that are delegable under applicable law.

(e) In discharging board or board committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data prepared or presented by any of the persons specified in subsection (f) of this section.

(f) A director is entitled to rely, in accordance with subsection (d) or (e) of this section, on:

(1) One (1) or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports, or statements provided;

(2) Legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters:

(i) Within the particular person's professional or expert competence; or

(ii) As to which the particular person merits confidence; or

(3) A board committee of which the director is not a member if the director reasonably believes the committee merits confidence.

History.

I.C., § 30-29-830, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 90, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, inserted "or conduct" in the section heading; redesignated the existing paragraphs; divided and rewrote former subsection (3) as subsections (c) and (d), which formerly read: "In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subsection (5)(a) or (c) of this section to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one (1) or more of the board's functions that are delegable under applicable law"; in subsection (e), inserted "board" preceding "committee" near the beginning and substituted "subsection (f) of this section" for "subsection (5) of this section" at the end; and, in subsection (f), substituted "subsection (d) or (e) of this section" for "subsection (3) or (4) of this section" near the end of the introductory paragraph.

Compiler's Notes.

This section is derived from former § 30-1-830.

Official Comment

Section 8.30 [this section] sets standards of conduct for directors that focus on the manner in which directors make their decisions, not the correctness of the decisions made. Section 8.30 should be read in light of the basic role of directors set forth in section 8.01(b) [§ 30-29-801], which provides that the "business and affairs of a corporation shall be managed by or under the direction and subject to the oversight of the board of directors," as supplemented by various provisions of the Act assigning specific powers or responsibilities to the board. The standards of conduct for directors established by section 8.30 are analogous to those generally articulated by courts in evaluating director conduct, often referred to as the duties of care and loyalty.

Section 8.30 addresses standards of conduct — the level of performance expected of directors undertaking the role and responsibilities of the office of director. The section does not address the liability of a director, although exposure to liability may result from a failure to honor the standards of conduct required to be observed. The issue of director liability is addressed in sections 8.31 and 8.32 [§§ 30-29-831 and 30-29-832]. Section 8.30 does, however, play an important role in evaluating a director's conduct and the effectiveness of board action. It has relevance in assessing, under section 8.31, the reasonableness of a director's belief. Similarly, it has relevance in assessing a director's timely attention to appropriate inquiry when particular facts and circumstances of significant concern materialize. It also serves as a frame of reference for determining, under section 8.32(a), liability for an unlawful distribution. Finally, section 8.30 compliance may influence a court's analysis where injunctive relief against a transaction is being sought. Directors act both individually and collectively as a board in performing their functions and discharging their duties. Section 8.30 addresses actions in both capacities.

Under the standards of section 8.30, the board may delegate or assign to appropriate officers or employees of the corporation the authority or duty to exercise powers that the law does not require the board to retain. Because the directors are entitled to rely on these persons absent knowledge making reliance unwarranted, the directors will not be in breach of the standards under section 8.30 as a result of their delegatees' actions or omissions so

long as the board acted in good faith and complied with the other standards of conduct set forth in section 8.30 in delegating responsibility and, where appropriate, monitoring performance of the duties delegated. In addition, subsections (d), (e) and (f) permit a director to rely on enumerated third parties for specified purposes, although reliance is prohibited when a director has knowledge that makes reliance unwarranted. Section 8.30(a)'s standards of good faith and reasonable belief in the best interests of the corporation also apply to a director's reliance under subsections (d), (e) and (f).

1. Section 8.30(a).

Section 8.30(a) establishes the basic standards of conduct for all directors and its mandate governs all aspects of directors' conduct, including the requirements in other subsections. It includes concepts courts have used in defining the duty of loyalty. Two of the phrases used in section 8.30(a) deserve further comment:

• The phrase "reasonably believes" is both subjective and objective in character. Its first level of analysis is geared to what the particular director, acting in good faith, actually believes — not what objective analysis would lead another director (in a like position and acting in similar circumstances) to conclude. The second level of analysis is focused specifically on "reasonably." Although a director has wide discretion in gathering information and reaching conclusions, whether a director's belief is reasonable (i.e., could — not would — a reasonable person in a like position and acting in similar circumstances, taking into account that director's knowledge and experience, have arrived at that belief) ultimately involves an overview that is objective in character.

• The phrase "best interests of the corporation" is key to an understanding of a director's duties. The term "corporation" is a surrogate for the business enterprise as well as a frame interests," the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups of shareholders or other corporate constituencies may differ.

Section 8.30 operates as a "baseline" principle governing director conduct in circumstances uncomplicated by self-interest. The Act recognizes, however, that directors' personal interests may not always align

with the corporation's best interests and provides procedures by which situations and transactions involving conflicts of interest can be processed. See subchapter D [§§ 30-29-740 to 30-29-747] (derivative proceedings) of chapter 7 and subchapters E [§§ 30-29-850 to 30-29-859] (indemnification and advance for expenses), F [§§ 30-29-860 to 30-29-863] (directors' conflicting interest transactions), and G [§ 30-29-870] (business opportunities) of this chapter 8. Those procedures generally contemplate that the interested director will provide appropriate disclosure and will not be involved in taking action on the matter giving rise to the conflict of interest.

2. Section 8.30(b).

Section 8.30(b) establishes a general standard of care for directors in the context of their dealing with the board's decision-making and oversight functions. Although certain aspects will involve individual conduct (*e.g.*, preparation for meetings), these functions are generally performed by the board of directors through collective action, as recognized by the reference in subsection (b) to board and committee "members" and "their duties." In contrast with section 8.30(a)'s individual conduct mandate, section 8.30(b) has a two-fold thrust: it provides a standard of conduct for individual action and, more broadly, it states a conduct obligation — "shall discharge their duties" — concerning the degree of care to be used collectively by the directors when performing those functions. The standard is not what care a particular director might believe appropriate in the circumstances but what a person — in a like position and acting under similar circumstances — would reasonably believe to be appropriate. Thus, the degree of care that directors should employ under section 8.30(b) involves an objective standard.

The process by which a director becomes informed, in carrying out the decision-making and oversight functions, will vary. The directors' decision-making function is reflected in various sections of the Act, including: the issuance of shares (section 6.21 [§ 30-29-621]); distributions (section 6.40 [§ 30-29-640]); dismissal of derivative proceedings (section 7.44 [§ 30-29-744]); indemnification (section 8.55 [§ 30-29-855]); conflict of interest transaction authorization (section 8.62 [§ 30-29-862]); articles of incorporation amendments (sections 10.02 and 10.03 [§§ 30-29-1002 and 30-29-1003]); bylaw amendments (section 10.20 [§ 30-29-1020]); mergers

and share exchanges (section 11.04 [§ 30-29-1104]); asset dispositions (section 12.02 [§ 30-29-1202]); and dissolution (section 14.02 [§ 30-29-1402]). The directors' oversight function is established under section 8.01. In discharging the section 8.01 duties associated with the board's oversight function, the standard of care entails primarily a requirement of attention. In contrast with the board's decision-making function, which generally involves informed action at a point in time, the oversight function is concerned with a continuum and the attention of the directors accordingly involves participatory performance over a period of time.

Several of the phrases chosen to define the standard of conduct in section 8.30(b) deserve specific mention:

• The phrase "becoming informed," in the context of the decision—making function, refers to the process of gaining sufficient familiarity with the background facts and circumstances to make an informed judgment. Unless the circumstances would permit a reasonable director to conclude that he or she is already sufficiently informed, the standard of care requires every director to take steps to become informed about the background facts and circumstances before taking action on the matter at hand. The process typically involves review of written materials provided before or at the meeting and attention to or participation in the deliberations leading up to a vote. In addition to considering information and data on which a director is expressly entitled to rely under section 8.30(e), "becoming informed" can also involve consideration of information and data generated by other persons, for example, review of industry studies or research articles prepared by third parties. It can also involve direct communications, outside of the boardroom, with members of management or other directors. There is no one way for "becoming informed," and both the method and measure — "how to" and "how much" — are matters of reasonable judgment for the director to exercise.

• The phrase "devoting attention," in the context of the oversight function, refers to considering such matters as the corporation's information and reporting systems generally and not to an independent investigation into particular system inadequacies or noncompliance. Although directors typically give attention to future plans and trends as well as current activities, they should not be expected to anticipate any particular problems which the corporation may face except in those circumstances where

something has occurred to make it obvious to the board that the corporation should be addressing a particular problem. The standard of care associated with the oversight function involves gaining assurances from management and advisers that appropriate systems have been established, such as those concerned with legal compliance, risk assessment or internal controls. Such assurances also should cover establishment of ongoing monitoring of the systems in place, with appropriate follow-up responses when alerted to the issues requiring attention.

• The reference to "person," without embellishment, is intended to avoid implying any qualifications, such as specialized expertise or experience requirements, beyond the basic attributes of common sense, practical wisdom, and informed judgment (however, see the last bullet below).

• The phrase "reasonably believe appropriate" refers to the array of possible options that a person possessing the basic attributes of common sense, practical wisdom and informed judgment would recognize to be available, in terms of the degree of care that might be appropriate, and from which a choice by such person would be made. The measure of care that such person might determine to be appropriate, in a given instance, would normally involve a selection from the range of options and any choice within the realm of reason would be an appropriate decision under the standard of care called for under section 8.30(b). However, a decision that is so removed from the realm of reason, or is so unreasonable, that it falls outside the permissible bounds of sound discretion, and thus is an abuse of discretion, will not satisfy the standard.

• The phrase "in a like position" recognizes that the "care" under consideration is that which would be used by the "person" if he or she were a director of the particular corporation.

• The combined phrase "in a like position . . . under similar circumstances" is intended to recognize that (i) the nature and extent of responsibilities will vary, depending upon such factors as the size, complexity, urgency, and location of activities carried on by the particular corporation, (ii) decisions must be made on the basis of the information known to the directors without the benefit of hindsight, and (iii) the special background, qualifications, and oversight responsibilities of a particular

director may be relevant in evaluating that director's compliance with the standard of care.

3. Section 8.30(c).

A requirement to disclose to other directors information that a director knows to be material to the decision-making or oversight functions of the board of directors or a board committee is implicit in the standards of conduct set forth in sections 8.30(a) and (b), but section 8.30(c) makes this explicit. Thus, for example, when a member of the board of directors knows information that the director recognizes is material to a decision by the board but is not known to the other directors, the director is obligated to disclose that information to the other members of the board. Such disclosure can occur through direct statements in meetings of the board, or by any other timely means, including, for example, communicating the information to the chairman of the board or the chairman of a committee, or to the corporation's general counsel, and requesting that the recipient inform the other board or committee members of the information.

Section 8.30(c) recognizes that a duty of confidentiality to a third party can override a director's obligation to share with other directors information pertaining to a current corporate matter. In some circumstances, a duty of confidentiality to a third party may even prohibit disclosure of the nature or the existence of the duty itself. Ordinarily, however, a director who withholds material information based on a reasonable belief that a duty of confidentiality to a third party prohibits disclosure should advise the other directors of the existence and nature of that duty. Under the standards of conduct set forth in section 8.30(a), the withholding of material information may, depending on the nature of the material information and of the matter before the board of directors or a board committee, require that a director abstain or recuse himself or herself from all or a portion of the other directors' deliberation or vote on the matter to which the undisclosed information is material, or even resign as a director. See Official Comment to section 8.62.

In connection with a director's conflicting interest transaction, the required disclosure (as defined in section 8.60 [§ 30-29-860]) that must be made under section 8.62(a) and the exceptions to the required disclosure in that context under section 8.62(b) have elements that parallel the disclosure

obligation of directors under section 8.30(c). The demands of section 8.62, however, are more detailed and specific. They apply to just one situation — a director's conflicting interest transaction — while the requirements of section 8.30(c) apply generally to all other decision-making and oversight functions. For example, the specific requirements of section 8.62(a)(1) for deliberation and a vote outside the presence of the conflicted director are not imposed universally for all decision-making matters or for oversight matters that do not involve decisions. Although they may be different from the generally applicable provisions of section 8.30(c), the specific provisions of subchapter 8F control and are exclusive with respect to director conflicting interest transactions.

The requirement that a director disclose information to other directors as set forth in section 8.30(c) is different from any common law duty the board may have to cause the corporation to make disclosures to shareholders under certain circumstances. The Act does not seek to codify such a duty of disclosure, but leaves its existence and scope, the circumstances for its application, and the consequences of any failure to satisfy it, to be developed by courts on a case-by-case basis.

4. Section 8.30(d).

The delegation of authority and responsibility described in section 8.30(d) may take a variety of forms, including (i) formal action through a board resolution, (ii) implicit action through the election of corporate officers (*e. g.*, chief financial officer or controller) or the appointment of corporate managers (*e.g.*, credit manager), or (iii) informal action through a course of conduct (*e.g.*, involvement through corporate officers and managers in the management of a significant 50%-owned joint venture). Under section 8.30(d), a director may properly rely on those to whom authority has been delegated pursuant to section 8.30(d) respecting particular matters calling for specific action or attention in connection with the directors' decision-making function as well as matters on the board's continuing agenda, such as legal compliance and internal controls, in connection with the directors' oversight function. Delegation should be carried out in accordance with the standard of care set forth in section 8.30(b).

By identifying those persons upon whom a director may rely in connection with the discharge of duties, section 8.30(d) does not limit the ability of directors to delegate their powers under section 8.01(b) except where delegation is expressly prohibited by the Act or otherwise by applicable law. See section 8.25 [§ 30-29-825] and its Official Comment for discussion of delegation to committees of the authority of the board under section 8.01. By employing the concept of delegation, the Act does not limit the ability of directors to establish baseline principles as to management responsibilities. Specifically, section 8.01(b) provides that "all corporate powers shall be exercised by or under the authority of" the board, and a basic board function involves the allocation of management responsibilities and the related assignment (or delegation) of corporate powers. For example, a board can properly decide to retain a third party to assume responsibility for the administration of designated aspects of risk management for the corporation (*e.g.*, health insurance or disability claims).

Although the board of directors may delegate the authority or duty to perform one or more of its functions, delegation and reliance under section 8.30(d) may not alone constitute compliance with sections 8.30(a) and (b) and the action taken by the delegatee may not alone satisfy the directors or a noncommittee board member's section 8.01 responsibilities. On the other hand, failure of the board committee or the corporate officer or employee performing the function delegated to meet section 8.30(b)'s standard of care will not automatically result in violation by the board of section 8.01. Factors to be considered in determining whether a violation of section 8.01 has occurred will include the care used in the delegation to and supervision over the delegatee, and the amount of knowledge regarding the particular matter which is reasonably available to the particular director. Care in delegation and supervision includes appraisal of the capabilities and diligence of the delegatee in light of the subject and its relative importance and may be satisfied, in the usual case, by receipt of reports concerning the delegatee's activities. The enumeration of these factors is intended to emphasize that directors may not abdicate their responsibilities and avoid accountability simply by delegating authority to others. Rather, a director who is accountable for the acts of delegatees will fulfill the director's duties if the standards contained in section 8.30 are met.

5. Section 8.30(e).

Reliance under section 8.30(e) on a report, statement, opinion, or other information is permitted only if the director has read or heard orally presented the information, opinion, report or statement in question, or took other steps to become generally familiar with it. A director must comply with the general standard of care of section 8.30(b) in making a judgment as to the reliability and competence of the source of information upon which the director proposes to rely or, as appropriate, that it otherwise merits confidence.

6. Section 8.30(f).

In determining whether a corporate officer or employee is "reliable," for purposes of section 8.30(f)(1), the director would typically consider (i) the individual's background experience and scope of responsibility within the corporation in gauging the individual's familiarity and knowledge respecting the subject matter and (ii) the individual's record and reputation for honesty, care and ability in discharging responsibilities which he or she undertakes. In determining whether a person is "competent," the director would normally take into account the same considerations and, if expertise should be relevant, the director would consider the individual's technical skills as well. Recognition of the right of one director to rely on the expertise and experience of another director, in the context of board or committee deliberations, is unnecessary, for reliance on shared experience and wisdom of other board members is an implicit underpinning of collective board conduct. In relying on another member of the board, a director would quite properly take advantage of the colleague's knowledge and experience in becoming informed about the matter at hand before taking action; however, the director would be expected to exercise independent judgment when it comes time to vote.

Advisers on whom a director may rely under section 8.30(f)(2) include not only licensed professionals, such as lawyers, accountants, and engineers, but also those in other fields involving special experience and skills, such as investment bankers, geologists, management consultants, actuaries, and appraisers. The adviser could be an individual or an organization, such as a law or investment banking firm. Reliance on a nonmanagement director, who is specifically engaged (and, normally, additionally compensated) to undertake a special assignment or a particular consulting role, would fall within this outside adviser frame of reference.

The concept of "expert competence" embraces a wide variety of qualifications and is not limited to the more precise and narrower recognition of experts under the Securities Act of 1933. In addition, a director may also rely on outside advisers where skills or expertise of a technical nature is not a prerequisite, or where the person's professional or expert competence has not been established, so long as the director reasonably believes the person merits confidence. For example, a board might choose to engage a private investigator to inquire into a particular matter (*e.g.*, follow up on rumors about a senior executive's alleged misconduct) and properly rely on the private investigator's report.

Section 8.30(f)(3) permits reliance on a board committee when it is submitting recommendations for action by the full board of directors as well as when it is performing supervisory or other functions in instances where neither the full board of directors nor the committee takes dispositive action. For example, the compensation committee typically reviews proposals and makes recommendations for action by the full board of directors. There also might be reliance upon an investigation undertaken by a board committee and reported to the full board, which forms the basis for a decision by the board of directors not to take dispositive action. Another example is reliance on a board committee, such as an audit committee with respect to the board's ongoing role of oversight of the accounting and auditing functions of the corporation. In addition, where reliance on information or materials prepared or presented by a board committee is not involved in connection with board action, a director may properly rely on oversight monitoring or dispositive action by a board committee (of which the director is not a member) empowered to act pursuant to authority delegated under section 8.25 or acting with the acquiescence of the board of directors. See the Official Comment to section 8.25. In parallel with section 8.30(f)(2)(ii), the concept of "confidence" is used instead of "competence" to avoid any inference that technical skills are a prerequisite. In the usual case, the appointment of committee members or the reconstitution of the membership of a standing committee (*e.g.*, the audit committee), following an annual shareholders' meeting, would alone manifest the noncommittee members' belief that the committee "merits confidence." Depending on the circumstances, the reliance contemplated by section 8.30(f)(3) is geared to the point in time when the board takes action or the period of time over which a committee is engaged in an oversight function; consequently, the

judgment to be made (i.e., whether a committee "merits confidence") will arise at varying points in time. Ordinarily, after making an initial judgment that a committee (of which a director is not a member) merits confidence, a director may continue to rely on that committee so long as the director has no reason to believe that confidence is no longer warranted.

7. Application to Officers.

Section 8.30 generally deals only with directors. Section 8.42 [§ 30-29-842] and its Official Comment explain the extent to which the principles set forth in section 8.30 apply to officers.

§ 30-29-831. Standards of liability for directors. — (a) A director shall not be liable to the corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes that:

(1) No defense interposed by the director based on any provision in the articles of incorporation authorized by section 30-29-202(b)(4) or (6), Idaho Code; the protection afforded by section 30-29-861, Idaho Code, for action taken in compliance with section 30-29-862 or 30-29-863, Idaho Code; or the protection afforded by section 30-29-870, Idaho Code, precludes liability; and

(2) The challenged conduct consisted or was the result of:

(i) Action not in good faith; or

(ii) A decision:

(A) That the director did not reasonably believe to be in the best interests of the corporation; or

(B) As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(iii) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct:

(A) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation; and

(B) After a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation; or

(iv) A sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making or causing to be made appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need for such inquiry; or

(v) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.

(b) The party seeking to hold the director liable:

(1) For money damages, shall also have the burden of establishing that:

(i) Harm to the corporation or its shareholders has been suffered; and

(ii) The harm suffered was proximately caused by the director's challenged conduct; or

(2) For other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, shall also have whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or

(3) For other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, shall also have whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

(c) Nothing contained in this section shall:

(1) In any instance where fairness is at issue, such as consideration of the fairness of a transaction to the corporation under section 30-29-861(b)(3), Idaho Code, alter the burden of proving the fact or lack of fairness otherwise applicable;

(2) Alter the fact or lack of liability of a director under another section of this chapter, such as the provisions governing the consequences of an unlawful distribution under section 30-29-832, Idaho Code, or a transactional interest under section 30-29-861, Idaho Code; or

(3) Affect any rights to which the corporation or a shareholder may be entitled under another statute of this state or the United States.

History.

I.C., § 30-29-831, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 91, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; and, in subsection (a), rewrote paragraph (1), which formerly read: "Any provision in the articles of incorporation authorized by section 30-29-202(2)(d), Idaho Code, or the protection afforded by section 30-29-861, Idaho Code, for action taken in compliance with section 30-29-862 or 30-29-863, Idaho Code, if interposed as a bar to the proceeding by the director, does not preclude liability; and", and rewrote paragraph (2)(iv), which formerly read: "A sustained failure of the director to be informed about the business and affairs of the corporation, or other material failure of the director to discharge the oversight function; or".

Compiler's Notes.

This section is derived from former § 30-1-831.

Official Comment

Boards of directors and corporate managers make numerous decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to have been unwise or the result of a mistake of judgment, it is not reasonable to impose liability for an informed decision made in good faith which with the benefit of hindsight turns out to be wrong or unwise. Therefore, as a general rule, a director is not exposed to personal liability for injury or damage caused by an unwise decision and conduct conforming with the standards of section 8.30 [§ 30-29-830] will almost always be protected regardless of the end result. Moreover, the fact that a director's performance fails to meet the standards of section 8.30 does not in itself establish personal liability for damages that the corporation or

its shareholders may have suffered as a consequence. Nevertheless, a director can be held liable for misfeasance or nonfeasance in performing his or her duties. Section 8.31 [this section] sets forth the standards of liability of directors as distinct from the standards of conduct set forth in section 8.30.

Courts have developed the broad common law concept of the business judgment rule. Although formulations vary, in basic principle, a board of directors generally enjoys a presumption of sound business judgment and its decisions will not be disturbed by a court substituting its own notions of what is or is not sound business judgment if the board's decisions can be attributed to any rational business purpose. It is also presumed that, in making a business decision, directors act in good faith, on an informed basis, and in the honest belief that the action taken is in the best interests of the corporation. The elements of the business judgment rule and the circumstances for its application continue to be developed and refined by courts. Accordingly, it would not be desirable to freeze the concept in a statute. Thus, section 8.31 does not codify the business judgment rule as a whole, although certain of its principal elements, relating to personal liability issues, are reflected in section 8.31(a)(2).

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Note on Directors' Liability.

A director's exposure to financial liability (*e.g.*, in a lawsuit for money damages suffered by the corporation or its shareholders claimed to have resulted from misfeasance or nonfeasance in connection with the performance of the director's duties) can be analyzed as follows:

• *Articles of incorporation limitations*. If the corporation's articles of incorporation contain a provision eliminating its directors' liability to the corporation or its shareholders for money damages, adopted pursuant to section 2.02(b)(4) [§ 30-29-202], there is no liability unless the director's conduct involves one of the exceptions prescribed in that section that preclude the elimination of liability. If the matter involves a director's taking of a business opportunity and an articles of incorporation provision has been adopted under section 2.02(b)(6) eliminating directors' duties with respect to those opportunities, there also will be no liability. See section 2.02 and its Official Comment.

• *Director's conflicting interest transaction safe harbor.* If the matter at issue involves a director's conflicting interest transaction (as defined in section 8.60 [§ 30-29-860]) and a safe harbor procedure under section 8.61 [§ 30-29-861] involving action taken in compliance with section 8.62 [§ 30-29-862] or 8.63 [§ 30-29-863] has been properly implemented, there is no liability for the interested director arising out of the transaction. See subchapter 8F [§§ 30-29-860 to 30-29-863].

• *Business opportunities safe harbors*. Similarly, if the matter involves a director's pursuit or taking of a business opportunity, there is no liability for that director if (i) an applicable limitation or elimination of any duty to offer that business opportunity has been adopted pursuant to section 2.02(b)(6), or (ii) a safe harbor procedure under section 8.70 [§ 30-29-870] has been properly implemented, even if the articles of incorporation contain no provision under section 2.02(b)(6). See subchapter 8G [§ 30-29-870].

• *Business judgment rule*. If a provision in the articles of incorporation adopted pursuant to section 2.02(b)(4) or (6) or a safe harbor procedure under section 8.61 or 8.70 does not shield the director's conduct from liability, the presumptions, standards of judicial review and procedural matters related to the business judgment rule may insulate the director from liability for conduct in connection with a corporate decision.

• *Damages and proximate cause*. If the business judgment rule does not shield the directors' decision-making from liability, as a general rule it must be established that money damages were suffered by the corporation or its shareholders and those damages resulted from and were legally caused by the challenged act or omission of the director.

• *Other liability for money payment*. Aside from a claim for damages, the director may have monetary liability for other reasons, for example, if corporate resources have been used without proper authorization, or a claim for disgorgement of short-swing trading profits under section 16(b) of the Securities Exchange Act of 1934.

• *Equitable profit recovery or disgorgement*. An equitable remedy compelling the disgorgement of the director's improper financial gain or entitling the corporation to profit recovery, where directors' duties have been breached, may require the payment of money by the director to the corporation.

• *Corporate indemnification*. If the director is monetarily liable, the director may be indemnified by the corporation for any payments made and expenses incurred, depending upon the circumstances. See subchapter 8E [§ 30-29-850 to 30-29-859].

• *Insurance*. To the extent that corporate indemnification is not available, the director may be reimbursed for the money damages for which the director is accountable, together with proceeding-related expenses, if the claim and grounds for liability come within the coverage under directors' and officers' liability insurance that has been purchased by the corporation as authorized under section 8.57 [§ 30-29-857]

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1. Section 8.31(a).

A. SECTION 8.31(A)(1) — AFFIRMATIVE DEFENSES.

Under section 8.31(a)(1), if a provision in the articles of incorporation (i) (adopted pursuant to section 2.02(b)(4)) shelters the director from liability for money damages, or (ii) (adopted pursuant to section 2.02(b)(6)) limits or eliminates any duty to offer the particular business opportunity to the corporation, or if a safe harbor procedure under sections 8.61(b)(1) or (b)(2) or section 8.70(a)(1) shelters the director's conduct in connection with a conflicting interest transaction or the pursuit or taking of a business opportunity, and such defense applies to all claims in plaintiff's complaint, there is no need to consider further the application of section 8.31's standards of liability. In that event, the court would presumably grant the defendant director's motion for dismissal or summary judgment (or the equivalent) and the proceeding would be ended. If the defense applies to some but not all of plaintiff's claims, dismissal or summary judgment would presumably be granted with respect to those claims. Termination of the proceeding or dismissal of claims on the basis of a provision in the articles of incorporation or a safe harbor procedure will not automatically follow, however, if the party challenging the director's conduct can assert any of the valid bases for contesting the availability of the liability shelter. Absent such a challenge, the relevant shelter provision is self-executing and the individual director's exoneration from liability is automatic. Further, under both sections 8.61 and 8.70, the directors approving the conflicting interest transaction or approving a director's taking of the business

opportunity will presumably be protected as well, because compliance with the relevant standards of conduct under section 8.30 is important for their action to be effective and because, as noted above, conduct meeting section 8.30's standards will almost always be protected.

If a claim of liability arising out of a challenged act or omission of a director is not resolved and disposed of under section 8.31(a)(1), section 8.31(a)(2) provides the basis for evaluating whether the conduct in question can be challenged. One of the elements in section 8.31(a)(2) must be established for a director to have liability under section 8.31.

B. SECTION 8.31(A)(2)(I) — GOOD FAITH.

It is a basic standard under section 8.31(a)(2)(i) that a director's conduct in performing his or her duties be in good faith. If a director's conduct can be successfully challenged pursuant to other clauses of section 8.31(a)(2), there is a substantial likelihood that the conduct in question will also present an issue of good faith implicating section 8.31(a)(2)(i). Similarly, if section 8.31(a)(2) included only subsection (i), much of the conduct with which the other clauses are concerned could still be considered under that subsection, on the basis that such conduct evidenced the director's lack of good faith. Where conduct has not been found deficient on other grounds, decision-making outside the bounds of reasonable judgment can give rise to an inference of bad faith. That form of conduct, sometimes characterized as "reckless indifference" or "deliberate disregard," giving rise to an inference of bad faith can also raise a question whether the director could have reasonably believed that the best interests of the corporation would be served. These issues could arise, for example, in approval of conflicting interest transactions. See the Official Comment to section 8.61.

C. SECTION 8.31(A)(2)(II) — REASONABLE BELIEF.

Liability under section 8.31(a)(2)(ii) turns on a director's reasonable belief with respect to the nature of his or her decision and the degree to which he or she has become informed. In each case, the director must have an actual subjective belief and, so long as it is his or her honest and good faith belief, a director has wide discretion. There is also an objective element to be met, in that the director's belief must also be reasonable. The inquiry is similar to that in section 8.30(a) — could a reasonable person in a like position and acting in similar circumstances have arrived at that belief?

In the rare case where a decision respecting the corporation's best interests is so removed from the realm of reason (*e.g.*, corporate waste), or a belief as to the sufficiency of the director's preparation to make an informed judgment is so unreasonable as to fall outside the permissible bounds of sound discretion (*e.g.*, if the director has undertaken no preparation and is completely uninformed), the director's judgment will not be sustained.

D. SECTION 8.31(A)(2)(III) — LACK OF OBJECTIVITY OR INDEPENDENCE.

If the matter at issue involves a director's transactional interest, such as a "director's conflicting interest transaction" in which a "related person" is involved (see section 8.60), it will be governed by section 8.61; otherwise, a lack of objectivity due to a relationship's influence on the director's judgment will be evaluated, in the context of the pending challenge of director conduct, under section 8.31. If the matter at issue involves lack of independence, the proof of domination or control and its influence on the director's judgment will typically entail different (and perhaps more convincing) evidence than what may be involved in a lack of objectivity case. The variables are manifold, and the facts must be sorted out and weighed on a case-by-case basis. For example, the closeness or nature of the relationship with the person allegedly exerting influence on the director could be a factor. If the director is required under section 8.31(a)(2)(iii)(B) to establish that the action taken by him or her was reasonably believed to be in the best interests of the corporation, the inquiry will involve the elements of actual subjective belief and objective reasonableness similar to those found in section 8.31(a)(2)(ii) and section 8.30(a).

To call into question the director's objectivity or independence on the basis of a person's relationship with, or exertion of dominance over, the director, the person must have a material interest in the challenged conduct. In the typical case, analysis of another's interest would first consider the materiality of the transaction or conduct at issue — in most cases, any transaction or other action involving the attention of the board of directors or a board committee will cross the materiality threshold, but not always — and would then consider the materiality of that person's interest in the matter. The possibility that a director's judgment would be adversely affected by another's interest in a transaction or conduct that is not material,

or another's immaterial interest in a transaction or conduct, is sufficiently remote that it should not be made subject to judicial review.

In situations where there may be a lack of objectivity, domination, a conflict of interest or divided loyalty, or even where there may be grounds for the issue to be raised, the better course to follow where board or committee action is required is usually for the director to disclose the facts and circumstances posing the possible issue, and then to withdraw from the meeting (or, in the alternative, to abstain from the deliberations and voting). The board members free of any possible taint may then take appropriate action as contemplated by section 8.30 (or section 8.61 if applicable). If this course is followed, the director's conduct respecting the matter in question should be beyond challenge.

E. SECTION 8.31(A)(2)(IV) — FAILURE TO DEVOTE ATTENTION.

The director's role involves two fundamental components: the decision-making function and the oversight function. In contrast with the decision-making function, which generally involves action taken at a point in time, the oversight function under section 8.01(b) [§§ 30-29-801] involves ongoing monitoring of the corporation's business and affairs over a period of time. Although the facts will be outcome-determinative, deficient conduct involving a sustained failure to exercise oversight — where found actionable — has typically been characterized by the courts in terms of abdication and continued neglect by a director to devote attention, not a brief distraction or temporary interruption. Also embedded in the oversight function is the need to inquire when suspicions are aroused. This need to inquire is not a component of ongoing oversight, and does not entail proactive vigilance, but arises under section 8.31(a)(2)(iv) when, and only when, particular facts and circumstances of material concern (*e.g.*, evidence of embezzlement at a high level or the discovery of significant inventory shortages) surface.

F. SECTION 8.31(A)(2)(V) — IMPROPER FINANCIAL BENEFIT AND OTHER BREACHES OF DUTIES.

Subchapter 8F deals in detail with directors' transactional interests. Its coverage of those interests is exclusive and its safe harbor procedures for director's conflicting interest transactions (as defined) — providing shelter

from legal challenges based on interest conflicts, when properly observed — will establish a director's entitlement to any financial benefit gained from the transactional event. A director's conflicting interest transaction that is not protected by the fairness standard set forth in section 8.61(b)(3), pursuant to which the conflicted director may establish the transaction to have been fair to the corporation, would often involve receipt of a financial benefit to which the director was not entitled (*i.e.*, the transaction was not "fair" to the corporation). Unauthorized use of corporate assets, such as aircraft or hotel suites, would also provide a basis for the proper challenge of a director's conduct. There can be other forms of improper financial benefit not involving a transaction with the corporation or use of its facilities, such as where a director profits from unauthorized use of proprietary information.

There is no materiality threshold that applies to a financial benefit to which a director is not properly entitled. The Act observes this principle in several places, for example, the exception to liability elimination prescribed in section 2.02(b)(4)(i) and the indemnification restriction in section 8.51(d)(2) [§ 30-29-851], as well as the liability standard in section 8.31(a)(2)(v).

The second clause of section 8.31(a)(2)(v) is, in part, a catchall provision that implements the intention to make section 8.31 a generally inclusive provision but, at the same time, to recognize the existence of other breaches of common-law principles that can give rise to liability for directors. As developed in the case law, these actionable breaches may include unauthorized use of corporate property or information (which as noted above, might also be characterized as receipt of an improper financial benefit), unfair competition with the corporation or the taking of a corporate opportunity. In the case of corporate opportunity, if the director is alleged to have wrongfully diverted a business opportunity as to which the corporation had a prior right, the Act provides two possible safe harbors. First, any duty to offer the business opportunity to the corporation may have been limited or eliminated pursuant to a provision in the articles of incorporation authorized by section 2.02(b)(6). Second, section 8.70(a)(1) provides a safe harbor procedure for a director who wishes to pursue or take advantage of a business opportunity, regardless of whether such opportunity would be characterized as a "corporate opportunity" under existing case law. Note that section 8.70(b) provides that the fact that a director did not employ the

safe harbor procedure of section 8.70(a)(1) does not create an implication that the opportunity should have first been presented to the corporation or alter the burden of proof otherwise applicable to establish a breach of the director's duty to the corporation.

2. Section 8.31(b).

Whether a corporation or its shareholders have suffered harm and whether a particular director's conduct was the proximate cause of that harm may be affected by the collective nature of board action. Proper performance of the relevant duty through the action taken by the director's colleagues can overcome the consequences of his or her deficient conduct. For example, where a director's conduct can be challenged under section 8.31(a)(2)(ii)(B) by reason of having been uninformed about the decision or not reading the materials distributed before the meeting, or arriving late at the board meeting just in time for the vote but, nonetheless, voting in favor solely because the others were in favor — the favorable action by a quorum of properly informed directors would ordinarily protect the director against liability, either because there was no harm or the offending director's actions were not the proximate cause of the harm. Although the concept of "proximate cause" is a term of art that is basic to tort law, for purposes of section 8.31(b)(1), a useful approach for the concept's application would be that the challenged conduct must have been a "substantial factor in producing the harm."

3. Section 8.31(c).

Section 8.31(c) expressly disclaims any shift of the burden of proof otherwise applicable where the question of the fairness of a transaction or other challenged conduct is at issue. This is the case whether the question of fairness arises under another section of the Act, such as section 8.61, under existing case law, under a judicial requirement in a particular instance or otherwise. Similarly, section 8.31 does not affect liability under other sections of the Act. It also does not foreclose any rights of the corporation or its shareholders under other laws, for example, rights of shareholders or ersons other than the corporation and its shareholders, such as liability to employee benefit plan participants and beneficiaries (who may or may not be shareholders), if the directors are determined to be fiduciaries under other applicable laws, to government agencies for regulatory violations or

to individuals claiming damages for injury governed by tort-law concepts (*e.g.*, libel or slander). Section 8.31 is not intended to change the standards applicable under these other laws or legal principles.

§ 30-29-832. Directors' liability for unlawful distributions. — (a) A director who votes for or assents to a distribution in excess of what may be authorized and made pursuant to section 30-29-640(a) or 30-29-1409(a), Idaho Code, is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating section 30-29-640(a) or 30-29-1409(a), Idaho Code, if the party asserting liability establishes that when taking the action the director did not comply with section 30-29-830, Idaho Code.

(b) A director held liable under subsection (a) of this section for an unlawful distribution is entitled to:

(1) Contribution from every other director who could be held liable under subsection (a) of this section for the unlawful distribution; and

(2) Recoupment from each shareholder of the pro rata portion of the amount of the unlawful distribution the shareholder accepted knowing the distribution was made in violation of section 30-29-640(a) or 30-29-1409(a), Idaho Code.

(c) A proceeding to enforce:

(1) The liability of a director under subsection (a) of this section is barred unless it is commenced within two (2) years after the date:

(i) On which the effect of the distribution was measured under section 30-29-640(e) or (g), Idaho Code; or

(ii) As of which the violation of section 30-29-640(a), Idaho Code, occurred as the consequence of disregard of a restriction in the articles of incorporation; or

(iii) On which the distribution of assets to shareholders under section 30-29-1409(a), Idaho Code, was made; or

(2) Contribution or recoupment under subsection (b) of this section is barred unless it is commenced within one (1) year after the liability of the claimant has been finally adjudicated under subsection (a) of this section.

History.

I.C., § 30-29-833, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 92, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, renumbered this section from former § 30-29-833; redesignated the existing paragraphs; and updated internal references throughout the section.

Compiler's Notes.

This section is derived from former § 30-1-833.

Official Comment

A director whose conduct, in voting for or assenting to a distribution, is challenged under section 8.32 [this section] will have no liability unless the complaining party establishes a breach of the relevant standards of section 8.30 [§ 30-29-830], for example a failure to act with the care required by section 8.30(b) or reliance on persons or information unwarranted under section 8.30(d) or (e). A shareholder (other than a director) who receives a payment not knowing of its invalidity is not subject to recoupment under subsection (b)(2). Although no attempt has been made in the Act to work out in detail the relationship between the right of recoupment from shareholders under subsection (b)(2) and the right of contribution from directors under subsection (b)(1), a court may equitably apportion the obligations and benefits arising from the application of the principles set forth in section 8.32.

Section 8.32(c) limits the time within which a proceeding may be commenced against a director for an unlawful distribution and the time within which a proceeding for contribution or recoupment may be made. The one-year period specified in subsection (c)(2) may end within or extend beyond the two-year period specified in subsection (c)(1).

§ 30-29-833. [Amended and Redesignated.]

STATUTORY NOTES

Compiler's Notes.

Former § 30-29-833 was amended and redesignated as § 30-29-832 by S.L. 2019, ch. 90, § 92, effective July 1, 2019.

§ 30-29-834 through 30-29-839. Reserved.

History.

I.C., § 30-29-834, as added by 2015, ch. 243, § 63, p. 758.

§ 30-29-840. Officers. — (a) A corporation has the offices described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) The board of directors may elect individuals to fill one (1) or more offices of the corporation. An officer may appoint one (1) or more officers if authorized by the bylaws or the board of directors.

(c) The bylaws or the board of directors shall assign an officer responsibility for maintaining and authenticating the records of the corporation required to be kept under section 30-29-1601(a), Idaho Code.

(d) The same individual may simultaneously hold more than one (1) office in a corporation.

History.

I.C., § 30-29-840, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 93, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "appointed by the board" for "designated by the board" near the middle of subsection (a); and rewrote subsection (c), which formerly read: "The bylaws or the board of directors shall assign to one (1) of the officers responsibility for preparing the minutes of the directors' and shareholders' meetings and for maintaining and authenticating the records of the corporation required to be kept under section 30-29-1601(1) and (2), Idaho Code."

Compiler's Notes.

This section is derived from former § 30-1-840.

Official Comment

Section 8.40 [this section] permits every corporation to designate the officers it will have. No particular officers are required.

The board of directors, as well as duly authorized officers, employees or agents, may also appoint other agents for the corporation. In addition, a board of directors has the intrinsic power to organize its own internal affairs, including designating officers of the board.

The officer who has the responsibility to maintain the minutes and authenticate the corporate records referred to in section 16.01(a) [§ 30-29-1601] is referred to as the "secretary" of the corporation throughout the Act. See section 1.40 [§ 30-29-140]. The person so designated has authority to bind the corporation by that officer's authentication under this section. This assignment of authority, traditionally vested in the corporate "secretary," allows third persons to rely on authenticated records without inquiry as to their truth or accuracy.

§ 30-29-841. Functions of officers. — Each officer has the authority and shall perform the functions set forth in the bylaws or, to the extent consistent with the bylaws, the functions prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the functions of other officers.

History.

I.C., § 30-29-841, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 94, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, substituted "duties" for "functions" in the section heading and throughout the section.

Compiler's Notes.

This section is derived from former § 30-1-841.

Official Comment The methods of investing officers with formal authority in section 8.41 [this section] do not exhaust the sources of an officer's actual or apparent authority. Specific officers, particularly the chief executive officer, may have implied authority to take certain actions on behalf of a corporation merely by virtue of their positions. Officers may also be vested with apparent authority by reason of corporate conduct on which third persons reasonably rely.

In addition to express, implied, or apparent authority, a corporation is bound by unauthorized acts of officers if they are ratified by the board of directors. Generally, ratification may extend only to acts that could have been authorized as an original matter. Ratification may itself be express or implied and may in some cases serve as the basis of apparent authority.

§ 30-29-842. Standards of conduct for officers. — (a) An officer, when performing in such capacity, has the duty to act:

(1) In good faith;

(2) With the care that a person in a like position would reasonably exercise under similar circumstances; and

(3) In a manner the officer reasonably believes to be in the best interests of the corporation.

(b) The duty of an officer includes the obligation:

(1) To inform the superior officer to whom, or the board of directors or the board committee to which, the officer reports of information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known to the officer to be material to such superior officer, board, or committee; and

(2) To inform his or her superior officer, or another appropriate person within the corporation, or the board of directors, or a board committee, of any actual or probable material violation of law involving the corporation or material breach of duty to the corporation by an officer, employee, or agent of the corporation that the officer believes has occurred or is likely to occur.

(c) In discharging his or her duties, an officer who does not have knowledge that makes reliance unwarranted is entitled to rely on:

(1) The performance of properly delegated responsibilities by one (1) or more employees of the corporation whom the officer reasonably believes to be reliable and competent in performing the responsibilities delegated; or

(2) Information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by one (1) or more employees of the corporation whom the officer reasonably believes to be competent in the matters presented or by legal counsel, public accountants or other persons retained by the corporation as to matters involving skill or expertise the officer reasonably believes are matters:

(i) Within the particular person's professional or expert competence; or

(ii) As to which the particular person merits confidence.

(d) An officer shall not be liable to the corporation or its shareholders for any decision to take or not to take action or any failure to take any action, as an officer, if the duties of the office are performed in compliance with this section. Whether an officer who does not comply with this section shall have liability will depend in such instance on applicable law, including those principles of section 30-29-831, Idaho Code, that have relevance.

History.

I.C., § 30-29-842, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 95, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "has the duty to act" for "shall act" at the end of the introductory paragraph of subsection (a); and added subsection (b).

Compiler's Notes.

This section is derived from former § 30-1-842.

Official Comment

Under section 8.42(a) [this section], an officer, when performing in such officer's official capacity, has to meet standards of conduct generally specified for directors under section 8.30 [§ 30-29-830]. This section is not intended to modify, diminish or qualify the duties or standards of conduct that may be imposed upon specific officers by other law or regulation.

Common law has generally recognized a duty on the part of officers and key employees to disclose to their superiors material information relevant to the affairs of the corporation. This duty is implicit in, and embraced under, the broader standard of section 8.42(a), but section 8.42(b) sets forth this disclosure obligation explicitly. Section 8.42(b)(1) specifies that business information shall be transmitted through the officer's regular reporting

channels. Section 8.42(b)(2) specifies the reporting responsibility differently with respect to actual or probable material violations of law or material breaches of duty. The use of the term "appropriate" in subsection (b)(2) accommodates any normative standard that the corporation may have prescribed for reporting potential violations of law or duty to a specified person, such as an ombudsperson, ethics officer, internal auditor, general counsel or the like, as well as situations where there is no designated person but the officer's immediate superior is not appropriate (for example, because the officer believes that individual is complicit in the unlawful activity or breach of duty).

Section 8.42(b)(1) should not be interpreted so broadly as to discourage efficient delegation of functions. It addresses the flow of information to the board of directors and to superior officers necessary to enable them to perform their decision-making and oversight functions. See the Official Comment to section 8.31 [§ 30-29-831]. The officer's duties under subsection (b) may not be negated by agreement; however, their scope under section 8.42(b)(1) may be shaped by prescribing the scope of an officer's functional responsibilities.

With respect to the duties under section 8.42(b)(2), codes of conduct or codes of ethics may prescribe the circumstances in which and mechanisms by which officers and employees may discharge their duty to report material information to superior officers or the board of directors, or to other designated persons.

The term "material" modifying violations of law or breaches of duty in section 8.42(b)(2) denotes a qualitative as well as quantitative standard. It relates not only to the potential direct financial impact on the corporation, but also to the nature of the violation or breach. For example, an embezzlement of $10,000, or even less, would be material because of the seriousness of the offense, even though the amount involved would ordinarily not be material to the financial position or results of operations of the corporation.

The duty under section 8.42(b)(2) is triggered by an officer's subjective belief that a material violation of law or breach of duty actually or probably has occurred or is likely to occur. This duty is not triggered by objective knowledge concepts, such as whether the officer should have concluded that

such misconduct was occurring. The subjectivity of the trigger under subsection (b)(2), however, does not excuse officers from their obligations under subsection (a) to act in good faith and with due care in the performance of the functions assigned to them, including oversight duties within their respective areas of responsibility. There may be occasions when the principles applicable under section 8.30(c) [§ 30-29-830] limiting the duty of disclosure by directors where a duty of confidentiality is overriding may also apply to officers. See the Official Comment to section 8.30(c).

An officer's ability to rely on others in meeting the standards prescribed in section 8.42 may be more limited, depending upon the circumstances of the particular case, than the measure and scope of reliance permitted a director under section 8.30, in view of the greater obligation the officer may have to be familiar with the affairs of the corporation. The proper delegation of responsibilities by an officer, separate and apart from the exercise of judgment as to the delegatee's reliability and competence, is concerned with the procedure employed. This will involve, in the usual case, sufficient communication such that the delegatee understands the scope of the assignment and, in turn, manifests to the officer a willingness and commitment to undertake its performance. The entitlement to rely upon employees assumes that a delegating officer will maintain a sufficient level of communication with the officer's subordinates to fulfill his or her supervisory responsibilities. The definition of "employee" in section 1.40 [§ 30-29-140] includes an officer; accordingly, section 8.42 contemplates the delegation of responsibilities to other officers as well as to non-officer employees.

Although under section 8.42(d), performance meeting that section's standards of conduct will eliminate an officer's exposure to any liability to the corporation or its shareholders, failure by an officer to meet that section's standards will not automatically result in liability. Deficient performance of duties by an officer, depending upon the facts and circumstances, will normally be dealt with through intracorporate disciplinary procedures, such as reprimand, compensation adjustment, delayed promotion, demotion or discharge. These procedures may be subject to (and limited by) the terms of an officer's employment agreement. See section 8.44 [§ 30-29-844].

In some cases, failure to observe relevant standards of conduct can give rise to an officer's liability to the corporation or its shareholders. A court review of challenged conduct will involve an evaluation of the particular facts and circumstances in light of applicable law. In this connection, section 8.42(d) recognizes that relevant principles of section 8.31, such as duties to deal fairly with the corporation and its shareholders and the challenger's burden of establishing proximately caused harm, should be taken into account. In addition, the business judgment rule will normally apply to decisions within an officer's discretionary authority. Liability to others can also arise from an officer's own acts or omissions (*e.g.*, violations of law or tort claims) and, in some cases, an officer with supervisory responsibilities can have risk exposure in connection with the acts or omissions of others.

The Official Comment to section 8.30 supplements this Official Comment to the extent that it can be appropriately viewed as generally applicable to officers as well as directors.

§ 30-29-843. Resignation and removal of officers. — (a) An officer may resign at any time by delivering written notice to the board of directors or its chair, or to the appointing officer or the secretary. A resignation is effective as provided in section 30-29-141(i), Idaho Code, unless the notice provides for a delayed effectiveness, including effectiveness determined upon a future event or events. If effectiveness of a resignation is stated to be delayed and the board of directors or the appointing officer accepts the delay, the board of directors or the appointing officer may fill the pending vacancy before the delayed effectiveness, but the new officer may not take office until the vacancy occurs.

(b) An officer may be removed at any time with or without cause by: (1) The board of directors; (2) The appointing officer, unless the bylaws or the board of directors provide otherwise; or (3) Any other officer if authorized by the bylaws or the board of directors.

(c) In this section "appointing officer" means the officer, including any successor to that officer, who appointed the officer resigning or being removed.

History.

I.C., § 30-29-843, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 96, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote subsection (a), which formerly read: "An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective time. If a resignation is made effective at a later time and the board or the appointing officer accepts the future effective time, the board or the appointing officer may fill the pending vacancy before the effective time if the board or the appointing officer provides that the successor does not take office until the effective time".

Compiler's Notes.

This section is derived from former § 30-1-843.

Official Comment

In part because of the unlimited power of removal under section 8.43(b) [this section], a corporation may enter into an employment agreement with the holder of an office that gives the officer rights in the event of removal or failure to be reelected or reappointed to office. This type of contract is binding on the corporation even if the articles of incorporation or bylaws provide that officers are elected for a term shorter than the period of the employment contract. Such an employment agreement does not override the removal power set forth in section 8.43(b) and may give the officer the right to damages, but not specific performance, if employment is terminated before the end of the contract term.

Section 8.43(b) provides the corporation with the flexibility to determine when, if ever, an officer will be permitted to remove another officer. To the extent that the corporation wishes to permit an officer, other than the appointing officer, to remove another officer, the bylaws or a board resolution should set forth clearly the persons having removal authority.

A person may be removed from office irrespective of contract rights or the presence or absence of "cause" in a legal sense.

§ 30-29-844. Contract rights of officers. — (a) The election or appointment of an officer does not itself create contract rights.

(b) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer.

History.

I.C., § 30-29-844, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 97, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs and inserted "election or" near the beginning of subsection (a).

Official Comment The removal of an officer with contract rights is without prejudice to the officer's rights in a proceeding seeking damages for breach of contract. See the Official Comment to section 8.43 [§ 30-29-843]. Similarly, an officer with an employment contract who prematurely resigns may be in breach of his or her employment contract. The mere election or appointment of an officer for a term does not create a contractual obligation on the officer's part to complete the term.

§ 30-29-845 through 30-29-849. Reserved.

History.

I.C., § 30-29-845, as added by 2015, ch. 243, § 63, p. 758.

§ 30-29-850. Definitions. — For purposes of this section and sections 30-29-851 through 30-29-859, Idaho Code:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger.

(2) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, manager, partner, trustee, employee or agent of another entity or employee benefit plan. A director or officer is considered to be serving an employee benefit plan at the corporation's request if the individual's duties to the corporation also impose duties on, or otherwise involve services by, the individual to the plan or to participants in or beneficiaries of the plan. "Director" or "officer" includes, unless the context requires otherwise, the estate or personal representative of a director or officer.

(3) "Liability" means the obligation to pay a judgment, settlement, penalty, fine, including an excise tax assessed with respect to an employee benefit plan, or reasonable expenses incurred with respect to a proceeding.

(4) "Official capacity" means:

(a) When used with respect to a director, the office of director in a corporation; and

(b) When used with respect to an officer, as contemplated in section 30-29-856, Idaho Code, the office in a corporation held by the officer.

"Official capacity" does not include service for any other domestic or foreign corporation or any joint venture, trust, employee benefit plan or other entity.

(5) "Party" means an individual who was, is or is threatened to be made a defendant or respondent in a proceeding.

(6) "Proceeding" means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitrative or investigative and whether formal or informal.

History.

I.C., § 30-29-850, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 98, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, in subsection (2), substituted "director, officer, manager, partner, trustee, employee or agent of another entity or employee benefit plan" for "director, officer, partner, trustee, employee or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan or other entity" at the end of the first sentence; deleted former subsections (3) and (4), which read: "(3) 'Disinterested director' means a director who, at the time of a vote referred to in section 30-29-853(3), Idaho Code, or a vote or selection referred to in section 30-29-855(2) or (3), Idaho Code, is not: (a) A party to the proceeding; or (b) An individual having a familial, financial, professional or employment relationship with the director whose indemnification or advance for expenses is the subject of the decision being made, which relationship would, in the circumstances, reasonably be expected to exert an influence on the director's judgment when voting on the decision being made. (4) 'Expenses' includes counsel fees"; redesignated former subsections (5) to (8) as subsections (4) to (6); and deleted "partnership" preceding "joint venture" near the end of paragraph (4)(b).

Compiler's Notes.

This section is derived from former § 30-1-850.

Official Comment

INTRODUCTORY COMMENT

1. Policy Issues Raised by Indemnification and Advance for Expenses.

Indemnification (including advance for expenses) provides financial protection by the corporation for its directors against exposure to expenses and liabilities that may be incurred by them in connection with legal

proceedings based on an alleged breach of duty in their service to or on behalf of the corporation.

The concept of indemnification recognizes that there will be situations in which even though the director does not satisfy all of the elements of the standard of conduct set forth in section 8.30(a) or the requirements of some other applicable law, the corporation should nevertheless be permitted (or required) to absorb the economic costs incurred by the director in any ensuing litigation.

Subchapter 8E [§§ 30-29-850 to 30-29-859] is an integrated treatment of indemnification and advance for expenses and strikes a balance among important public policies. It would be difficult to persuade responsible persons to serve as directors if they were compelled to bear personally the cost of vindicating the propriety of their conduct in every instance in which it might be challenged. If permitted too broadly, however, indemnification may violate equally basic tenets of public policy. For example, a director who intentionally inflicts harm on the corporation should not expect to receive assistance from the corporation for legal or other expenses and should be required to satisfy from his or her personal assets not only any adverse judgment but also expenses incurred in connection with the proceeding. A similar policy issue is raised in connection with indemnification against liabilities or sanctions imposed under state or federal civil or criminal statutes. A shift of the economic cost of these liabilities from the individual director to the corporation by way of indemnification may in some instances frustrate the public policy of those statutes.

Some of the same policy considerations apply to the indemnification of officers and, in many cases, employees and agents. The indemnification of officers, whose duties are specified in section 8.42 [§ 30-29-842], is dealt with separately in section 8.56 [§ 30-29-856]. The indemnification of employees and agents, whose duties are prescribed by sources of law other than corporation law (*e.g.*, contract and agency law), is beyond the scope of this subchapter. Section 8.58(d) [§ 30-29-858], however, makes clear that subchapter E does not limit a corporation's power to indemnify or advance expenses to employees and agents in accordance with applicable law.

2. Relationship of Indemnification to Other Policies Established in the Act.

Indemnification is closely related to the standards of conduct for directors and officers established elsewhere in chapter [part] 8. The structure of the Act is based on the assumption that if a director acts consistently with the standards of conduct described in section 8.30 [§ 30-29-830] or with the standards of a liability-limitation provision in the articles of incorporation (as authorized by section 2.02(b)(4) [§ 30-29-202]), the director will not have exposure to liability to the corporation or to shareholders and any expenses necessary to establish a defense will be borne by the corporation (under section 8.52 [§ 30-29-852]). The converse, however, is not necessarily true. The basic standards for indemnification set forth in section 8.51 [§ 30-29-851] for a civil action, in the absence of an indemnification provision in the articles of incorporation (as authorized by section 2.02(b)(5)), are good faith and reasonable belief that the conduct was in or not opposed to the best interests of the corporation. In some circumstances, a director or officer may be found to have violated a statutory or common law duty and yet be able to establish eligibility for indemnification under these standards of conduct. In addition, subchapter E permits a director or officer who is held liable for violating a statutory or common law duty, but who does not meet the relevant standard of conduct, to petition a court to order indemnification under section 8.54 [§ 30-29-854] if the court determines that it would be fair and reasonable to do so.

*

The definitions set forth in section 8.50 [this section] apply only to subchapter E and have no application elsewhere in the Act, except for the use of “liability” in section 2.02(b)(5). The term “qualified director,” which is used in sections 8.53 and 8.55 [§§ 30-29-853 and 30-29-855], is defined in section 1.43 [§ 30-29-143].

1. Corporation.

Subchapter E’s definition of “corporation” includes predecessor entities that have been absorbed in mergers to negate any argument that a different result might be reached under section 11.07(a) [§ 30-29-1107], which provides for the assumption of liabilities by operation of law upon a merger. The express responsibility of successor entities for the liabilities of their

predecessors under this subchapter is broader than under section 11.07(a) and may impose liability on a successor although section 11.07(a) does not. The definition of “corporation” in section 8.50 is thus an essential aspect of the protection provided by this subchapter for persons eligible for indemnification.

2. Director and Officer.

A special definition of “director” and “officer” is included in subchapter E to cover individuals who are made parties to proceedings because they are or were directors or officers or, while serving as directors or officers, also serve or served at the corporation’s request in another capacity for another entity. The purpose of the latter part of this definition is to give directors and officers the benefits of the protection of this subchapter while serving at the corporation’s request in a responsible position for employee benefit plans, trade associations, nonprofit or charitable entities, domestic or foreign entities, or other kinds of profit or nonprofit ventures. To avoid misunderstanding, it is good practice from both the corporation’s and director’s or officer’s viewpoint for this type of request to be evidenced by resolution, memorandum or other writing.

Even without such a formal action, the second sentence of the definition of “director” or ”officer” in section 8.50 addresses the question of liabilities arising under the Employee Retirement Income Security Act of 1974 (ERISA). It makes clear that a director or officer who is serving as a fiduciary of an employee benefit plan is automatically viewed for purposes of this subchapter as having been requested by the corporation to act in that capacity. Special treatment is believed necessary because of ERISA’s broad definition of “fiduciary” and the requirement that a “fiduciary” must discharge his or her duties “solely in the interest” of the participants and beneficiaries of the employee benefit plan. Decisions by a director or officer, who is serving as a fiduciary under the plan on questions regarding, for example, (i) eligibility for benefits, (ii) investment decisions, or (iii) interpretation of plan provisions respecting (a) qualifying service, (b) years of service, or (c) retroactivity, are all subject to the protections of this subchapter. See also the definition of “official capacity” in section 8.50.

In the last sentence of the definition of “director” or “officer” in section 8.50, the phrase “unless the context requires otherwise” is intended to

clarify that the estate or personal representative does not have the right to participate in decisions by directors authorized in this subchapter.

3. Liability.

"Liability" is defined for convenience to avoid repeated references to recoverable items throughout the subchapter. Even though the definition of "liability" includes amounts paid in settlement or to satisfy a judgment, indemnification against certain types of settlements and judgments is not allowed under several provisions of subchapter E. For example, indemnification in suits brought by or in the right of the corporation is limited to expenses (see section 8.51(d)(1)), unless indemnification for a settlement is ordered by a court under section 8.54(a)(3).

The definition of "liability" permits the indemnification of "expenses." The definition of "expenses" in section 1.40 [§ 30-29-140] limits expenses to those that are reasonable. The result is that any portion of expenses which is not reasonable should not be advanced or indemnified. In contrast, amounts paid to settle or satisfy substantive claims are not subject to a reasonableness test. Since payment of these amounts is permissive — mandatory indemnification is available under section 8.52 only where the defendant is "wholly successful" — a limitation of "reasonableness" for settlements is inappropriate.

The definition of "liability" is intended to cover every type of monetary obligation that may be imposed upon a director, including civil penalties, restitution, and the levy of excise taxes under the Internal Revenue Code pursuant to ERISA.

4. Official Capacity.

The term "official capacity" is used in determining which of the two alternative standards of conduct set forth in section 8.51(a)(1)(ii) applies: If the action was taken in an "official capacity," the individual to be indemnified must have reasonably believed that he or she was acting in the best interests of the corporation. In contrast, if the action in question was not taken in an "official capacity," the individual need only have reasonably believed that the conduct was not opposed to the best interests of the corporation. See also the Official Comment to section 8.51(a).

5. Party.

The definition of “party” includes present and former parties in addition to individuals currently or formerly threatened with being made a party. An individual who is only called as a witness is not a “party” within this definition, but as specifically provided in section 8.58(e) payment or reimbursement of witness expenses is not limited by this subchapter.

6. Proceeding.

The broad definition of “proceeding” ensures that the benefits of this subchapter will be available to directors in new and unexpected, as well as traditional, types of litigation or other adversarial matters, whether civil, criminal, administrative, or investigative. It also includes arbitration and other dispute resolution proceedings, appeals and petitions to review administrative actions.

§ 30-29-851. Permissible indemnification. — (a) Except as otherwise provided in this section, a corporation may indemnify an individual who is a party to a proceeding because the individual is a director against liability incurred in the proceeding if:

(1)(i) The director conducted himself or herself in good faith; and

(ii) The director reasonably believed:

(A) In the case of conduct in an official capacity, that his or her conduct was in the best interests of the corporation; and

(B) In all other cases, that his or her conduct was at least not opposed to the best interests of the corporation; and

(iii) In the case of any criminal proceeding, the director had no reasonable cause to believe his or her conduct was unlawful; or

(2) The director engaged in conduct for which broader indemnification has been made permissible or obligatory under a provision of the articles of incorporation, as authorized by section 30-29-202(b)(5), Idaho Code.

(b) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in, and the beneficiaries of, the plan is conduct that satisfies the requirement of subsection (a)(1)(ii)(B) of this section.

(c) The termination of a proceeding by judgment, order, settlement or conviction, or upon a plea of nolo contendere or its equivalent, is not, of itself, determinative that the director did not meet the relevant standard of conduct described in this section.

(d) Unless ordered by a court under section 30-29-854(a)(3), Idaho Code, a corporation may not indemnify a director:

(1) In connection with a proceeding by or in the right of the corporation, except for expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection (a) of this section; or

(2) In connection with any proceeding with respect to conduct for which the director was adjudged liable on the basis of receiving a financial benefit to which he or she was not entitled, regardless of whether it involved action in the director's official capacity.

History.

I.C., § 30-29-851, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 99, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), substituted "section 30-29-202(b)(5), Idaho Code" for "section 30-29-202(2)(e), Idaho Code" at the end of paragraph (2); in subsection (b), substituted "employee benefit plan for a purpose the director reasonably believed to be in the interests" for "employee plan for a purpose he reasonably believed to be in the best interests" near the beginning and substituted "subsection (a)(1)(ii)(B)" for "subsection (1)(a)(ii)(B)" near the end; in subsection (d), substituted "section 30-29-854(a)(3), Idaho Code" for "section 30-29-854(1)(c), Idaho Code" near the middle of the introductory paragraph, in paragraph (1), deleted "reasonable" preceding "expenses incurred" near the beginning and substituted "subsection (a) of this section" for "subsection (1) of this section" near the end; and rewrote paragraph (2), which formerly read: "In connection with any proceeding with respect to conduct for which he was adjudged liable on the basis that he received a financial benefit to which he was not entitled, whether or not involving action in his official capacity."

Compiler's Notes.

This section is derived from former § 30-1-851.

Official Comment

1. Section 8.51(a).

The standards for indemnification of directors contained in section 8.51(a) [this section] define the limits of the conduct for which

discretionary indemnification is permitted under the Act, except to the extent that court-ordered indemnification is available under section 8.54(a)(3) [§ 30-29-854]. Conduct that falls within these limits does not automatically entitle directors to indemnification, although a corporation may obligate itself to indemnify directors to the maximum extent permitted by applicable law. See section 8.58(a) [§ 30-29-858]. Absent such an obligatory provision, section 8.52 [§ 30-29-852] defines much narrower circumstances in which directors are entitled as a matter of right to indemnification.

The standards of conduct in section 8.51(a) are not dependent on the type of proceeding in which the claim arises. These standards are closely related, but not identical, to the standards of conduct imposed by section 8.30 [§ 30-29-830] on directors when discharging the duties of a director: good faith, reasonable belief that the best interests of the corporation are being served, and appropriate care (i.e., that which a person in a like position would reasonably believe appropriate under similar circumstances). As in the case of section 8.30, where the concept of good faith is also used, section 8.51 provides no definition for that term. The concept involves a subjective test, which would permit indemnification for an unwise decision or "a mistake of judgment," even though made negligently by objective standards. Section 8.51 also requires, as does section 8.30, a "reasonable" belief that conduct when acting in the director's official capacity was in the corporation's best interests. It then adds a provision, not found in section 8.30, relating to criminal proceedings that requires the director to have had no "reasonable cause" to believe that the conduct was unlawful. These both involve objective standards applicable to the director's belief concerning the effect of the conduct in question. Conduct includes both acts and omissions.

In section 8.51(a)(1)(ii)(B), the words "at least" qualify "not opposed to" and make clear that this standard is for conduct other than in an official capacity. Although this provision deals with indemnification by the corporation, a director serving another entity at the request of the corporation remains subject to the provisions of the law governing service to that other entity, including provisions dealing with conflicts of interest. Compare sections 8.60 through 8.63 [§§ 30-29-860 and 30-29-863]. Should indemnification from the requesting corporation be sought by a director for acts done while serving another entity, which acts involved breach of a duty

owed to that other entity, nothing in section 8.51(a)(1)(ii)(B) would preclude the requesting corporation from considering, in assessing its own best interests, whether the fact that its director had engaged in a violation of the duty owed to the other entity was in fact "opposed to" the interests of the indemnifying corporation.

If the relevant standards are met, section 8.51 also permits indemnification in connection with a proceeding involving an alleged failure to satisfy legal standards other than the standards of conduct in section 8.30, e.g., violations of antitrust, environmental or securities laws.

In addition to indemnification under section 8.51(a)(1), section 8.51(a)(2) permits indemnification under the standard of conduct set forth in a provision of the articles of incorporation adopted pursuant to section 2.02(b)(5) [§ 30-29-202]. Based on such a provision, section 8.51(a)(2) permits indemnification in connection with claims by third parties and, through section 8.56 [§ 30-29-856], applies to officers as well as directors. (This goes beyond the scope of a provision of the articles of incorporation adopted pursuant to section 2.02(b)(4), which can only limit liability of directors against claims by the corporation or its shareholders.) Section 8.51(a)(2) is subject to the prohibition of subsection (d)(1) against indemnification of settlements and judgments in derivative suits, except as ordered by a court under section 8.54(a)(3). It is also subject to the prohibition of subsection (d)(2) against indemnification for receipt of an improper financial benefit; however, this prohibition is already subsumed in the exception contained in section 2.02(b)(5)(i).

2. Section 8.51(b).

As discussed in the Official Comment to the definition of "director" or "officer" in section 8.50 [§ 30-29-850], ERISA requires that a "fiduciary" (as defined in ERISA) discharge the fiduciary's duties "solely in the interest" of the participants in and beneficiaries of an employee benefit plan. The standard in section 8.51(b) for indemnification of a director who is serving as a trustee or fiduciary for an employee benefit plan under ERISA is arguably an exception to the more general standard that conduct not in an official corporate capacity is indemnifiable if it is "at least not opposed to" the best interests of the corporation. However, a corporation that causes a director to undertake fiduciary duties in connection with an employee

benefit plan should expect the director to act in the best interests of the plan's beneficiaries or participants. Thus, subsection (b) establishes and provides a standard for indemnification that is consistent with the statutory policies embodied in ERISA. See Official Comment to section 8.50(2).

3. Section 8.51(c).

Section 8.51(c) rejects the argument that indemnification is automatically improper whenever a proceeding has been concluded on a basis that does not exonerate the director claiming indemnification. However, any judicial determination of substantive liability should be taken into account in determining whether the standards of section 8.51(a) were met. By the same token, it is clear that the termination of a proceeding by settlement or plea of no contest should not of itself create a presumption either that conduct met or did not meet the relevant standard of subsection (a) since a settlement or nolo plea may be agreed to for many reasons unrelated to the merits of the claim. On the other hand, a final determination of non-liability (including one based on a liability-limitation provision adopted under section 2.02(b)(4)) or an acquittal in a criminal case automatically entitles the director to indemnification of expenses under section 8.52.

4. Section 8.51(d).

Section 8.51(d) does not permit indemnification of settlements and judgments in derivative proceedings which would give rise to a circularity in which the corporation receiving payment of damages by the director in the settlement or judgment (less attorneys' fees) would then immediately return the same amount to the director (including attorneys' fees) as indemnification. Thus, the corporation would be in a poorer economic position than if there had been no proceeding. Further, in many cases a director may be protected by a provision in the articles of incorporation under section 2.02(b)(4) limiting liability or because a proceeding was dismissed under section 7.44 [§ 30-29-744]. The prohibition on indemnification of a settlement or a judgment in a derivative proceeding, however, does not extend to the related expenses incurred in the proceeding so long as the director meets the relevant standard of conduct set forth in section 8.51(a). In addition, indemnification and advance of expenses may be ordered by a court under section 8.54(a)(3) even if the relevant standard was not met.

Indemnification under section 8.51 is also prohibited if there has been an adjudication that a director received a financial benefit to which the director is not entitled, even if, for example, the director acted in a manner not opposed to the best interests of the corporation. For example, improper use of inside information for financial benefit should not be an action for which the corporation may elect to provide indemnification, even if the corporation was not thereby harmed. Given the express language of section 2.02(b)(5) establishing the limit of an indemnification provision contained in the articles of incorporation, a director found to have received an improper financial benefit would not be permitted indemnification under section 8.51(a)(2). Although it is unlikely that a director found to have received an improper financial benefit could meet the standard in section 8.51(a)(1)(ii)(B), this limitation is made explicit in section 8.51(d)(2). Section 8.54(a)(3) permits a director found liable in a proceeding referred to in section 8.51(d)(2) to petition a court for a judicial determination of entitlement to indemnification for expenses. The language of section 8.51(d)(2) parallels sections 2.02(b)(4)(i) and 2.02(b)(5)(i), and thus, the same standards should be used in interpreting the application of all three provisions. Although a settlement may create an obligation to pay money, it should not be construed for purposes of this subchapter as an adjudication of liability.

§ 30-29-852. Mandatory indemnification. — A corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because he or she was a director of the corporation against expenses incurred by the director in connection with the proceeding.

History.

I.C., § 30-29-852, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 100, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, substituted "the director was a party because he or she was a director of the corporation against expenses incurred by the director" for "he was a party because he was a director of the corporation against reasonable expenses incurred by him" near the end of the section.

Compiler's Notes.

This section is derived from former § 30-1-852.

Official Comment Section 8.52 [this section] creates a right of indemnification in favor of the director who meets its requirements. Enforcement of this right by judicial proceeding is specifically contemplated by section 8.54(a)(1) [§ 30-29-854]. Section 8.54(b) gives the director a right to recover expenses incurred in enforcing the director's right to indemnification under section 8.52.

The basic standard for mandatory indemnification is that the director has been "wholly successful, on the merits or otherwise," in the defense of the proceeding. A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis which does not involve a finding of liability. A director who is precluded from mandatory indemnification by this requirement may still be entitled to permissible indemnification under

section 8.51(a) [§ 30-29-851] or court-ordered indemnification under section 8.54(a)(3).

Although the standard "on the merits or otherwise" may result in an occasional defendant becoming entitled to indemnification because of procedural defenses not related to the merits, *e.g.*, the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits to establish eligibility for mandatory indemnification.

§ 30-29-853. Advance for expenses. — (a) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse expenses incurred in connection with the proceeding by an individual who is a party to the proceeding because that individual is a director if the director delivers to the corporation a signed written undertaking of the director to repay any funds advanced if the director is not entitled to mandatory indemnification under section 30-29-852, Idaho Code; and it is ultimately determined under section 30-29-854 or 30-29-855, Idaho Code, that the director is not entitled to indemnification.

(b) The undertaking required by subsection (a) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

(c) Authorizations under this section shall be made:

(1) By the board of directors:

(i) If there are two (2) or more qualified directors, by a majority vote of all the qualified directors, a majority of whom shall for such purposes constitute a quorum, or by a majority of the members of a committee consisting solely of two (2) or more qualified directors appointed by such a vote; or

(ii) If there are fewer than two (2) qualified directors, by the vote necessary for action by the board of directors in accordance with section 30-29-824(c), Idaho Code, in which authorization directors who are qualified directors may participate; or

(2) By the shareholders, but shares owned by or voted under the control of a director who at the time is not a qualified director may not be voted on the authorization.

History.

I.C., § 30-29-853, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 101, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-853.

Official Comment

Section 8.53 [this section] authorizes, but does not require, a corporation to advance or reimburse a director's reasonable expenses, subject to the delivery of the repayment undertaking required by subsection (a) and any limitations set forth in the articles of incorporation pursuant to section 8.58(d) [§ 30-29-858]. The repayment undertaking required by section 8.53 is also required in connection with obligatory advancement pursuant to section 8.58(a).

Section 8.53 recognizes an important difference between indemnification and an advance for expenses: indemnification is retrospective and, therefore, enables the persons determining whether to indemnify to do so on the basis of known facts, including the outcome of the proceeding. Indemnification may include reimbursement for non-advanced expenses. Advance for expenses is necessarily prospective and, in situations where advancement is not obligatory, the individuals making the decision whether to authorize expense advancement generally have fewer known facts on which to base their decision.

Section 8.53 reflects a determination that it is sound public policy to permit the corporation to advance (by direct payment or by reimbursement) the defense expenses of a director so long as the director agrees to repay any amounts advanced if it is ultimately determined that the director is not entitled to indemnification. This policy is based upon the view that a person who serves an entity in a representative capacity should not be required to finance his or her own defense of actions taken in that capacity. Moreover, adequate legal representation often involves substantial expenses during the course of the proceeding and many individuals are willing to serve as

directors only if they have the assurance that the corporation will advance these expenses. Accordingly, many corporations enter into contractual obligations (e.g., by a provision in the articles of incorporation or bylaws or by individual agreements) to advance expenses for directors. See section 8.58(a).

A single written undertaking by the director pursuant to section 8.53(a) may cover all funds advanced from time to time in connection with a proceeding. The theory underlying section 8.53(b) is that wealthy directors should not be favored over directors whose financial resources are modest. The undertaking must be made by the director and not by a third party. If the director or the corporation wishes some third party to be responsible for the director's obligation in this regard, either is free to make those arrangements separately with the third party.

If advancement is not obligatory, the standards of section 8.30 should, in general, govern the decision of directors acting on a request for advancement. In making such a decision, the directors may consider any matters they deem appropriate and may condition the advance of expenses on compliance with any requirements they believe are appropriate, including, for example, an affirmation of a requesting director's good faith belief that he or she is entitled to indemnification under section 8.51 [§ 30-29-851].

A corporation may obligate itself pursuant to section 8.58(a) to advance for expenses under section 8.53 by means of a provision set forth in the articles of incorporation or bylaws, by a resolution of its board of directors or shareholders, or by an agreement. Unless provided otherwise, section 8.58(a) deems a general obligatory provision requiring indemnification to the fullest extent permitted by law to include advance for expenses to the fullest extent permitted by law, even if not specifically mentioned, subject to providing the required repayment undertaking. No other procedures are required or contemplated although obligatory arrangements may include notice and any other requirements that the directors believe are appropriate.

If advancement is not obligatory, the decision to advance expenses is required to be made only one time with respect to each proceeding rather than each time a request for payment of expenses is received by the corporation. However, the directors are free to reconsider the decision at

any time (e.g., upon a change in the financial ability of the corporation to pay the amounts in question). The decision as to the reasonableness of any expenses may be made by any officer or agent of the corporation duly authorized to do so.

The procedures set forth in section 8.53(c) for authorizing an advance for expenses parallel the procedures set forth in section 8.55(b) [§ 30-29-855] for selecting the person or persons to make the determination that indemnification is permissible. If the advance for expenses is not authorized by the shareholders under section 8.53(c)(2), the applicable procedure specified in subsection (c)(1) must be used.

Under subsection (c)(1)(ii), which is available only if subsection (c)(1)(i) is not available, the action of the board of directors must be taken in accordance with section 8.20 [§ 30-29-820] or section 8.21 [§ 30-29-821], as the case may be, and directors who are not qualified directors may participate in the vote. Allowing directors who at the time are not qualified directors to participate in the authorization decision, if there is no or only one qualified director, is based on the concept that, if there are not at least two qualified directors, then it is preferable to return the power to make the decision to the full board (even though it includes non-qualified directors) than to leave it with one qualified director.

Illustration 1: The board consists of 15 directors, four of whom are non-qualified directors. Of the 11 qualified directors, nine are present at the meeting at which the authorization is to be made (or the committee is to be appointed). Under subsection (c)(1)(i), a quorum is present and at least six of the nine qualified directors present at the board meeting must authorize any advance for expenses because six is an absolute majority of the 11 qualified directors. Alternatively, six of the nine qualified directors present at the board meeting may appoint a committee of two or more of the qualified directors (up to all 11) to decide whether to authorize the advance. Action by the committee would require a majority of the committee.

Illustration 2: The board consists of 15 directors, only one of whom is a qualified director. Subsection (c)(1)(i) is not available because the number of qualified directors is less than two. Accordingly, the decision must be made by the board under subsection (c)(1)(ii) (or, as is always permitted, by the shareholders under subsection (c)(2)).

With respect to shareholder authorizations under section 8.53(c)(2), the prohibition on voting shares owned by or voted under the control of directors who at the time are not qualified directors does not affect general rules as to the required presence of a quorum at the meeting.

The fact that there has been an advance for expenses does not determine whether a director is entitled to indemnification. A proceeding will often terminate without a judicial or other determination as to whether the director's conduct met the applicable standard of conduct in section 8.51. Nevertheless, the board of directors should make, or cause to be made, an affirmative determination of entitlement to indemnification at the conclusion of the proceeding. This decision should be made in accordance with the procedures set forth in section 8.55.

Judicial enforcement of rights granted by or pursuant to section 8.53 is specifically contemplated by section 8.54 § 30-29-854].

§ 30-29-854. Court-ordered indemnification and advance for expenses. — (a) A director who is a party to a proceeding because he or she is a director may apply for indemnification or an advance for expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the court shall:

(1) Order indemnification if the court determines that the director is entitled to mandatory indemnification under section 30-29-852, Idaho Code;

(2) Order indemnification or advance for expenses if the court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by section 30-29-858(a), Idaho Code; or

(3) Order indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable:

(i) To indemnify the director; or

(ii) To advance expenses to the director, even if under this paragraph he or she has not met the relevant standard of conduct set forth in section 30-29-851(a), Idaho Code, failed to comply with section 30-29-853, Idaho Code, or was adjudged liable in a proceeding referred to in section 30-29-851(d)(1) or (2), Idaho Code, but if the director was adjudged so liable, indemnification shall be limited to expenses incurred in connection with the proceeding.

(b) If the court determines that the director is entitled to indemnification under subsection (a)(1) of this section or to indemnification or advance for expenses under subsection (a)(2) of this section, it shall also order the corporation to pay the director's expenses incurred in connection with obtaining court-ordered indemnification or advance for expenses. If the court determines that the director is entitled to indemnification or advance for expenses under subsection (a)(3) of this section, it may also order the

corporation to pay the director's expenses to obtain court-ordered indemnification or advance for expenses.

History.

I.C., § 30-29-854, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 102, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), substituted "section 30-29-858(a), Idaho Code" for "section 30-29-858(1), Idaho Code" near the end of paragraph (2), rewrote paragraph (3)(ii), which formerly read: "To advance expenses to the director, even if he has not met the relevant standard of conduct set forth in section 30-29-851(1), Idaho Code, failed to comply with section 30-29-853, Idaho Code, or was adjudged liable in a proceeding referred to in section 30-29-851(4)(a) or (b), Idaho Code, but if he was adjudged so liable his indemnification shall be limited to reasonable expenses incurred in connection with the proceeding"; and, in subsection (b), in the first sentence, substituted "subsection (a)(1) of this section" for "subsection (1)(a) of this section" and substituted "subsection (a)(2) of this section" for "subsection (1)(b) of this section" near the beginning and deleted "reasonable" following "pay the director's" near the end, and in the last sentence, substituted "subsection (a)(3) of this section" for "subsection (1)(e) of this section" near the middle and deleted "reasonable" following "director's" near the end.

Compiler's Notes.

This section is derived from former § 30-1-854.

Official Comment

In determining whether indemnification or expense advance would be "fair and reasonable" under section 8.54(a)(3) [this section], a court should give appropriate deference to an informed decision of a board of directors or committee made in good faith and based upon full information.

Ordinarily, a court should not determine that it is "fair and reasonable" to order indemnification or expense advance where the director has not met conditions and procedures to which he or she agreed. A director seeking court-ordered indemnification or expense advance under section 8.54(a)(3) must show that there are facts peculiar to his or her situation that make it fair and reasonable to both the corporation and to the director to override an intra-corporate declination or any otherwise applicable statutory prohibition against indemnification, e.g., sections 8.51(a) or (d) [§ 30-29-851].

Apart from the provisions of section 8.54(a)(3), there are no statutory outer limits on the court's power to order indemnification under that subsection. In an appropriate case, a court may wish to refer to the provisions of section 2.02(b)(4) [§ 30-29-202] establishing the outer limits of a liability-limiting provision in the articles of incorporation. It would be unusual for a court to provide indemnification going beyond the limits of section 2.02(b)(4), but the court is permitted to do so.

Among the factors a court may want to consider under section 8.54(a)(3) are the gravity of the offense, the financial impact upon the corporation, the occurrence of a change in control or, in the case of an advance for expenses, the inability of the director to finance a defense. A court may want to give special attention to certain other issues. For example, has the corporation joined in the application to the court for indemnification or an advance for expenses? This factor may be particularly important where under section 8.51(d) indemnification is not permitted for an amount paid in settlement of a proceeding brought by or in the right of the corporation. Also, in a case where indemnification would have been available under section 8.51(a)(2) if the corporation had adopted a provision authorized by section 2.02(b)(5), was the decision to adopt such a provision presented to and rejected by the shareholders and, if not, would exculpation of the director's conduct have resulted under a section 2.02(b)(4) provision? Additionally, in connection with considering indemnification for expenses under section 8.51(d)(2) in a proceeding in which a director was adjudged liable for receiving a financial benefit to which he or she was not entitled, was the financial benefit insubstantial — particularly in relation to the other aspects of the transaction involved — and what was the degree of the director's involvement in the transaction and the corporate decision to participate?

Under section 8.54(b), if a director successfully sues to enforce the right to indemnification under subsection (a)(1) or to indemnification or advance for expenses under subsection (a)(2), the court is required to order the corporation to pay the director's expenses in the enforcement proceeding. However, if a director successfully sues for indemnification or expense advancement under subsection (a)(3), the court may (but is not required to) order the corporation to pay those expenses. The basis for the distinction is that the corporation breached its obligation in the first two cases but not in the third.

Application for indemnification under section 8.54 may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction. For example, a defendant in a criminal proceeding who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal proceeding or bring an action against the corporation in another forum.

A decision by the board of directors not to oppose a request for indemnification is governed by the general standards of conduct of section 8.30 [§ 30-29-830]. Even if the corporation does not oppose the request, the court must satisfy itself that the person seeking indemnification is entitled to or otherwise deserving of receiving it under section 8.54.

As provided in section 8.58(d) [§ 30-29-858], a corporation may limit the rights of a director under section 8.54 by a provision in the articles of incorporation. In the absence of such a provision, the court has general power to exercise the authority granted under this section.

§ 30-29-855. Determination and authorization of indemnification. — (a) A corporation may not indemnify a director under section 30-29-851, Idaho Code, unless authorized for a specific proceeding after a determination has been made that indemnification is permissible because the director has met the relevant standard of conduct set forth in section 30-29-851, Idaho Code.

(b) The determination shall be made:

(1) If there are two (2) or more qualified directors, by the board of directors by a majority vote of all the qualified directors, a majority of whom shall for such purpose constitute a quorum, or by a majority of the members of a committee of two (2) or more qualified directors appointed by such a vote;

(2) By special legal counsel:

(i) Selected in the manner prescribed in paragraph (1) of this subsection; or

(ii) If there are fewer than two (2) qualified directors, selected by the board of directors, in which selection directors who are not qualified directors may participate; or

(3) By the shareholders, but shares owned by or voted under the control of a director who at the time is not a qualified director may not be voted on the determination.

(c) Authorization of indemnification shall be made in the same manner as the determination that indemnification is permissible, except that if there are fewer than two (2) qualified directors or if the determination is made by special legal counsel, authorization of indemnification shall be made by those entitled to select special legal counsel under subsection (b)(2)(ii) of this section.

History.

I.C., § 30-29-855, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 103, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "qualified directors" for "disinterested directors" throughout the section; in subsection (b), substituted "paragraph (1) of this subsection" for "paragraph (a) of this subsection" near the end of paragraph (i), substituted "directors who are not qualified directors" for "directors who do not qualify as disinterested directors" near the end of paragraph (2)(ii), substituted "time is not" for "time does not" near the end of paragraph (3); and substituted "to select special legal counsel under subsection (b)(2)(ii) of this section" for "under subsection (2)(b)(ii) of this section to select special legal counsel" at the end of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-855.

Official Comment

Section 8.55 distinguishes between a "determination" that indemnification is permissible and an "authorization" of indemnification. A "determination" involves a decision by individuals or groups described in section 8.55(b) whether, under the circumstances, the person seeking indemnification has met the relevant standard of conduct under section 8.51 [§ 30-29-851] and is therefore eligible for indemnification. After a favorable determination has been made, the corporation must decide whether to authorize indemnification except to the extent that an obligatory provision under section 8.58(a) [§ 30-29-858] is applicable. Although special legal counsel may make the determination of eligibility for indemnification, counsel may not authorize the indemnification. A pre-existing obligation under section 8.58(a) to indemnify if the director is eligible for indemnification dispenses with the second-step decision to authorize indemnification.

Section 8.55(b) establishes procedures for selecting the person or persons who will make the determination of permissibility of indemnification. The committee of qualified directors referred to in subsection (b)(1) may include a committee to which has been delegated the power to determine whether to

indemnify a director so long as the appointment and composition of the committee members comply with subsection (b)(1). In selecting special legal counsel under subsection (b)(2), directors who are parties to the proceeding may participate in the decision if there are insufficient qualified directors to satisfy subsection (b)(1). Directors who are not eligible to act as qualified directors may also participate in the decision to authorize indemnification on the basis of a favorable determination if necessary to permit action by the board of directors. The authorization of indemnification is the decision that results in payment of any amounts to be indemnified. This limited participation of non-qualified directors in the authorization decision is justified by the principle of necessity.

Under section 8.55(b)(l), the vote required when the qualified directors act as a group is an absolute majority of their number. A majority of the qualified directors constitutes a quorum for board action for this purpose. If there are not at least two qualified directors, then the determination of entitlement to indemnification must be made by special legal counsel or by the shareholders.

The phrase "special legal counsel" is not defined in the Act, and it is important that the process be sufficiently flexible to permit selection of counsel in light of the particular circumstances. In many instances, however, it may be important that "special legal counsel" be counsel having no prior professional relationship with those seeking indemnification, be retained for the specific purpose, and not be or have been either inside counsel or regular outside counsel to the corporation. Among other factors that may be considered are whether special legal counsel has any familial, financial or other relationship with any of those seeking indemnification that would, in the circumstances, reasonably be expected to exert an influence on counsel in making the determination.

In determinations of eligibility for indemnification by shareholders under section 8.55(b)(3), shares owned by or voted under the control of directors who at the time are not qualified directors may not be voted on the determination. This does not affect general rules as to the required presence of a quorum at the meeting in order for the determination to be made.

Section 8.55 is subject to section 8.58(a), which authorizes an arrangement obligating the corporation in advance to provide

indemnification or to advance expenses. Although such an arrangement may effectively provide an authorization of indemnification, the determination requirements of sections 8.55(a) and (b) must still be satisfied.

§ 30-29-856. Indemnification of officers. — (a) A corporation may indemnify and advance expenses under sections 30-29-850 through 30-29-859, Idaho Code, to an officer who is a party to a proceeding because he or she is an officer:

(1) To the same extent as a director; and

(2) If he or she is an officer but not a director, to such further extent as may be provided by the articles of incorporation or the bylaws, or by a resolution adopted or a contract approved by the board of directors, or shareholders except for:

(i) Liability in connection with a proceeding by or in the right of the corporation other than for expenses incurred in connection with the proceeding; or

(ii) Liability arising out of conduct that constitutes:

(A) Receipt by the officer of a financial benefit to which he or she is not entitled;

(B) An intentional infliction of harm on the corporation or the shareholders; or

(C) An intentional violation of criminal law.

(b) The provisions of subsection (a)(2) of this section shall apply to an officer who is also a director if he or she is made a party to the proceeding based on an act or omission solely as an officer.

(c) An officer who is not a director is entitled to mandatory indemnification under section 30-29-852, Idaho Code, and may apply to a court under section 30-29-854, Idaho Code, for indemnification or an advance for expenses, in each case to the same extent to which a director may be entitled to indemnification or advance for expenses under those sections.

History.

I.C., § 30-29-856, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 104, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, inserted "Indemnification of" at the beginning of the section heading; redesignated the existing paragraphs; in subsection (a), rewrote the introductory paragraph, which formerly read: "A corporation may indemnify and advance expenses under this part to an officer of the corporation who is a party to a proceeding because he is an officer of the corporation", in paragraph (2), rewrote the introductory paragraph, which formerly read: "If he is an officer but not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract except for" and deleted "reasonable" preceding "expenses" near the end of paragraph (i); rewrote subsection (b), which formerly read: "The provisions of subsection (1)(b) of this section shall apply to an officer who is also a director if the basis on which he is made a party to the proceeding is an act or omission solely as an officer"; and, in subsection (c), deleted "of a corporation" following "An officer" near the beginning and substituted "sections" for "provisions" at the end.

Compiler's Notes.

This section is derived from former § 30-1-856.

Official Comment

Section 8.56 [this section] correlates the general legal principles relating to the indemnification of officers of the corporation with the limitations on indemnification in subchapter E. This correlation may be summarized in general terms as follows.

• An officer of a corporation who is *not* a director may be indemnified by the corporation on a discretionary basis to the same extent as though he or she were a director, and, in addition, may have additional indemnification rights apart from subchapter E, subject to the limits set forth in section 8.56(a)(2).

• An officer who is *also* a director is entitled to the indemnification rights of a director, and if the conduct that is the subject of the proceeding was

solely in his or her capacity as an officer, also to any of the rights of an officer who is not a director. See preceding bullet.

• An officer who is *not* a director has the right of mandatory indemnification granted to directors under section 8.52 [§ 30-29-852] and the right to apply for court-ordered indemnification under section 8.54 [§ 30-29-854]. See section 8.56(c).

Section 8.56 does not deal with indemnification of employees and agents because the concerns of self-dealing that arise when directors provide for their own indemnification and expense advance (and sometimes for senior executive officers) are not present when directors (or officers) provide for indemnification and expense advance for employees and agents who are not directors or officers.

Although subchapter E [§§ 30-29-850 to 30-29-859] is silent with respect to such employees and agents, they may be indemnified using broad grants of powers to corporations under section 3.02 [§ 30-29-302], including powers to make contracts, appoint and fix the compensation of employees and agents and to make payments furthering the business and affairs of the corporation. Many corporations use these powers to provide for employees and agents in the same provisions in the articles, bylaws or otherwise in which they provide for expense advance and indemnification for directors and officers. Indemnification may also be provided to protect employees or agents from liabilities incurred while serving at a corporation's request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit venture.

Although employees and agents are not covered by subchapter E, the principles and procedures set forth in the subchapter for indemnification and advance for expenses for directors and officers may be helpful to counsel and courts in dealing with indemnification and expense advance for employees and agents.

Careful consideration should be given to extending mandatory maximum indemnification and expense advance to employees and agents. The same considerations that may favor mandatory maximum indemnification for directors and officers — *e.g.*, encouraging qualified individuals to serve — may not be present in the cases of employees and agents. Many corporations may prefer to retain the discretion to decide, on a case-by-case

basis, whether to indemnify and advance expenses to employees and agents (and perhaps even officers, especially nonexecutive officers) rather than binding themselves in advance to do so.

1. Officers Who Are Not Directors.

Although section 8.56 does not prescribe the standards governing the rights of officers to indemnification, subsection (a) does set outer limits beyond which the corporation may not indemnify. These limits for officers are substantially the same as the outer limits on the corporation's power to indemnify directors. Since officers are held to substantially the same standards of conduct as directors (see section 8.42 [§ 30-29-842]), there does not appear to be any reasoned basis for granting officers greater indemnification rights as a substantive matter. Procedurally, however, there is an important difference. To permit greater flexibility, officers may be indemnified (within the above-mentioned limits) with respect to conduct that does not meet the standards set by section 8.51(a)(1) [§ 30-29-851] simply by authorization of the board of directors, whereas directors' indemnification can reach beyond those standards, as contemplated by section 8.51(a)(2), only with a provision included in the articles of incorporation pursuant to section 2.02(b)(5) [§ 30-29-202]. This procedural difference reflects the reduced risk of self-dealing as to officers.

The broad authority in section 8.56(a)(2) to grant indemnification may be limited by appropriate provisions in the articles of incorporation. See section 8.58(c) [§ 30-29-858].

2. Officers Who Are Also Directors.

Section 8.56(b) provides, in effect, that an officer of the corporation who is also a director is subject to the same standards of indemnification as other directors and cannot avail himself or herself of the provisions of subsection (a) unless the act or omission that is the subject of the proceeding was committed solely in the capacity as an officer. Thus, a vice president for sales who is also a director and whose actions failed to meet section 8.51(a) standards could be indemnified provided that the conduct was within the limits of section 8.56(a)(2) and involved only his or her officer capacity.

This more flexible approach for situations where the individual is not acting as a director seems appropriate as a matter of fairness. There are

many instances where officers who also serve as directors assume responsibilities and take actions in their non-director capacities for which indemnification may be appropriate.

For a director-officer to be indemnified under section 8.51 for conduct in the capacity as a director when he or she has not satisfied the standards of section 8.51(a), a provision in the articles of incorporation under section 2.02(b)(5) is required. If such a provision is included in the articles, the standards for indemnification are those specified in the articles of incorporation, subject to the limitations in section 2.02(b)(5). For a director-officer to be indemnified for conduct solely in the capacity as an officer, even though the director-officer has not satisfied the standards of section 8.56(a), only a bylaw or a resolution of the board of directors authorizing such indemnification is required, rather than a provision in the articles of incorporation. If such a bylaw or resolution is adopted, the standards for indemnification are those specified in section 8.56(a)(2). However, when a director-officer seeks indemnification or expense advance under sections 8.56(b) and (a)(2) on the basis of having acted solely in the capacity as an officer, indemnification or expense advance must be approved through the same procedures as set forth in section 8.55 or 8.53(c) [§ 30-29-855 or 30-29-853], as the case may be, for approval of indemnification or expense advance for a director when acting in the capacity of a director.

§ 30-29-857. Insurance. — A corporation may purchase and maintain insurance on behalf of an individual who is a director or officer of the corporation, or who, while a director or officer of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee or agent of another domestic or foreign corporation, joint venture, trust, employee benefit plan, or other entity, against liability asserted against or incurred by the individual in that capacity or arising from the individual's status as a director or officer, regardless of whether the corporation would have power to indemnify or advance expenses to the individual against the same liability under sections 30-29-850 through 30-29-859, Idaho Code.

History.

I.C., § 30-29-857, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 105, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section, which formerly read: "A corporation may purchase and maintain insurance on behalf of an individual who is a director or officer of the corporation, or who, while a director or officer of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity, against liability asserted against or incurred by him in that capacity or arising from his status as a director or officer, whether or not the corporation would have power to indemnify or advance expenses to him against the same liability under this part; provided that banks, savings and loan associations and credit unions chartered under the laws of the state of Idaho may provide indemnification only by insurance."

Compiler's Notes.

This section is derived from former § 30-1-857.

Official Comment In authorizing a corporation to purchase and maintain insurance on behalf of directors and officers, section 8.57 [this section] sets no limits on the type of insurance which a corporation may maintain or the type of persons who are covered. Insurance is not limited to claims against which a corporation is entitled to indemnify under this subchapter. Such insurance can provide protection to directors and officers in addition to the rights of indemnification created by or pursuant to subchapter E (as well as typically protecting the individual insureds against the corporation's failure to pay indemnification required or permitted by this subchapter) and can also provide a source of reimbursement for a corporation that indemnifies its directors and others for conduct covered by the insurance. On the other hand, policies typically do not cover uninsurable matters, such as actions involving dishonesty, self-dealing, bad faith, knowing violations of the securities laws, or other willful misconduct.

Although section 8.57 does not include employees and agents for the reasons stated in the Official Comment to section 8.58 [§ 30-29-858], the corporation has the power under section 3.02 [§ 30-29-302] to purchase and maintain insurance on their behalf. This power is confirmed in section 8.58(f).

§ 30-29-858. Variation by corporate action — Application of indemnification provisions. — (a) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by the board of directors or shareholders, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification in accordance with section 30-29-851, Idaho Code, or advance funds to pay for or reimburse expenses in accordance with section 30-29-853(c), Idaho Code. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in section 30-29-853(c), Idaho Code, and in section 30-29-855(c), Idaho Code. Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with section 30-29-853, Idaho Code, to the fullest extent permitted by law, unless the provision expressly provides otherwise.

(b) A right of indemnification or to advances for expenses created by sections 30-29-850 through 30-29-859, Idaho Code, or under subsection (a) of this section and in effect at the time of an act or omission shall not be eliminated or impaired with respect to such act or omission by an amendment of the articles of incorporation or bylaws or a resolution of the board of directors or shareholders, adopted after the occurrence of such act or omission, unless, in the case of a right created under subsection (a) of this section, the provision creating such right and in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such act or omission has occurred.

(c) Any provision pursuant to subsection (a) of this section shall not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise expressly provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by section 30-22-206(a)(4), Idaho Code.

(d) Subject to the provisions of subsection (b) of this section, a corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to sections 30-29-850 through 30-29-859, Idaho Code.

(e) Sections 30-29-850 through 30-29-859, Idaho Code, do not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with his appearance as a witness in a proceeding at a time when he is not a party.

(f) Sections 30-29-850 through 30-29-859, Idaho Code, do not limit a corporation's power to indemnify, advance expenses to or provide or maintain insurance on behalf of an employee or agent.

History.

I.C., § 30-29-858, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 106, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), in the first sentence, substituted "resolution adopted or a contract approved by the board" for "resolution approved by its board" near the beginning and substituted "section 30-39-858(c), Idaho Code" for "section 30-29-858, Idaho Code" at the end, twice substituted "section 30-39-858(c), Idaho Code" for "section 30-29-858(3), Idaho Code" in the second sentence, and substituted "expressly" for "specifically" near the end of the last sentence; added subsection (b); in subsection (c), in the first sentence, substituted "subsection (a) of this section" for "subsection (1) of this section" near the beginning and substituted "expressly provided" for "specifically provided" at the end, and substituted "section 30-22-206(a)(4), Idaho Code" for "section 30-22-206, Idaho Code" at the end of the last sentence; and rewrote subsection (d), which formerly read: "A corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this part, other than the rights to mandatory indemnification under section 30-29-852,

Idaho Code, and to court-ordered indemnification and advance for expenses under section 30-29-854, Idaho Code."

Compiler's Notes.

This section is derived from former § 30-1-858.

Official Comment

Section 8.58(a) [this section] authorizes a corporation to make obligatory the permissive provisions of subchapter E [§§ 30-29-850 to 30-29-859] in advance of the conduct giving rise to the request for indemnification or advance for expenses. An obligatory provision satisfies the requirements for authorization in sections 8.53(c) and 8.55(c) [§§ 30-29-853 and 30-29-855], but the requirements for determination of eligibility for indemnification in subsections (a) and (b) of those sections must still be met.

If a corporation provides for obligatory indemnification and not for obligatory advance for expenses, the provision should be reviewed to ensure that it properly reflects the intent in view of the third sentence of section 8.58(a). Also, a corporation should consider whether obligatory expense advance is intended for direct suits by the corporation as well as for derivative suits by shareholders in the right of the corporation. In the former case, assuming compliance with sections 8.53(a) and (b), the corporation could be required to fund the defense of a defendant director even where the board of directors has already concluded that the director has engaged in significant wrongdoing. See Official Comment to section 8.53.

Although section 8.58(d) permits a corporation to limit the right of the corporation to indemnify or advance expenses by a provision in its articles of incorporation, as provided in section 10.09 [§ 30-29-1009], no such limitation will affect rights in existence when the provision becomes effective pursuant to section 1.23 [§ 30-29-123].

Subchapter E does not regulate the power of the corporation to indemnify or advance expenses to employees and agents. That subject is governed by the law of agency and related principles and frequently by contractual arrangements between the corporation and the employee or agent. Section 8.58(f) makes clear that, although indemnification, advance for expenses, and insurance for employees and agents are beyond the scope of subchapter

E, the elaboration in subchapter E of standards and procedures for indemnification, expense advance, and insurance for directors and officers is not in any way intended to cast doubt on the power of the corporation to indemnify or advance expenses to or purchase and maintain insurance for employees and agents under section 3.02 [§ 30-29-302] or otherwise.

§ 30-29-859. Exclusivity. — A corporation may provide indemnification or advance expenses to a director or an officer only as permitted by sections 30-29-850 through 30-29-859, Idaho Code.

History.

I.C., § 30-29-859, as added by 2015, ch. 243, § 63, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-1-859.

Official Comment Subchapter E [§§ 30-29-850 to 30-29-859] is the exclusive source for the power of a corporation to indemnify or advance expenses to a director or an officer.

Section 8.59 does not preclude provisions in the articles of incorporation, the bylaws, resolutions, or contracts designed to provide procedural machinery in addition to (but not inconsistent with) that provided by subchapter E. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advance for expenses or to cooperate in the procedural steps required to obtain a judicial determination under section 8.54 [§ 30-29-854].

§ 30-29-860. Definitions. — As used in sections 30-29-860 through 30-29-863, Idaho Code:

(1) "Control" or "controlled by" means having the power, directly or indirectly, to elect or remove a majority of the members of the board of directors or other governing body of an entity, whether through the ownership of voting shares or interests, by contract, or otherwise; or being subject to a majority of the risk of loss from the entity's activities or entitled to receive a majority of the entity's residual returns.

(2) "Director's conflicting interest transaction" means a transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, where at the relevant time the director is a party, had knowledge and a material financial interest known to the director, or knew that a related person was a party or had a material financial interest.

(3) "Fair to the corporation" means, for purposes of section 30-29-861(b)(3), Idaho Code, that the transaction as a whole was beneficial to the corporation, taking into appropriate account whether it was fair in terms of the director's dealings with the corporation, and comparable to what might have been obtainable in an arm's length transaction, given the consideration paid or received by the corporation.

(4) "Material financial interest" means a financial interest in a transaction that would reasonably be expected to impair the objectivity of the director's judgment when participating in action on the authorization of the transaction.

(5) "Related person" means:

(a) The individual's spouse;

(b) A child, stepchild, grandchild, parent, stepparent, grandparent, sibling, stepsibling, half-sibling, aunt, uncle, niece, or nephew, or spouse of any such person, of the individual or of the individual's spouse;

(c) A natural living person living in the same house as the individual;

(d) An entity, other than the corporation or an entity controlled by the corporation, controlled by the individual or any person specified in this

subsection;

(e) A domestic or foreign business or nonprofit corporation, other than the corporation or an entity controlled by the corporation, of which the individual is a director; an unincorporated entity of which the individual is a general partner or a member of the governing body; or an individual, trust, or estate for whom, or of which, the individual is a trustee, guardian, personal representative, or like fiduciary; or

(f) A person that is, or an entity that is controlled by, an employer of the individual.

(6) "Relevant time" means the time at which directors' action respecting the transaction is taken in compliance with section 30-29-862, Idaho Code; or if the transaction is not brought before the board of directors, or a committee, for action under section 30-29-862, Idaho Code, at the time the corporation, or an entity controlled by the corporation, becomes legally obligated to consummate the transaction.

(7) "Required disclosure" means disclosure of the existence and nature of the director's conflicting interest and all facts known to the director respecting the subject matter of the transaction that a director free of such conflicting interest would reasonably believe to be material in deciding whether to proceed with the transaction.

History.

I.C., § 30-29-860, as added by 2019, ch. 90, § 108, p. 220.

STATUTORY NOTES

Prior Laws.

Former § 30-29-860, Definitions, which comprised I.C., § 30-29-860, as added by 2015, ch. 243, § 63, p. 758, was repealed by S.L. 2019, ch. 90, § 107, effective July 1, 2019.

Compiler's Notes.

This section is derived from former § 30-1-860, from which many of the annotations have been carried forward.

Official Comment

INTRODUCTORY COMMENT

1. Overview.

There are four basic elements in subchapter F [§§ 30-29-860 to 30-29-863].

First, subchapter F defines, with bright-line rules, the transactions that are to be treated as director's conflicting interest transactions.

Second, subchapter F provides that a director's transaction that is not within the statutory definition of a director's conflicting interest transaction is not subject to judicial review for fairness on the ground that it involved a conflict of interest (although circumstances that fall outside the statutory definition may afford the basis for a legal attack on the transaction on some other ground), even if the transaction involves some sort of conflict lying outside the statutory definition, such as a remote familial relationship.

Third, subchapter F provides that if a director's conflicting interest transaction is properly approved by disinterested (or "qualified") directors or shareholders, the transaction is insulated from judicial review for fairness (although, again, it might be open to attack on some basis other than the conflict).

Fourth, subchapter F also provides that if a director's conflicting interest transaction is properly approved by disinterested (or "qualified") directors or shareholders, the conflicted director may not be subject to an award of damages or other sanctions (although the director could be subject to claims on some basis other than the conflict).

Bright-line provisions of any kind represent a trade-off between the benefits of certainty and the danger that some transactions or conduct that fall outside the area circumscribed by the bright-lines may be so similar to the transactions and conduct that fall within the area that different treatment may seem anomalous. Subchapter F reflects the judgment that in corporate matters, where planning is critical, the clear and important efficiency gains that result from certainty through defining director's conflicting interest transactions exceed any potential and uncertain efficiency losses that might follow from excluding other director's transactions from judicial review for fairness on conflict-of-interest grounds.

2. Scope of Subchapter F.

Subchapter F addresses legal challenges based on director conflicts of interest only. Subchapter F does not undertake to define, regulate, or provide any form of procedure regarding other possible claims. For example, subchapter F does not address a claim that a controlling shareholder has violated a duty owed to the corporation or minority shareholders. So, although transactions between a corporation and a parent corporation or other controlling shareholder who owns less than all of its shares may give rise to the possibility of abuse of power by the controlling shareholder, subchapter F does not address proceedings brought on that basis because section 8.61 concerns only proceedings that are brought on the ground that a "director has an interest respecting the transaction."

Subchapter F applies only when there is a "transaction" by or with the corporation. For purposes of subchapter F, "transaction" generally connotes negotiations or consensual arrangements between the corporation and another party or parties that concern their respective and differing economic rights or interests — not a unilateral action by the corporation or a director. Whether safe harbor procedures of some kind might be available to the director and the corporation with respect to nontransactional matters is discussed in numbered part 3 of this Introductory Comment.

Subchapter F does not preclude the assertion of defenses, such as statute of limitations or failure of a condition precedent, that are based on grounds other than the defenses set forth in this subchapter.

The voting procedures and conduct standards prescribed in subchapter F deal solely with the complicating element presented by the director's conflicting interest in a transaction. A transaction that receives favorable directors' or shareholders' action complying with subchapter F may still fail to satisfy a different quorum requirement or to achieve a different vote than may be needed for substantive approval of the transaction under other applicable statutory provisions or under the articles of incorporation, and vice versa. (Under the Act, a corporation may set higher voting requirements and different quorum requirements in the articles of incorporation. See sections 2.02(b)(2) and 7.27 [§§ 30-29-202 and 30-29-727). In addition, subchapter F does not shield misbehavior by a director or other person that is actionable under other provisions of the Act, such as

section 8.31 [§ 30-29-831], or under other legal rules, regardless of whether the misbehavior is incident to a transaction with the corporation and regardless of whether the rule is one of corporate law.

Finally, certain corporate transactions or arrangements in which directors inherently have a special personal interest are of a unique character and are regulated by special procedural provisions of the Act. See sections 8.51 and 8.52 [§§ 30-29-851 and 30-29-852] dealing with indemnification arrangements, and section 7.44 [§ 30-29-744] dealing with termination of derivative proceedings by board action. Any corporate transactions or arrangements affecting directors that are governed by such regulatory sections of the Act are not governed by subchapter F.

3. Nontransactional Situations Involving Interest Conflicts.

A. CORPORATE OR BUSINESS OPPORTUNITY.

Subchapter F does not apply by its terms to corporate or business opportunities because no transaction between the corporation and the director is involved in the taking of an opportunity. However, subchapter 8G [§ 30-29-870] provides, in effect, that the safe harbor procedures of section 8.62 or 8.63 [§§ 30-29-862 or 30-29-863] may be employed, at the interested director's election, to protect the taking of a business opportunity that might be challenged under the corporate opportunity doctrine. Also, section 2.02(b)(6) permits a corporation to include in its articles of incorporation a provision that limits or eliminates the duty to present a business opportunity to the corporation.

B. OTHER SITUATIONS.

Many other kinds of situations can give rise to divergent economic interests between a director and the corporation. For example, a director's personal financial interests can be affected by a nontransactional policy decision of the board of directors, such as where it decides to establish a divisional headquarters in the director's small hometown. In other situations, simple inaction by a board might work to a director's personal advantage, or a flow of ongoing business relationships between a director and the corporation may, without centering upon any discrete "transaction," raise questions of possible favoritism, unfair dealing, or undue influence. If a director decides to engage in business activity that directly competes with

the corporation's own business, the economic interest in that competing activity ordinarily will conflict with the best interests of the corporation and put in issue the breach of the director's duties to the corporation. Basic conflicts and improprieties can also arise out of a director's personal appropriation of corporate assets or improper use of corporate proprietary or inside information.

The circumstances in which such nontransactional conflict situations should be brought to the board of directors or shareholders for clearance, and the legal effect, if any, of such clearance, are matters for development under the common law and lie outside the ambit of subchapter F. Although these nontransactional situations are not covered by the provisions of subchapter F, a court may well recognize that the subchapter F procedures provide a useful analogy for dealing with such situations.

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Note on Terms in Official Comments.

In the Official Comments to subchapter F, the director who has a conflicting interest is for convenience referred to as "the director" or "D," and the corporation of which he or she is a director is referred to as "the corporation" or "X Co." A subsidiary of the corporation is referred to as "S Co." Another corporation dealing with X Co. is referred to as "Y Co."

*

The definitions set forth in section 8.60 [this section] apply only to subchapter F and section 2.02(b)(6) and, where relevant to subchapter G. They have no application elsewhere in the Act. (For the meaning and use of certain terms used below, such as "D," "X Co." and "Y Co.," see the Note on Terms at the end of the Introductory Comment of subchapter F.)

1. Director's Conflicting Interest Transaction.

The definition of "director's conflicting interest transaction" in section 8.60 is the core concept underlying subchapter F. The definition operates preclusively in that, as used in section 8.61, it denies the power of a court to invalidate transactions or otherwise to remedy conduct on the ground that the director has a conflict of interest if it falls outside the statutory definition of "director's conflicting interest transaction."

A. TRANSACTION.

For purposes of subchapter F, “transaction” requires a bilateral (or multilateral) arrangement to which the corporation or an entity controlled by the corporation is a party. Subchapter F does not apply to transactions to which no such entity is a party. For example, a purchase or sale by the director of the corporation’s shares on the open market or from or to a third party is not a “director’s conflicting interest transaction” within the meaning of subchapter F.

B. PARTY TO THE TRANSACTION — THE CORPORATION OR A CONTROLLED ENTITY.

In the usual case, the transaction would be effected by X Co. Assume, however, that X Co. controls the vote for directors of S Co. D wishes to sell a building D owns to X Co. and X Co. is willing to buy it. As a business matter, it makes no difference to X Co. whether it takes the title directly or indirectly through its subsidiary S Co. or some other entity that X Co. controls. The applicability of subchapter F does not depend upon that formal distinction, because the subchapter includes within its operative framework transactions by entities controlled by X Co. Thus, subchapter F would apply to a sale of the building by D to S Co.

C. PARTY TO THE TRANSACTION — THE DIRECTOR OR A RELATED PERSON.

D can have a conflicting interest in only two ways.

First, a conflicting interest can arise under either clause (i) or (ii) of the definition of “director’s conflicting interest transaction.” This will be the case if, under clause (i), the transaction is between D and X Co. A conflicting interest also will arise under clause (ii) if D is not a party to the transaction, but knows about it and knows that he or she has a material financial interest in it. The personal economic stake of the director must be in the transaction itself — that is, the director’s gain must flow directly from the transaction. A remote gain (for example, a future reduction in tax rates in the local community) is not enough to give rise to a conflicting interest under clause (ii) of the definition.

Second, a conflicting interest for D can arise under clause (iii) of the definition from the involvement in the transaction of a “related person” of D

that is either a party to the transaction or has a "material financial interest" in it. "Related person" is defined in section 8.60.

Circumstances may arise where a director could have a conflicting interest under more than one clause of the definition. For example, if Y Co. is a party to or interested in the transaction with X Co. and Y Co. is a related person of D, the matter would fall under clause (iii), but D also may have a conflicting interest under clause (ii) if D's economic interest in Y Co. is sufficiently material and if the importance of the transaction to Y Co. is sufficiently material.

A director may have relationships and connections to persons and institutions that are not specified in clause (iii) of the definition. Such relationships and connections fall outside subchapter F because the categories of persons described in clause (iii) constitute the exclusive universe for purposes of subchapter F. For example, in a challenged transaction between X Co. and Y Co., suppose the court confronts the argument that D also is a major creditor of Y Co. and that creditor status in Y Co. gives D a conflicting interest. The court should rule that D's creditor status in Y Co. does not fit any category of the definition; and therefore, the conflict of interest claim must be rejected by reason of section 8.61(a) [§ 30-29-861]. The result would be different if Y Co.'s debt to D were of such economic significance to D that it would either fall under clause (ii) of the definition or, if it placed D in control of Y Co., it would fall under clause (iii) (because Y Co. is a related person of D under clause (iv) of the definition). To explore the example further, if D is also a shareholder of Y Co., but D does not have a material financial interest in the transaction and does not control Y Co., no director's conflicting interest transaction arises and the transaction cannot be challenged on conflict of interest grounds. To avoid any appearance of impropriety, D, nonetheless, could consider recusal from the other directors' deliberations and voting on the transaction between X Co. and Y Co.

Any director's interest in a transaction that meets the criteria of the definition renders the transaction a "director's conflicting interest transaction." If the director's interest satisfies those criteria, subchapter F draws no distinction between a director's interest that clashes with the interests of the corporation and a director's interest that coincides with, or is parallel to, or even furthers the interests of the corporation.

Routine business transactions frequently occur between companies with overlapping directors. If X Co. and Y Co. have routine, frequent business dealings with terms dictated by competitive market forces, then even if a director of X Co. has a relevant relationship with Y Co., the transactions would almost always be defensible, regardless of approval by disinterested directors or shareholders, on the ground that they are "fair." For example, a common transaction involves a purchase of the corporation's products or services by Y Co., or perhaps by D or a related person, at prices normally charged by the corporation. In such circumstances, it usually will not be difficult for D to show that the transaction was on arms-length terms and was fair. Even a purchase by D of a product of X Co. at a usual "employee's discount," although technically assailable as a conflicting interest transaction, would customarily be viewed as a routine incident of the office of director and, thus, "fair" to the corporation.

2. Control.

The definition of "control" in section 8.60 contains two independent clauses. The first clause addresses the ability to elect or remove a majority of the members of an entity's governing body. That power can arise, for example, from articles of incorporation or a shareholders' agreement. The second clause addresses economic interest in the entity and may include, among other circumstances, financial structures that do not have voting interests or a governing body in the traditional sense, such as special purpose entities.

3. Relevant Time.

The definition of director's conflicting interest transaction requires that, except where he or she is a party, the director know of the transaction at the "relevant time" as defined in section 8.60. Where the director lacks such knowledge, the risk to the corporation that the director's judgment might be improperly influenced, or the risk of unfair dealing by the director, is not present. In a corporation of significant size, routine transactions in the ordinary course of business, which typically involve decision making at lower management levels, normally will not be known to the director and, if that is the case, will not meet the "knowledge" requirement of clauses (ii) or (iii) of the definition of director's conflicting interest transaction.

4. Material Financial Interest.

The “interest” of a director or a related person in a transaction can be direct or indirect (e.g., as an owner of an entity or a beneficiary of a trust or estate), but it must be financial for there to exist a “director’s conflicting interest transaction.” Thus, for example, an interest in a transaction between X Co. and a director’s alma mater, or any other transaction involving X Co. and a party with which D might have emotional involvement but no financial interest, would not give rise to a director’s conflicting interest transaction. Moreover, whether a financial interest is material does not turn on any assertion by the possibly conflicted director that the interest in question would not impair his or her objectivity if called upon to vote on the authorization of the transaction. Instead, assuming a court challenge asserting the materiality of the financial interest, the standard calls upon the trier of fact to determine whether the objectivity of the director would reasonably be expected to have been impaired by the financial interest when voting on the matter. Thus, the standard is objective, not subjective.

Under clause (ii) of the definition of “director’s conflicting interest transaction,” at the relevant time a director must have knowledge of his or her financial interest in the transaction in addition to knowing about the transaction itself. As a practical matter, a director could not be influenced by a financial interest about which that director had no knowledge. For example, the possibly conflicted director might know about X Co.’s transaction with Y Co., but might not know that his or her money manager recently established a significant position in Y Co. stock for the director’s portfolio. In such circumstances, the transaction with Y Co. would not fall within clause (ii), notwithstanding the portfolio investment’s significance. If the director did not know about the Y Co. portfolio investment, it could not reasonably be expected to impair the objectivity of that director’s judgment.

Similarly, under clause (iii) of that definition, a director must know about his or her related person’s financial interest in the transaction for the matter to give rise to a “material financial interest” as defined in section 8.60. If there is such knowledge and “interest” (i.e., the financial interest could reasonably be expected to influence the director’s judgment), then the matter involves a director’s conflicting interest transaction.

5. Related Person.

Six categories of “related person” of the director are set out in the definition of that term. These categories are specific, exclusive and preemptive.

The first three categories involve closely related family, or near-family, individuals as specified in clauses (i) through (iii). These clauses are exclusive insofar as family relationships are concerned and include adoptive relationships. The references to a “spouse” include a common law spouse. Clause (iii) covers personal, as opposed to business, relationships; for example, clause (iii) does not cover a lessee.

Regarding the subcategories of persons described in clause (v) from the perspective of X Co., certain of D’s relationships with other entities and D’s fiduciary relationships are always a sensitive concern, separate and apart from whether D has a financial interest in the transaction. Clause (v) reflects the policy judgment that D cannot escape D’s legal obligation to act in the best interests of another person for whom D has such a relationship and, accordingly, that such a relationship (without regard to any financial interest on D’s part) should cause the relevant entity to have “related person” status.

The term “employer” as used in clause (vi) is not separately defined but should be interpreted in light of the purpose of subchapter F. The relevant inquiry is whether D, because of an employment relationship with an employer who has a significant stake in the outcome of the transaction, is likely to be influenced to act in the interest of that employer rather than in the interest of X Co.

References in the foregoing to “director” or “D” include the term “officer” where relevant in section 2.02(b)(6) and section 8.70.

6. Fair to the Corporation.

The term “fair” to the corporation in subchapter F has a special meaning. The transaction, viewed as a whole, must have been beneficial to the corporation.

In considering the “fairness” of the transaction, the court will be required to consider not only the market fairness of the terms of the deal — whether it is comparable to what might have been obtainable in an arm’s length transaction — but also (as the board of directors would have been required to do) whether the transaction was one that was reasonably likely to yield

favorable results (or reduce detrimental results). Thus, if a manufacturing company that lacks sufficient working capital allocates some of its scarce funds to purchase at a market price a sailing yacht owned by one of its directors, it will not be easy to persuade the court that the transaction was "fair" in the sense that it was reasonably made to further the business interests of the corporation. The fact that the price paid for the yacht was a "fair" market price, and that the full measure of disclosures made by the director is beyond challenge, may still not be enough to defend and uphold the transaction.

A. CONSIDERATION AND OTHER TERMS OF THE TRANSACTION.

The fairness of the consideration and other transaction terms are to be judged at the relevant time. See section 8.61(b)(3). The relevant inquiry is whether the consideration paid or received by the corporation or the benefit expected to be realized by the corporation was adequate in relation to the obligations assumed or received or other consideration provided by or to the corporation. If the issue in a transaction is the "fairness" of a price, "fair" is not to be taken to imply that there is one single "fair" price, all others being "unfair." Generally a "fair" price is any price within a range that an unrelated party might have been willing to pay or willing to accept, as the case may be, for the relevant property, asset, service or commitment, following a normal arm's-length business negotiation. The same approach applies not only to gauging the fairness of price, but also to the fairness evaluation of any other key term of the deal.

Although the "fair" criterion used to assess the consideration under section 8.61(b)(3) is also a range rather than a point, the width of that range may be narrower than would be the case in an arm's-length transaction. For example, the quality and completeness of disclosures, if any, made by the conflicted director that bear upon the consideration in question are relevant in determining whether the consideration paid or received by the corporation, although otherwise commercially reasonable, was "fair" for purposes of section 8.61(b)(3).

B. PROCESS OF DECISION AND THE DIRECTOR'S CONDUCT.

In some circumstances, the behavior of the director having the conflicting interest may affect the finding and content of "fairness." Fair dealing

requires that the director make "required disclosure" at the "relevant time" (both as defined) even if the director plays no role in arranging or negotiating the terms of the transaction. One illustration of unfair dealing is the director's failure to disclose fully the director's interest or hidden defects known to the director regarding the transaction. Another illustration would be the exertion by the director of improper pressure upon the other directors or other parties that might be involved with the transaction. Whether a transaction can be successfully challenged by reason of deficient or improper conduct, notwithstanding the fairness of the economic terms, will turn on the court's evaluation of the conduct and its impact on the transaction.

7. Required Disclosure.

An important element of subchapter F's safe harbor procedures is that those acting for the corporation be able to make an informed judgment. As an example of "required disclosure" (as defined), if D knows that the land the corporation is proposing to buy from D is sinking into an abandoned coal mine, D must disclose not only D's interest in the transaction but also that the land is subsiding. As a director of X Co., D may not invoke the "buyer beware" doctrine. On the other hand, D does not have any obligation to reveal the price that D paid for the property 10 years ago, or the fact that D inherited the property, because that information is not material to the board's evaluation of the property and its business decision whether to proceed with the transaction. Further, although material facts respecting the subject of the transaction must be disclosed, D is not required to reveal personal or subjective information that bears upon D's negotiating position (such as, for example, D's urgent need for cash, or the lowest price D would be willing to accept). This is true even though such information would be highly relevant to the corporation's decision-making in that, if the information were known to the corporation, it could enable the corporation to hold out for more favorable terms.

§ 30-29-861. Judicial action. — (a) A transaction effected or proposed to be effected by the corporation or by an entity controlled by the corporation may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against a director of the corporation, in a proceeding by a shareholder or by or in the right of the corporation, on the grounds that the director has an interest, respecting the transaction if it is not a director's conflicting interest transaction.

(b) A director's conflicting interest transaction may not be the subject of equitable relief or give rise to an award of damages or other sanctions against a director of the corporation, in a proceeding by a shareholder or by or in the right of the corporation, on the grounds that the director has an interest respecting the transaction, if:

(1) Directors' action respecting the transaction was taken in compliance with section 30-29-862, Idaho Code, at any time;

(2) Shareholders' action respecting the transaction was taken in compliance with section 30-29-863, Idaho Code, at any time; or

(3) The transaction, judged according to the circumstances at the relevant time, is established to have been fair to the corporation.

History.

I.C., § 30-29-861, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 109, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-861.

Official Comment

Section 8.61 [this section] is the operational section of subchapter F [§§ 30-29-860 to 30-29-863], as it prescribes the judicial consequences of the other sections. In general terms:

• If the section 8.62 or 8.63 [§§ 30-29-862 to 30-29-863] procedures are complied with, or if it is established that at the relevant time a director's conflicting interest transaction was fair to the corporation, then a director's conflicting interest transaction is immune from attack by a shareholder or the corporation on the ground of an interest of the director. However, if the transaction is vulnerable to attack on some other ground, observance of subchapter F's procedures does not make it less so.

• If a transaction is *not* a director's conflicting interest transaction as defined in section 8.60 [§ 30-29-860], then the transaction may *not* be enjoined, rescinded, or made the basis of other sanction on the ground of a conflict of interest of a director, regardless of whether it went through the procedures of subchapter F. In that sense, subchapter F is specifically intended to be both comprehensive and exclusive.

• If a director's conflicting interest transaction that was not at any time the subject of action taken in compliance with section 8.62 or 8.63 is challenged on grounds of the director's conflicting interest, and is not shown to be fair to the corporation, then the court may take such remedial action as it considers appropriate under the applicable law of the jurisdiction.

1. Section 8.61(a).

Section 8.61(a) makes clear that the bright-line definition of "director's conflicting interest transaction" is exclusive with respect to a court's review of a director's interest in a transaction. So, for example, a transaction will not constitute a director's conflicting interest transaction and, therefore, will not be subject to judicial review on the ground that a director had an interest in the transaction, where the transaction is made with a relative of a director who is not one of the relatives specified in the definition of "related person," or on the ground of an alleged interest other than a material financial interest, such as a financial interest of the director that is not material, as defined in section 8.60, or a nonfinancial interest. If, however, there is reason to believe that the fairness of a transaction involving D could be questioned, D should subject the transaction to the safe harbor

procedures of subchapter F. The procedures of section 8.62 (and, to a lesser extent, section 8.63) may be used for many transactions that lie outside the definitions of section 8.60.

2. Section 8.61(b).

Section 8.61(b)(1) provides a defense in a proceeding challenging a director's conflicting interest transaction if the procedures of section 8.62 have been properly followed.

The plaintiff may challenge the availability of that defense based on a failure to meet the specific requirements of section 8.62 or to conform with general standards of director conduct. For example, a challenge addressed to section 8.62 compliance might question whether the acting directors were "qualified directors" or might dispute the quality and completeness of the disclosures made by D to the qualified directors. If such a challenge is successful, the board action is ineffective for purposes of section 8.61(b)(1) and both D and the transaction may be subject to the full range of remedies that might apply, absent the safe harbor, unless the fairness of the transaction can be established under section 8.61(b)(3). The fact that a transaction has been nominally passed through safe harbor procedures does not preclude a subsequent challenge based on any failure to meet the requirements of section 8.62. A challenge to the effectiveness of board action for purposes of section 8.61(b)(1) might also assert that, although the conflicted director's conduct in connection with the process of approval by qualified directors may have been consistent with the statute's expectations, the qualified directors dealing with the matter did not act in good faith or on reasonable inquiry. The kind of relief that may be appropriate when qualified directors have approved a transaction but have not acted in good faith or have failed to become reasonably informed — and, again, where the fairness of the transaction has not been established under section 8.61(b)(3) — will depend heavily on the facts of the individual case.

Section 8.61(b)(2) regarding shareholders' approval of the transaction is the matching piece to section 8.61(b)(1) regarding directors' approval.

The language "at any time" in these provisions permits the directors or the shareholders to ratify a director's conflicting interest transaction after the fact for purposes of subchapter F.

Section 8.61(b)(3) permits a showing that a director's conflicting interest transaction was fair to the corporation even if there was no compliance with section 8.62 or 8.63. Under section 8.61(b)(3) the interested director has the burden of establishing that the transaction was fair.

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Note on Directors' Compensation.

Although directors' fees and other forms of director compensation are typically set by the board of directors and are specifically authorized by section 8.11 [§ 30-29-811] of the Act, they do involve a director's conflicting interest transaction in which most if not all of the directors may not be qualified directors. Therefore, board action on directors' compensation and benefits would be subject to judicial sanction if they are not favorably acted upon by shareholders pursuant to section 8.63 or if they are not in the circumstances fair to the corporation pursuant to section 8.61(b)(3).

§ 30-29-862. Directors' action. — (a) Directors' action respecting a director's conflicting interest transaction is effective for purposes of section 30-29-861(b)(1), Idaho Code, if the transaction has been authorized by the affirmative vote of a majority, but no fewer than two (2), of the qualified directors who voted on the transaction after required disclosure by the conflicted director of information not already known by such qualified directors, or after modified disclosure in compliance with subsection (b) of this section; provided that:

(1) The qualified directors have deliberated and voted outside the presence of and without the participation by any other director; and

(2) Where the action has been taken by a board committee, all members of the committee were qualified directors, and either the committee was composed of all the qualified directors on the board of directors, or the members of the committee were appointed by the affirmative vote of a majority of the qualified directors on the board of directors.

(b) Notwithstanding the provisions of subsection (a) of this section, when a transaction is a director's conflicting interest transaction, only because a related person described in section 30-29-860(3)(e) or (f), Idaho Code, is a party to or has a material financial interest in the transaction, the conflicted director is not obligated to make required disclosure to the extent that the director reasonably believes that doing so would violate a duty imposed under law, a legally enforceable obligation of confidentiality, or a professional ethics rule, provided that the conflicted director discloses to the qualified directors voting on the transaction:

(1) All information required to be disclosed that is not so violative;

(2) The existence and nature of the director's conflicting interest; and

(3) The nature of the conflicted director's duty not to disclose the confidential information.

(c) A majority, but no fewer than two (2), of all the qualified directors on the board of directors, or on the board committee, constitutes a quorum for purposes of action that complies with this section.

(d) Where directors' action under this section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by reason of the articles of incorporation or bylaws or a provision of law, independent action to satisfy those authorization requirements shall be taken by the board of directors or a board committee, in which action directors who are not qualified directors may participate.

History.

I.C., § 30-29-862, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 110, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-862.

Official Comment

Section 8.62 [this section] provides the procedure for action by the board of directors or by a board committee under subchapter F [§§ 30-29-860 to 30-29-863]. In the normal course this section, together with section 8.61(b) [§ 30-29-861], will be the key method for addressing directors' conflicting interest transactions. Any discussion of section 8.62 must have in mind the requirements that directors act in good faith and on reasonable inquiry. See section 8.30 [§ 30-29-830]. Director action that does not comply with those requirements, even if otherwise in compliance with section 8.62, will be subject to challenge and not be given effect under section 8.62. See the Official Comment to section 8.61(b).

1. Section 8.62(a).

The definition of "qualified director" in section 1.43(a)(4) [§ 30-29-143] excludes not only a director who is conflicted directly or because of a person specified in the categories of the "related person" definition in section 8.60 [§ 30-29-860], but also any director with a familial, financial,

employment, professional or other relationship with *another director for whom the transaction is a director's conflicting interest transaction* that would be likely to impair the objectivity of the first director's judgment when participating in a vote on the transaction.

Action under section 8.62 may take the form of committee action meeting the requirements of subsection (a)(2). The requirements for effective committee action are intended to preclude the appointment as committee members of a favorably inclined minority from among all the qualified directors. With respect to required disclosure under subsection (a), if there is more than one conflicted director interested in the transaction, the need for required disclosure would apply to each.

2. Section 8.62(b).

Section 8.62(b) accommodates situations where a director who has a conflicting interest is not able to comply fully with the disclosure requirement of subsection (a) because of an extrinsic duty of confidentiality that such director reasonably believes to exist. The director may, for example, be prohibited from making full disclosure because of legal restrictions that happen to apply to the transaction (*e.g.*, grand jury seal or national security statute) or professional ethics rule (*e.g.*, attorney-client confidentiality). The most frequent use of subsection (b), however, will likely involve directors who have conflicting fiduciary obligations. If D is also a director of Y Co., D may have acquired confidential information from one or both directorships relevant to a transaction between X Co. and Y Co., that D cannot reveal to one without violating a fiduciary duty owed to the other. In such circumstances, subsection (b) enables the conflicting interest complication to be presented for consideration under subsection (a), and thereby enables X Co. (and Y Co.) and D to secure for the transaction the protection afforded by subchapter F even though D cannot, by reason of applicable law, confidentiality strictures or a professional ethics rule, make the full disclosure otherwise required.

To comply with section 8.62(b), D must meet all three requirements set forth in clauses (1), (2) and (3). D must then play no personal role in the board's (or committee's) ultimate deliberations or action. The purpose of subsection (b) is to make it clear that the provisions of subchapter F may be employed to "safe harbor" a transaction in circumstances where a conflicted

director cannot, because of enforced fiduciary silence, disclose all the known facts. A director could, of course, encounter the same problem of mandated silence with regard to any matter that comes before the board; that is, the problem of forced silence is not linked at all to the problems of transactions involving a conflicting interest of a director. It could happen that at the same board meeting of X Co. at which D invokes subsection (b), another director who has no financial interest in the transaction might conclude that under applicable law he or she is bound to silence (because of attorney-client confidentiality, for example) and would under general principles of sound director conduct withdraw from participation in the board's deliberations and action. Of course, if D invokes subsection (b) and does not make disclosures that would otherwise be required under subsection (a) before leaving the meeting, the qualified directors may decline to act on the transaction out of concern that D knows (or may know) something they do not. On the other hand, if D is subject to an extrinsic duty of confidentiality but has no knowledge of material facts that should otherwise be disclosed, D would normally state just that and subsection (b) would be irrelevant. Having disclosed the existence and nature of the conflicting interest, D would thereby comply with the "required disclosure" as defined under section 8.60.

Although section 8.62(b) will apply to the recurring situation where transacting corporations have common directors (or where a director of one party is an officer of the other), it should not otherwise be read as attempting to address the scope, or mandate the consequences, of various silence-privileges.

Section 8.62(b) is available to D if a transaction is a director's conflicting interest transaction only because a related person described in clauses (v) or (vi) of the definition of that term in section 8.60 is a party to or has a material financial interest in the transaction. Its availability is so limited because in those instances a director owes a fiduciary duty to such a related person. If D or a related person of D other than a related person described in clauses (v) or (vi) of the definition of is a party to or has a material financial interest in the transaction, D's only options are satisfying the required disclosure obligation on an unrestricted basis, abandoning the transaction, or accepting the risk of establishing fairness under section 8.61(b)(3), if the transaction is challenged in a court proceeding.

Whenever a conflicted director proceeds in the manner provided in subsection (b), the other directors should recognize that the conflicted director may have information that, but for the narrow exception set forth in subsection (b), D would be required to reveal to the qualified directors who are acting on the transaction — information that could well indicate that the transaction would be either favorable or unfavorable for X Co.

3. Section 8.62(d).

Subsection 8.62(d) underscores the fact that the directors' voting procedures and requirements set forth in subsections (a) through (c) address only the director's conflicting interest. Thus, in any case where the quorum or voting requirements for substantive approval of a transaction differ from the quorum or voting requirements for "safe harbor" protection under section 8.62, the directors may find it necessary to conduct (and record in the minutes of the proceedings) two separate votes — one for section 8.62 purposes and the other for substantive approval purposes.

§ 30-29-863. Shareholders' action. — (a) Shareholders' action respecting a director's conflicting interest transaction is effective for purposes of section 30-29-861(b)(2), Idaho Code, if a majority of the votes cast by the holders of all qualified shares are in favor of the transaction after:

(1) Notice to shareholders describing action to be taken respecting the transaction;

(2) Provision to the corporation of the information referred to in subsection (b) of this section; and

(3) Communication to the shareholders entitled to vote on the transaction of the information that is the subject of required disclosure, to the extent the information is not known by them. In the case of shareholders' action at a meeting, the shareholders entitled to vote shall be determined as of the record date for notice of the meeting.

(b) A director who has a conflicting interest respecting the transaction shall, before the shareholders' vote, inform the secretary, or other officer or agent of the corporation authorized to tabulate votes, in writing, of the number of shares that the director knows are not qualified shares under subsection (c) of this section, and the identity of the holders of those shares.

(c) As used in this section:

(1) "Holder" means and "held by" refers to shares held by a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner; and

(2) "Qualified shares" means all shares entitled to be voted with respect to the transaction except for shares that the secretary or other officer or agent of the corporation authorized to tabulate votes either knows, or under subsection (b) of this section is notified, are held by either a director who has a conflicting interest respecting the transaction or a related person of the director, not including a person described in section 30-29-860(4)(f), Idaho Code.

(d) A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum for purposes of compliance with this section. Subject to the provisions of subsection (e) of this section, shareholders' action that otherwise complies with this section is not affected by the presence of holders or by the voting of shares that are not qualified shares.

(e) If a shareholders' vote does not comply with subsection (a) of this section solely because of a director's failure to comply with subsection (b) of this section, and if the director establishes that the failure was not intended to influence, and did not in fact determine, the outcome of the vote, the court may take such action respecting the transaction and the director, and may give such effect, if any, to the shareholders' vote, as the court considers appropriate in the circumstances.

(f) Where shareholders' action under this section does not satisfy a quorum or voting requirement applicable to the authorization of the transaction by reason of the articles of incorporation or the bylaws or a provision of law, independent action to satisfy those authorization requirements shall be taken by the shareholders, in which action shares that are not qualified shares may participate.

History.

I.C., § 30-29-863, as added by 2015, ch. 243, § 63, p. 758; am. 2019, ch. 90, § 111, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-863.

Official Comment

Section 8.63 [this section] provides the machinery for shareholders' action that confers safe harbor protection for a director's conflicting interest

transaction, just as section 8.62 [§ 30-29-862] provides the machinery for directors' action that confers subchapter F [§§ 30-29-860 to 30-29-863] safe harbor protection for such a transaction.

1. Section 8.63(a).

Section 8.63(a) specifies the procedure required to confer effective safe harbor protection for a director's conflicting interest transaction through a vote of shareholders. In advance of the vote, three steps must be taken: (i) shareholders must be given timely and adequate notice describing the transaction; (ii) D must disclose the information called for in subsection (b); and (iii) required disclosure (as defined in section 8.60 [§ 30-29-860]) must be made to the shareholders entitled to vote. Shareholder action that complies with subsection (a) may be taken at any time, before or after the corporation becomes legally obligated to complete the transaction.

Section 8.63 does not contain a "limited disclosure" provision that is comparable to section 8.62(b). Thus, the safe harbor protection of subchapter F is not available through shareholder action under section 8.63 in a case where D either remains silent or makes less than required disclosure because of an extrinsic duty of confidentiality.

2. Section 8.63(b).

In many circumstances, the secretary or other person charged with counting votes on behalf of X Co. will have no way to know which of X Co.'s outstanding shares should be excluded from the vote. Section 8.63(b) (together with subsection (c)) therefore obligates a director who has a conflicting interest respecting the transaction, as a prerequisite to safe harbor protection by shareholder action, to provide information known to the director with respect to the shares that are not qualified.

If the person counting the votes knows, or is notified under subsection (b), that particular shares should be excluded but for some reason fails to exclude them from the count and their inclusion in the vote does not affect its outcome, the shareholders' vote will stand. If the improper inclusion determines the outcome, the shareholders' vote fails because it does not comply with subsection (a). Subsection (e) permits the court to take the appropriate action in cases where the notification under subsection (b) is defective but not determinative of the outcome of the vote.

3. Section 8.63(c).

The definition of "qualified shares" in section 8.63(c) does not exclude shares held by entities or persons described in clause (vi) of the definition of "related person" in section 8.60, i.e., a person that is, or is an entity that is controlled by, an employer of D. If D is an employee of Y Co., that fact does not prevent Y Co. from exercising its usual rights to vote any shares it may hold in X Co. D may be unaware of, and would not necessarily monitor, whether his or her employer holds X Co. shares. Moreover, D will typically have no control over his or her employer and how it may vote its X Co. shares.

4. Section 8.63(e).

If D did not provide the information required under section 8.63(b), on its face the shareholders' action is not in compliance with subsection (a) and D has no safe harbor under subsection (a). In the absence of that safe harbor, D can be put to the burden of establishing the fairness of the transaction under section 8.61(b)(3) [§ 30-29-861].

That result is proper where D's failure to inform was determinative of the vote results or, worse, was part of a deliberate effort on D's part to influence the outcome. If, however, D's omission was not motivated by D's effort to influence the integrity of the voting process (for example, it was the result of D's negligence), and the voting of the unreported shares was not determinative of the outcome of the vote, then the court should be free to fashion an appropriate response to the situation in light of all the considerations at the time of its decision.

Despite the presumption of regularity customarily accorded the secretary's record, a plaintiff may go behind the secretary's record for purposes of subsection (e).

5. Section 8.63(f).

Section 8.63(f) underscores that the shareholders' voting procedures and requirements set forth in subsections (a) through (e) treat only the director's conflicting interest. A transaction that receives a shareholders' vote that complies with subchapter F may well fail to achieve a different vote or quorum that may be required for substantive approval of the transaction under other applicable statutory provisions or provisions contained in X

Co.'s articles of incorporation or bylaws, and vice versa. Thus, in any case where the quorum or voting requirements for substantive approval of a transaction differ from the quorum or voting requirements for "safe harbor" protection under section 8.63, the corporation may find it necessary to conduct (and record in the minutes of the proceedings) two separate shareholder votes — one for section 8.63 purposes and the other for substantive approval purposes (or, if appropriate, conduct two separate tabulations of one vote).

§ 30-29-864 through 30-29-869. [Reserved.]

§ 30-29-870. Business opportunities. — (a) If a director or officer pursues or takes advantage of a business opportunity directly, or indirectly through or on behalf of another person, that action may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against the director, officer, or other person, in a proceeding by or in the right of the corporation on the ground that the opportunity should have first been offered to the corporation, if:

(1) Before the director, officer, or other person becomes legally obligated respecting the opportunity, the director or officer brings it to the attention of the corporation and either:

(i) Action by qualified directors disclaiming the corporation's interest in the opportunity is taken in compliance with the same procedures as are set forth in the provisions of section 30-29-862, Idaho Code; or

(ii) Shareholders' action disclaiming the corporation's interest in the opportunity is taken in compliance with the procedures set forth in the provisions of section 30-29-863, Idaho Code, in either case as if the decision being made concerned a director's conflicting interest transaction, except that, rather than making the required disclosure as defined in section 30-29-860, Idaho Code, the director or officer shall have made prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity known to the director or officer; or

(2) The duty to offer the corporation the business opportunity has been limited or eliminated pursuant to a provision of the articles of incorporation adopted, and where required, made effective by action of qualified directors, in accordance with the provisions of section 30-29-202(b)(6), Idaho Code.

(b) In any proceeding seeking equitable relief or other remedies based upon an alleged improper pursuit or taking advantage of a business

opportunity by a director or officer, directly, or indirectly through or on behalf of another person, the fact that the director or officer did not employ the procedure described in paragraph (i) or (ii) of subsection (a)(1) of this section before pursuing or taking advantage of the opportunity shall not create an implication that the opportunity should have been first presented to the corporation or alter the burden of proof otherwise applicable to establish that the director or officer breached a duty to the corporation in the circumstances.

History.

I.C., § 30-29-870, as added by 2019, ch. 90, § 112, p. 220.

Official Comment

Section 8.70(a)(1) [this section] provides a safe harbor for a director or officer weighing possible involvement with a prospective business opportunity that might constitute a "corporate opportunity." The phrase "directly, or indirectly through or on behalf of another person" recognizes the need to cover transactions pursued or effected either directly by the director or officer or indirectly through or on behalf of another person, which might be a related person as defined in section 8.60 [§ 30-29-860] or a person which is not a related person. By action of the board of directors or shareholders of the corporation under section 8.70(a)(1), the director or officer can obtain a disclaimer of the corporation's interest in the matter before proceeding with such involvement. In the alternative, the corporation may, among other things, (i) decline to disclaim its interest, (ii) delay a decision respecting granting a disclaimer pending receipt from the director or officer of additional information (or for any other reason), or (iii) attach conditions to the disclaimer it grants under section 8.70(a)(1).

The safe harbor provided under section 8.70(a)(1) may be utilized only for a specific business opportunity. A broader advance safe harbor for any, or one or more classes or categories of, business opportunities must meet the requirements of section 2.02(b)(6) [§ 30-29-202]. Section 8.70(a)(2) confirms that if the duty of an officer or director to present an opportunity has been limited or eliminated by a provision in the articles of incorporation under section 2.02(b)(6) (and, in the case of officers, appropriate action by qualified directors as required by that section), a safe harbor exists in

connection with the pursuit or taking of the opportunity. The common law doctrine of "corporate opportunity" has long been recognized as a part of the director's duty of loyalty and, under court decisions, extends to officers. See section 8.30(a) [§ 30-29-830] and its Official Comment. The doctrine recognizes that the corporation has a right prior to that of its directors or officers to act on certain business opportunities that come to the attention of the directors or officers. In such situations, a director or officer who acts on the opportunity for the benefit of the director or officer or another person without having first presented it to the corporation can be held to have "usurped" or "intercepted" a right of the corporation. A defendant director or officer who is found by a court to have violated the duty of loyalty in this regard, as well as related or other persons involved in the transaction, may be subject to damages or possible equitable remedies, including injunction, disgorgement or the imposition of a constructive trust in favor of the corporation. Although the doctrine's concept is easily described, whether it will be found to apply in a given case depends on the facts and circumstances of the particular situation and is thus frequently unpredictable.

In recognition that the corporation need not pursue every business opportunity of which it becomes aware, an opportunity coming within the doctrine's criteria that has been properly presented to and declined by the corporation may then be pursued or taken by the presenting director or officer without breach of the duty of loyalty.

The fact-intensive nature of the corporate opportunity doctrine resists statutory definition. Instead, subchapter G [§ 30-29-870] employs the broader notion of "business opportunity" that encompasses any opportunity, without regard to whether it would come within the judicial definition of a "corporate opportunity," as it may have been developed by courts in a jurisdiction. When properly employed, subchapter G provides a safe-harbor mechanism enabling a director or officer to pursue an opportunity directly, or indirectly through or on behalf of another person, free of possible challenge claiming conflict with the director's or officer's duty on the ground that the opportunity should first have been offered to the corporation. Section 8.70 is modeled on the safe-harbor and approval procedures of subchapter F pertaining to directors' conflicting interest

transactions with, however, some modifications necessary to accommodate differences in the two matters addressed.

1. Section 8.70(a)(1).

Section 8.70(a)(1) describes the safe harbor available to a director or officer who elects to subject a business opportunity, regardless of whether the opportunity would be classified as a "corporate opportunity," to the disclosure and approval procedures set forth in that section. The safe harbor provided is as broad as that provided for a director's conflicting interest transaction in section 8.61 [§ 30-29-861]. If the director or officer makes the prescribed disclosure of the facts specified and the corporation's interest in the opportunity is disclaimed by director action under subsection (a)(1)(i) or shareholder action under subsection (a)(1)(ii), the director or officer has foreclosed any claimed breach of the duty of loyalty and may not be subject to equitable relief, damages or other sanctions if the director or officer thereafter pursues or takes the opportunity for his or her own account or through or for the benefit of another person. As a general proposition, disclaimer by director action under subsection (a)(1)(i) must meet all of the requirements provided in section 8.62 [§ 30-29-862] with respect to a director's conflicting interest transaction and disclaimer by shareholder action under subsection (a)(1)(ii) must likewise meet all of the requirements for shareholder action under section 8.63 [§ 30-29-863]. Note, however, several important differences.

First, in contrast to director or shareholder action under sections 8.62 and 8.63, which may be taken at any time, section 8.70(a)(1) requires that the director or officer present the opportunity and secure director or shareholder action disclaiming it *before* the director of officer or other person involved through or on behalf of the director or officer becomes legally obligated respecting the opportunity. The safe harbor concept contemplates that the corporation's decision maker will have full freedom of action in deciding whether the corporation should take over a proffered opportunity or disclaim the corporation's interest in it. If the director or officer could seek ratification after the legal obligation respecting the opportunity arises, the option of taking over the opportunity would, in most cases, be foreclosed to the corporation. The safe harbor's benefit is available only when the corporation can entertain the opportunity in a fully objective way.

The second difference relates to the necessary disclosure. Instead of employing section 8.60's definition of "required disclosure" which is incorporated in sections 8.62 and 8.63 and includes "the existence and nature of the director's conflicting interest," the disclosure obligation of section 8.70(a)(1) requires only that the director or officer reveal all material facts concerning the business opportunity known to the director or officer. The safe harbor procedure shields the director or officer even if a material fact regarding the business opportunity is not disclosed, so long as the proffering director or officer had no knowledge of that fact.

2. Section 8.70(b).

Section 8.70(b) reflects a fundamental difference between the coverage of subchapters F [§§ 30-29-860 to 30-29-863] and G. Because subchapter F provides an exclusive definition of "director's conflicting interest transaction," any transaction meeting the definition that is not approved in accordance with the provisions of subchapter F is not entitled to its safe harbor. Unless the interested director can, upon challenge, establish the transaction's fairness, the director's conduct is presumptively actionable and subject to the full range of remedies that might otherwise be awarded by a court. In contrast, the concept of "business opportunity" under section 8.70 is not defined but is intended to be broader than what might be regarded as an actionable "corporate opportunity." This approach reflects the fact-intensive nature of the corporate opportunity doctrine, with the result that a director or officer may be inclined to seek safe harbor protection under section 8.70 before pursuing an opportunity that may or may not be a "corporate opportunity." Likewise, a director or officer may conclude that a business opportunity is not a "corporate opportunity" under applicable law and choose to pursue it without seeking a disclaimer by the corporation under subsection (a)(1). Accordingly, subsection (b) provides that a decision not to seek the safe harbor offered by subsection (a)(1) neither creates a negative implication nor alters the burden of proof in any subsequent proceeding seeking damages or equitable relief based upon an alleged improper taking of a "corporate opportunity."

Part 9
Domestication and Conversion

Idaho Code § 30-29-901

§ 30-29-901. Definitions. — (a) As used in this part:

(1) "Domesticated corporation" means a domesticated entity that is a corporation.

(2) "Domesticating corporation" means a domesticating entity that is a corporation.

(b) The following definitions in chapter 22, title 30, Idaho Code, shall apply to this part:

(1) "Conversion" is as defined in section 30-22-102(a)(4), Idaho Code.

(2) "Converted entity" is as defined in section 30-22-102(a)(5), Idaho Code.

(3) "Converting entity" is as defined in section 30-22-102(a)(6), Idaho Code.

(4) "Domesticated entity" is as defined in section 30-22-102(a)(7), Idaho Code.

(5) "Domesticating entity" is as defined in section 30-22-102(a)(8), Idaho Code.

(6) "Domestication" is as defined in section 30-22-102(a)(9), Idaho Code.

(7) "Protected agreement" is as defined in section 30-22-102(a)(19), Idaho Code.

History.

I.C., § 30-29-901, as added by 2019, ch. 90, § 113, p. 220.

Official Comment

INTRODUCTORY COMMENT

This chapter provides procedures by which a domestic corporation may become a foreign corporation or a different form of domestic or foreign entity and, conversely, a foreign corporation or an eligible entity may become a domestic corporation. These procedures are:

• **Domestication.** The procedures in subchapter 9B [§§ 30-29-921 to 30-29-924] permit a corporation to change its state of incorporation, thus allowing a domestic corporation to become a foreign corporation or a foreign corporation to become a domestic corporation.

• **Conversion.** The procedures in subchapter 9C [§§ 30-29-931 to 30-29-935] permit a domestic corporation to become a domestic or foreign eligible entity and also permit a domestic or foreign eligible entity to become a domestic corporation.

The provisions of this chapter [part] apply only if a domestic corporation is present either immediately before or immediately after a domestication or conversion.

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Section 9.01 [this section] sets out definitions used in the Act's provisions on domestication and conversion. It defines "protected agreement" as those specified documents and agreements which were in effect before the laws of the state first provided for domestication or conversion transactions. A person contracting with a corporation or loaning it money, or which drafted and negotiated special rights relating to mergers or similar transactions, before the enactment of this chapter (or any similar predecessor law) should not be charged with the consequences of not having dealt with domestications and conversions. Sections 9.20(f) [see § 30-22-501(c)] and 9.30(d) [see § 30-29-401(c)] provide special rules dealing with protected agreements.

§ 30-29-902 through 30-29-920. [Reserved.]

§ 30-29-921. Action on a plan of domestication. — In the case of a domestication of a domestic corporation into a foreign jurisdiction, the plan of domestication shall be adopted in the following manner, notwithstanding the provisions of section 30-22-503(a), Idaho Code:

(a) The plan of domestication shall first be adopted by the board of directors.

(b) The plan of domestication shall then be approved by the shareholders. In submitting the plan of domestication to the shareholders for approval, the board of directors shall recommend that the shareholders approve the plan, unless either the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation; or section 30-29-826, Idaho Code, applies. In either case, the board shall inform the shareholders of the basis for its so proceeding.

(c) The board of directors may set conditions for approval of the plan of domestication by the shareholders or the effectiveness of the plan of domestication.

(d) If the approval of the shareholders is to be given at a meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the plan of domestication is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the plan of domestication and must contain or be accompanied by a copy or summary of the plan. The notice must include or be accompanied by a copy of the articles of incorporation and the bylaws as they will be in effect immediately after the domestication.

(e) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (c) of this section, require a greater vote or a greater quorum, approval of the plan of domestication requires the approval of the shareholders at a meeting at which a quorum exists consisting of a majority

of the votes entitled to be cast on the plan, and, except as provided in subsection (f) of this section, the approval of each class or series of shares voting as a separate voting group at a meeting at which a quorum of the voting group exists consisting of a majority of the votes entitled to be cast on the plan by that voting group.

(f) The articles of incorporation may expressly limit or eliminate the separate voting rights provided in subsection (e) of this section as to any class or series of shares, except when the articles of incorporation of the foreign corporation resulting from the domestication include what would be in effect an amendment that would entitle the class or series to vote as a separate group under section 30-29-1004, Idaho Code, if it were a proposed amendment of the articles of incorporation of the domestic domesticating corporation.

(g) If as a result of a domestication one (1) or more shareholders of a domestic corporation would become subject to interest holder liability, approval of the plan of domestication shall require the signing in connection with the domestication, by each such shareholder, of a separate written consent to become subject to such interest holder liability, unless in the case of a shareholder that already has interest holder liability with respect to the domesticating corporation, the terms and conditions of the interest holder liability with respect to the domesticated corporation are substantially identical to those of the existing interest holder liability other than for changes that eliminate or reduce such interest holder liability.

History.

I.C., § 30-29-921, as added by 2019, ch. 90, § 113, p. 220.

Official Comment

1. In General.

Section 9.21 [this section] sets forth the rules for adoption and approval of a plan of domestication of a domestic corporation into a foreign jurisdiction. The manner in which the domestication of a foreign corporation into this state must be adopted and approved will be controlled by the organic law of the foreign corporation.

When submitting a plan of domestication to shareholders, the board of directors must recommend the transaction, subject to two exceptions in section 9.21(b). The board might exercise the exception under clause (i) where the number of directors having a conflicting interest makes it inadvisable for the board to recommend the domestication or where the board is evenly divided as to the merits of the domestication but is able to agree that shareholders should be permitted to consider it. Alternatively, the board of directors might exercise the exception under clause (ii), which recognizes that, under section 8.26 [§ 30-29-826], a board of directors may agree to submit a plan to a vote of shareholders even if, after approving the plan, the board of directors determines that it no longer recommends the plan.

Section 9.21(c) permits the board of directors to condition its submission of a plan of domestication to the shareholders or the effectiveness of the plan of domestication. Among the conditions that a board of directors might impose are that the plan will not be deemed approved (i) unless it is approved by a specified vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders or (ii) if shareholders holding more than a specified fraction of the outstanding shares assert appraisal rights.

Section 9.21(d) provides a notice requirement if a plan of domestication is to be considered by the shareholders at a meeting. Requirements concerning the timing and content of a notice of meeting are in section 7.05 [§ 30-29-705]. Section 9.21(d) does not address the notice to be given to nonvoting or nonconsenting shareholders where the plan is approved without a meeting by written consent. However, that requirement is imposed by section 7.04 [§ 30-29-704].

2. Quorum; Voting by Separate Groups.

Section 9.21(e) sets forth quorum and voting requirements applicable to a shareholder vote to approve a plan of domestication. Section 9.21(e) also provides that each class or series has a right to vote on a plan of domestication as a separate voting group. See sections 7.25(f) [§ 30-29-725] and 10.04(c) [§ 30-29-1004] for rules governing when separate classes or series vote together as a single voting group. Section 9.21(f) permits the

articles of incorporation to expressly limit or eliminate separate voting as a voting group for any class or series of shares on a plan of domestication unless the articles of incorporation of the foreign domesticated corporation into which the corporation would be domesticated include what would be an amendment requiring separate group voting under section 10.04 if it had been done as an amendment of that domestic corporation's articles of incorporation. The requirement that such a limitation or elimination be "express" is meant to avoid any ambiguity that might arise from a provision in the articles of incorporation that denies voting rights to the class or series. In lieu of approval at a meeting, shareholder approval may be by written consent under the procedures set forth in section 7.04.

3. Personal Liability of Shareholders.

Section 9.21(g) applies only in situations where a shareholder of a domestic corporation is becoming subject to "interest holder liability," as defined in section 1.40 [§ 30-29-140], with respect to the domesticated corporation. Approval of a domestication that would have such a result generally requires the written consent of each such shareholder who becomes subject to such interest holder liability. The exception is the limited case where the shareholder has interest holder liability with respect to the domesticating corporation, and the terms and conditions of the shareholder's interest holder liability with respect to the domesticated corporation are substantially identical to those existing prior to the domestication. If, for example, a shareholder before the domestication has interest holder liability for certain borrowings and after the domestication would have interest holder liability for unpaid wages, the terms and conditions of the interest holder liability are not substantially identical, and the shareholder's written consent to become subject to that liability would be required for the domestication to be approved.

§ 30-29-922. Articles of domestication — Effectiveness. — Notwithstanding the provisions of section 30-22-505(b)(4), Idaho Code, a statement of domestication of a domesticating corporation shall include a statement that the plan of domestication was approved in accordance with this section.

History.

I.C., § 30-29-922, as added by 2019, ch. 90, § 113, p. 220.

Official Comment

The filing of articles of domestication makes the domestication a matter of public record. Where the domesticated corporation is a domestic corporation, it also makes its articles of incorporation a matter of public record.

The requirements for filing are set forth in section 1.20 [§ 30-29-120]. Under section 1.23 [§ 30-29-123], the articles of domestication are effective on the date and at the time of filing unless a later effective date is specified in the articles within the limits provided in section 1.23. Under section 1.23, a delayed effective date may not be later than the 90th day after the date the document is filed. Section 9.22(d) [this section] provides when the domestication becomes effective.

§ 30-29-923. [Reserved.]

§ 30-29-924. Effect of domestication. — (a) When a domestication becomes effective, the domesticated corporation is deemed to have been incorporated on the date the domesticating corporation was originally incorporated.

(b) When a domestication of a domestic corporation into a foreign jurisdiction becomes effective, the domesticated corporation is deemed to agree that it will promptly pay the amount, if any, to which shareholders who exercise appraisal rights in connection with the domestication are entitled under part 13 of this chapter.

(c) Notwithstanding the provisions of section 30-22-506(c) and (d), Idaho Code, except as otherwise provided in the organic law or organic rules of a domesticating foreign corporation, the interest holder liability of a shareholder in a foreign corporation that is domesticated into this state who had interest holder liability in respect of such domesticating corporation before the domestication becomes effective shall be as follows:

(1) The domestication does not discharge that prior interest holder liability with respect to any interest holder liabilities that arose before the domestication becomes effective.

(2) The provisions of the organic law of the domesticating corporation shall continue to apply to the collection or discharge of any interest holder liabilities preserved by paragraph (1) of this subsection, as if the domestication had not occurred.

(3) The shareholder shall have such rights of contribution from other persons as are provided by the organic law of the domesticating corporation with respect to any interest holder liabilities preserved by paragraph (1) of this subsection, as if the domestication had not occurred.

(4) The shareholder shall not, by reason of such prior interest holder liability, have interest holder liability with respect to any interest holder liabilities that are incurred after the domestication becomes effective.

(d) Notwithstanding the provisions of section 30-22-506(c) and (d), Idaho Code, a shareholder who becomes subject to interest holder liability in respect of the domesticated corporation as a result of the domestication shall have such interest holder liability only in respect of interest holder liabilities that arise after the domestication becomes effective.

History.

I.C., § 30-29-924, as added by 2019, ch. 90, § 113, p. 220.

Official Comment

The domesticated corporation is the same entity as the domesticating corporation, and it continues without interruption. It becomes a business corporation in the resulting jurisdiction with the same status as if it had been originally incorporated there. The domesticated corporation will have all of the powers, privileges and rights granted to corporations originally incorporated in that jurisdiction and will be subject to all of the duties, liabilities and limitations imposed on business corporations in that jurisdiction. Thus, a domestication is not a conveyance, transfer or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer or assignment. Nor does it give rise to a claim that a contract with the corporation is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive domestication. See, however, section 9.20(f) [see § 30-22-501(c)] and its Official Comment with respect to special rules regarding protected agreements. All pending proceedings involving the domesticating corporation are continued.

A domestic corporation domesticating into a foreign jurisdiction remains obligated to its shareholders who exercise appraisal rights to pay them the amount, if any, to which they are entitled under chapter [part] 13. For this purpose, under section 9.24(b) [this section] the domesticated corporation is deemed to appoint the secretary of state as its agent for service of process in proceedings to enforce those rights.

Section 9.24(c) preserves the interest holder liability of shareholders of the domesticating foreign corporation only for interest holder liabilities to the extent they arise before the domestication becomes effective. Interest holder liability is not preserved for subsequent changes in an underlying

liability, regardless of whether a change is voluntary or involuntary. Section 9.24(d) similarly provides that interest holder liability with respect to the domesticated corporation only relates to interest holder liabilities that arise after the domestication.

§ 30-29-925 through 30-29-931. [Reserved.]

§ 30-29-932. Action on a plan of conversion. — In the case of a conversion of a domestic corporation to a domestic or foreign eligible entity, the plan of conversion shall be adopted in the following manner, notwithstanding the provisions of section 30-22-403(a), Idaho Code:

(a) The plan of conversion shall first be adopted by the board of directors.

(b) The plan of conversion shall then be approved by the shareholders. In submitting the plan of conversion to the shareholders for their approval, the board of directors must recommend that the shareholders approve the plan, unless either the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation; or section 30-29-826, Idaho Code, applies. In either case, the board of directors shall inform the shareholders of the basis for its so proceeding.

(c) The board of directors may set conditions for approval of the plan of conversion by the shareholders or the effectiveness of the plan of conversion.

(d) If the approval of the shareholders is to be given at a meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the plan of conversion is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the plan of conversion and must contain or be accompanied by a copy or summary of the plan. The notice must include or be accompanied by a copy of the organic rules of the converted entity which are to be in writing as they will be in effect immediately after the conversion.

(e) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (c) of this section, require a greater vote or a greater quorum, approval of the plan of conversion requires the approval of the shareholders at a meeting at which a quorum exists consisting of a majority

of the votes entitled to be cast on the plan, and the approval of each class or series of shares voting as a separate voting group at a meeting at which a quorum of the voting group exists consisting of a majority of the votes entitled to be cast on the plan by that voting group.

(f) If as a result of the conversion one (1) or more shareholders of the converting domestic corporation would become subject to interest holder liability, approval of the plan of conversion shall require the signing in connection with the transaction, by each such shareholder, of a separate written consent to become subject to such interest holder liability.

History.

I.C., § 30-29-932, as added by 2019, ch. 90, § 113, p. 220.

Official Comment

1. In General.

This section sets forth the rules for adoption and approval of a plan of conversion by a domestic corporation. The manner in which the conversion of a foreign eligible entity to a domestic corporation must be adopted and approved will be controlled by the organic law of the foreign jurisdiction. The manner in which the conversion of a domestic eligible entity to a domestic corporation must be adopted and approved will be controlled by the organic law of the eligible entity, as supplemented by section 9.30(b) [see § 30-29-401], if applicable.

When submitting a plan of conversion to shareholders, the board of directors must recommend the transaction, subject to two exceptions in section 9.32(b) [this section]. The board might exercise the exception under clause (i) where the number of directors having a conflicting interest makes it inadvisable for the board to recommend the conversion or where the board is evenly divided as to the merits of the conversion but is able to agree that shareholders should be permitted to consider it. Alternatively, the board of directors might exercise the exception in clause (ii), which recognizes that, under section 8.26 [§ 30-29-826], a board of directors may agree to submit a plan to a vote of shareholders even if, after approving the plan, the board of directors determines that it no longer recommends the plan.

Section 9.32(c) permits the board of directors to condition its submission of a plan of conversion to the shareholders or the effectiveness of the plan of conversion. Among the conditions that a board of directors might impose are that the plan will not be deemed approved (i) unless it is approved by a specified vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders or (ii) if shareholders holding more than a specified percentage of the outstanding shares assert appraisal rights.

Section 9.32(d) provides a notice requirement if a plan of conversion is to be considered by the shareholders at a meeting. Requirements concerning the timing and content of a notice of meeting are in section 7.05 [§ 30-29-705]. Section 9.32(d) does not address the notice to be given to nonvoting or nonconsenting shareholders where the plan is approved without a meeting by written consent. However, that requirement is imposed by section 7.04 [§ 30-29-704].

2. Quorum and Voting.

Section 9.32(e) sets forth quorum and voting requirements applicable to a shareholder vote to approve a plan of conversion. It requires both the vote of the shareholders entitled to vote on the plan, and the vote of each class or series of shares voting as a separate voting group. See sections 7.25(f) and 10.04(c) [§ 30-29-725 and 30-29-1004] for rules governing when separate classes or series vote together as a single voting group. In lieu of approval at a meeting, shareholder approval may be by written consent under the procedures set forth in section 7.04.

3. Personal Liability of Shareholders.

Section 9.32(f) applies only in situations where a shareholder of a domestic corporation is becoming subject to “interest holder liability,” as defined in section 1.40 [§ 30-29-140], with respect to the converted entity. Approval of a conversion that would have such a result requires the written consent of each such shareholder who becomes subject to such interest holder liability.

§ 30-29-933. Articles of conversion — Effectiveness. — Notwithstanding the provisions of section 30-22-405(b)(4), Idaho Code, a statement of conversion of a domestic converting corporation shall include a statement that the plan of conversion was approved in accordance with this section.

History.

I.C., § 30-29-933, as added by 2019, ch. 90, § 113, p. 220.

Official Comment

The filing of articles of conversion makes the conversion a matter of public record. Where the converted entity is organized under the laws of this state, the filing also makes a public record of its articles of incorporation or public organic record.

The requirements for filing are set forth in section 1.20 [§ 30-29-120]. Under section 1.23 [§ 30-29-123], the articles of conversion are effective on the date and at the time of filing unless a later effective date is specified in the articles within the limits provided in section 1.23. Under that section, a delayed effective date may not be later than the 90th day after the date the document is filed. Section 9.33(d) [this section] provides when the conversion becomes effective.

§ 30-29-934. [Reserved.]

§ 30-29-935. Effect of conversion. — (a) When a conversion becomes effective, the converted entity is deemed to have been incorporated or otherwise organized on the date that the converting entity was originally incorporated or organized.

(b) When a conversion of a domestic corporation to a foreign eligible entity becomes effective, the converted entity is deemed to agree that it will promptly pay the amount, if any, to which shareholders who exercise appraisal rights in connection with the conversion are entitled under part 13 of this chapter.

(c) Notwithstanding the provisions of section 30-22-406(c) and (d), Idaho Code, and except as otherwise provided in the articles of incorporation of a domestic corporation or the organic law or organic rules of a foreign corporation or a domestic or foreign eligible entity, a shareholder or eligible interest holder who becomes subject to interest holder liability in respect of a domestic corporation or eligible entity as a result of the conversion shall have such interest holder liability only in respect of interest holder liabilities that arise after the conversion becomes effective.

(d) Except as otherwise provided in the organic law or the organic rules of the eligible entity, the interest holder liability of an interest holder in a converting eligible entity that converts to a domestic corporation who had interest holder liability in respect of such converting eligible entity before the conversion becomes effective shall be as follows:

(1) The conversion does not discharge that prior interest holder liability with respect to any interest holder liabilities that arose before the conversion became effective.

(2) The provisions of the organic law of the eligible entity shall continue to apply to the collection or discharge of any interest holder liabilities preserved by paragraph (1) of this subsection, as if the conversion had not occurred.

(3) The eligible interest holder shall have such rights of contribution from other persons as are provided by the organic law of the eligible entity with respect to any interest holder liabilities preserved by paragraph (1) of this subsection, as if the conversion had not occurred.

(4) The eligible interest holder shall not, by reason of such prior interest holder liability, have interest holder liability with respect to any interest holder liabilities that arise after the conversion becomes effective.

History.

I.C., § 30-29-935, as added by 2019, ch. 90, § 113, p. 220.

Official Comment

The converted entity is the same entity as the converting entity, and it continues without interruption. It becomes the new type of entity in the specified jurisdiction of formation with the same status as if it had been originally incorporated or organized there. The converted entity will be subject to the organic law for that entity in that jurisdiction and will be subject to all of the duties, liabilities and limitations imposed on such entities in that jurisdiction. Thus, a conversion is not a conveyance, transfer or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer or assignment. Nor does it give rise to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion. See, however, section 9.30(d) [see § 30-29-401(c)] and its Official Comment with respect to special rules regarding protected agreements. All pending proceedings involving the converting entity are continued.

A domestic corporation converting to a foreign entity remains obligated to its shareholders who exercise appraisal rights to pay them the amount, if any, to which they are entitled under chapter [part] 13. For this purpose, under section 9.35(b)(1) [this section] that entity is deemed to appoint the secretary of state as its agent for service of process in proceedings to enforce those rights. Where the converted entity is a domestic other entity, it will be similarly liable to the shareholders of a domestic converting corporation pursuant to section 9.35(a)(2).

Section 9.35(c) provides that interest holder liability with respect to a domestic corporation or eligible entity that is the converted entity only relates to interest holder liabilities that arise after the conversion. Section 9.35(d) similarly preserves the interest holder liability of interest holders in an eligible entity that converts to a domestic corporation only for interest holder liabilities to the extent they arise before the conversion becomes effective. Interest holder liability is not preserved for subsequent changes in an underlying liability, regardless of whether a change is voluntary or involuntary.

Part 10
Amendment of Articles of Incorporation and Bylaws

§ 30-29-1001. Authority to amend. — (a) A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation as of the effective date of the amendment or to delete a provision that is not required to be contained in the articles of incorporation.

(b) A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend, entitlement, or purpose or duration of the corporation.

History.

I.C., § 30-29-1001, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 114, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, deleted "articles of incorporation" from the end of the section heading; and redesignated existing subsections (1) and (2) as subsections (a) and (b).

Compiler's Notes.

This section is derived from former § 30-1-1001.

Official Comment

Under section 10.01(a) [this section], the sole test for the permissibility of an amendment to the corporation's articles of incorporation is whether the provision could lawfully have been included in (or in the case of a deletion, omitted from) the articles of incorporation on the effective date of the amendment. The articles of incorporation need not make any reference

to, or reserve, the express power to amend the articles of incorporation. Under the Act, a provision in the articles of incorporation is subject to amendment under section 10.01 [this section] even though the provision is described, referred to, or stated in a share certificate, a written information statement, or other document issued by the corporation that reflects provisions of the articles of incorporation. Certain amendments or liabilities, however, may not be enforceable against all shareholders without their consent. See, *e.g.*, section 6.27(a) [§ 30-29-627] with respect to transfer restrictions and section 9.32(e) [§ 30-29-932] with respect to interest holder liability after a conversion, section 10.03(f) [§ 30-29-1003] with respect to new interest holder liability after an amendment of the articles of incorporation, and section 11.04(i) [§ 30-29-1104] with respect to new interest holder liability after a merger or share exchange.

Section 10.01 does not override contracts by a corporation outside of its articles of incorporation. For example, a corporation might contract with a shareholder or a third party that it would not make particular amendments to its articles. If the corporation made such an amendment, it would be in breach of the contract even if the amendment were otherwise permitted by this section. A shareholder may also obtain protection against amendments by establishing procedures in the articles of incorporation or bylaws that limit the power of amendment without that shareholder's consent.

Section 10.01(b) expressly rejects the concept that an otherwise lawful amendment to the articles of incorporation might be restricted or invalidated because it modified particular rights conferred on shareholders by the original or prior version of the articles of incorporation. Similarly, under section 1.02 [see § 30-21-701], corporations and their shareholders are subject to subsequent amendments of the Act.

§ 30-29-1002. Amendment before issuance of shares. — If a corporation has not yet issued shares, its board of directors, or its incorporators if it has no board of directors, may adopt one (1) or more amendments to the corporation's articles of incorporation.

History.

I.C., § 30-29-1002, as added by 2015, ch. 243, § 65, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-1-1002.

Official Comment Section 10.02 [this section] allows the incorporators or the board to amend the articles of incorporation before any shares are issued.

§ 30-29-1003. Amendment by board of directors and shareholders. — If a corporation has issued shares, an amendment to the articles of incorporation shall be adopted in the following manner:

(a) The proposed amendment shall first be adopted by the board of directors.

(b) Except as provided in sections 30-29-1005, 30-29-1007 and 30-29-1008, Idaho Code, the amendment shall then be approved by the shareholders. In submitting the proposed amendment to the shareholders for approval the board of directors shall recommend that the shareholders approve the amendment, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, or unless section 30-29-826, Idaho Code, applies. In either case, the board must inform the shareholders of the basis for its so proceeding.

(c) The board of directors may set conditions for the approval of the amendment by the shareholders or the effectiveness of the amendment.

(d) If the amendment is required to be approved by the shareholders, and the approval is to be given at a meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the amendment is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the amendment. The notice must contain or be accompanied by a copy of the amendment.

(e) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (c) of this section, require a greater vote or a greater quorum, approval of the amendment requires the approval of the shareholders at a meeting at which a quorum consisting of a majority of the votes entitled to be cast on the amendment exists, and, if any class or series of shares is entitled to vote as a separate group on the amendment, except as provided in section 30-29-1004(c), Idaho Code, the approval of each such separate voting group at a meeting at which a quorum of the voting group

exists consisting of a majority of the votes entitled to be cast on the amendment by that voting group.

(f) If as a result of an amendment of the articles of incorporation one (1) or more shareholders of a domestic corporation would become subject to new interest holder liability, approval of the amendment requires the signing in connection with the amendment, by each such shareholder, of a separate written consent to become subject to such new interest holder liability, unless in the case of a shareholder that already has interest holder liability the terms and conditions of the new interest holder liability are substantially identical to those of the existing interest holder liability; or are substantially identical to those of the existing interest holder liability, other than changes that eliminate or reduce such interest holder liability.

(g) For purposes of subsection (f) of this section and section 30-29-1009, Idaho Code, "new interest holder liability" means interest holder liability of a person resulting from an amendment of the articles of incorporation if the person did not have interest holder liability before the amendment becomes effective; or the person had interest holder liability before the amendment becomes effective, the terms and conditions of which are changed when the amendment becomes effective.

History.

I.C., § 30-29-1003, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 115, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1003.

Official Comment

Section 10.03 [this section] governs amendments to the articles of incorporation after shares have been issued. Most such amendments will

require a shareholder vote. When submitting an amendment to the articles of incorporation to shareholders, the board of directors must recommend the amendment, subject to two exceptions in section 10.03(b). The board might exercise the exception under clause (i) where the number of directors having a conflicting interest makes it inadvisable for the board to recommend the amendment or where the board is evenly divided as to the merits of the amendment but is able to agree that shareholders should be permitted to consider it. Alternatively, the board of directors might exercise the exception under clause (ii), which recognizes that, under section 8.26 [§ 30-29-826], a board of directors may agree to submit an amendment to a vote of shareholders even if, after approving the amendment, the board of directors determines that it no longer recommends the amendment.

Section 10.03(c) permits the board of directors to set conditions for its submission of an amendment to the shareholders or effectiveness of an amendment. Examples of conditions that a board might impose are that the amendment will not be deemed approved (i) unless it is approved by a specified vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of votes of disinterested shareholders, or (ii) if shareholders holding more than a specified number or percentage of outstanding shares assert appraisal rights.

Section 10.03(e) specifies quorum and voting requirements applicable to a shareholder vote to approve an amendment to the articles of incorporation. If the prescribed quorum exists, then under sections 7.25 and 7.26 [§§ 30-29-725 and 30-29-726] the amendment will be approved if more votes are cast in favor of the amendment than against it by the voting group or separate voting groups entitled to vote on the amendment, unless the articles of incorporation or the board of directors acting pursuant to section 10.03(c) require a greater vote. In lieu of approval at a meeting, shareholder approval may be by written consent under the procedures set forth in section 7.04 [§ 30-29-704].

If an amendment would affect the voting or quorum requirements on future amendments, it must also be approved by the vote required by section 7.27 [§ 30-29-727].

§ 30-29-1004. Voting on amendments by voting groups. — (a) The holders of the outstanding shares of a class are entitled to vote as a separate voting group, if shareholder voting is otherwise required by this chapter, on a proposed amendment to the articles of incorporation if the amendment would:

(1) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(2) Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(3) Change the rights, preferences or limitations of all or part of the shares of the class;

(4) Change the shares of all or part of the class into a different number of shares of the same class;

(5) Create a new class of shares having rights or preferences with respect to distributions that are prior or superior to the shares of the class;

(6) Increase the rights, preferences or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions that are prior or superior to the shares of the class;

(7) Limit or deny an existing preemptive right of all or part of the shares of the class; or

(8) Cancel or otherwise affect rights to distributions that have accumulated but not yet been authorized on all or part of the shares of the class.

(b) If a proposed amendment would affect a series of a class of shares in one (1) or more of the ways described in subsection (a) of this section, the holders of shares of that series are entitled to vote as a separate voting group on the proposed amendment.

(c) If a proposed amendment that entitles the holders of two (2) or more classes or series of shares to vote as separate voting groups under this

section would affect those two (2) or more classes or series in the same or a substantially similar way, the holders of shares of all the classes or series so affected shall vote together as a single voting group on the proposed amendment, unless otherwise provided in the articles of incorporation or added as a condition by the board of directors pursuant to section 30-29-1003(c), Idaho Code.

(d) A class or series of shares is entitled to the voting rights granted by this section even if the articles of incorporation provide that the shares are nonvoting shares.

History.

I.C., § 30-29-1004, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 116, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; deleted the former introductory paragraph, which read: "Except as otherwise provided in the articles of incorporation"; in subsection (a), substituted "The holders of the outstanding shares of a class are entitled" for "If a corporation has more than one (1) class of shares outstanding, the holders of the outstanding share of a class, whether voting or nonvoting in whole or in part, are entitled" at the beginning of the introductory paragraph, deleted former paragraph (a), which read: "Increase or decrease the aggregate number of authorized shares of the class", substituted "distributions that are prior or superior" for "distributions or to dissolution that are prior, superior or substantially equal" near the end of paragraphs (5) and (6); substituted "subsection (a) of this section, the holders of shares" for "subsection (1) of this section, the shares" near the middle of subsection (b); in subsection (c), substituted "affected shall vote" for "affected must vote" near the middle and substituted "added as a condition by the board of directors pursuant to section 30-29-1003(c), Idaho Code" for "required by the board of directors" at the end; and added subsection (d).

Compiler's Notes.

This section is derived from former § 30-1-1004.

Official Comment

Section 10.04(a) [this section] requires separate approval by voting groups for certain types of amendments to the articles of incorporation where the corporation has more than one class or series of shares outstanding. Even if a class or series of shares is described as "nonvoting" or the articles purport to make that class or series nonvoting "for all purposes," that class or series nonetheless has the voting rights provided by this section. Likewise, shares are entitled to vote as separate voting groups under this section even though the articles of incorporation purport to allow other classes or series of shares to vote as part of the same voting group. However, an amendment that does not require shareholder approval does not trigger the right to vote by voting groups under this section. This would include a determination by the board, pursuant to authority granted in the articles of incorporation, of the rights, preferences and limitations of any class before the issuance of any shares of that class, or of one or more series within a class before the issuance of any shares of that series. See sections 6.02(a) and (b) [§ 30-29-602].

The right to vote as a separate voting group provides a major protection for classes or series of shares with preferential rights, or classes or series of limited or nonvoting shares, against amendments that affect that class or series. This section, however, does not make the right to vote by a separate voting group dependent on an evaluation of whether the amendment is detrimental to that class or series; if the amendment is one of those described in section 10.04(a), the class or series is automatically entitled to vote as a separate voting group on the amendment.

An amendment that changes the number of shares owned by one or more shareholders of a class into a fraction of a share, through a "reverse split," falls within subsection (a)(4) and therefore requires approval by the class, voting as a separate voting group, whether the fractional share is to be issued or otherwise paid in cash under section 6.04 [§ 30-29-604]. Sections 10.04(a)(5) and (6) refer to preferences with respect to distributions, including distributions in liquidation or dissolution. See section 1.40 [§ 30-29-104] and the Official Comment to section 1.40 under "Distributions."

Sections 7.25 and 7.26 [§§ 30-29-725 and 30-29-726] set forth the mechanics of voting by multiple voting groups. Section 10.04(b) extends

the privilege of voting as a separate voting group to a series of a class of shares if the series is affected in one or more of the ways described in subsection (a). Any distinguishing feature of a series, which an amendment affects or alters, should trigger the right of voting as a separate voting group for that series. However, if a proposed amendment that affects two or more classes or series of shares in the same or a substantially similar way, under subsection (c), the shares of all the class or series so affected must vote together, as a single voting group, unless otherwise provided in the articles of incorporation or a condition set by the board of directors pursuant to section 10.03(c) [§ 30-29-1003].

The application of sections 10.04(b) and (c) may best be illustrated by the following examples, all of which assume there is no provision in the articles of incorporation providing otherwise and that the board has not set an additional voting condition.

First, assume there is a class of shares comprised of three series, each with different preferential dividend rights. A proposed amendment would reduce the rate of dividend applicable to the "Series A" shares and would change the dividend right of the "Series B" shares from a cumulative to a noncumulative right. The amendment would not affect the preferential dividend right of the "Series C" shares. Both Series A and B would be entitled to vote as separate voting groups on the proposed amendment; the holders of the Series C shares, not directly affected by the amendment, would not be entitled to vote unless the Series C shares are voting shares under the articles of incorporation, in which case the Series C shares would not vote as a separate voting group but would vote in the voting group consisting of all shares in the class, as well as in the voting group consisting of all shares with general voting rights under the articles of incorporation.

Second, if the proposed amendment would reduce the dividend right of Series A and change the dividend right of both Series B and C from a cumulative to a noncumulative right, the holders of Series A would be entitled to vote as a single voting group, and the holders of Series B and C would be required to vote together as a single, separate voting group.

Third, assume that a corporation has common stock and two classes of preferred stock. A proposed amendment would create a new class of senior preferred that would have priority in distribution rights over both the

common stock and the existing classes of preferred stock. Because the creation of the new senior preferred would affect all three classes of stock in the same or a substantially similar way, all three classes would vote together as a single voting group on the proposed amendment.

§ 30-29-1005. Amendment by board of directors. — Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt amendments to the corporation's articles of incorporation without shareholder approval:

(a) To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(b) To delete the names and addresses of the initial directors;

(c) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state;

(d) If the corporation has only one (1) class of shares outstanding:

(1) To change each issued and unissued authorized share of the class into a greater number of whole shares of that class; or

(2) To increase the number of authorized shares of the class to the extent necessary to permit the issuance of shares as a share dividend;

(e) To change the corporate name by substituting the word "corporation," "incorporated," "company," "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," for a similar word or abbreviation in the name, or by adding, deleting or changing a geographical attribution for the name;

(f) To reflect a reduction in authorized shares, as a result of the operation of section 30-29-631(b), Idaho Code, when the corporation has acquired its own shares and the articles of incorporation prohibit the reissue of the acquired shares;

(g) To delete a class of shares from the articles of incorporation, as a result of the operation of section 30-29-631(b), Idaho Code, when there are no remaining shares of the class because the corporation has acquired all shares of the class and the articles of incorporation prohibit the reissue of the acquired shares; or

(h) To make any change expressly permitted by section 30-29-602(a) or (b), Idaho Code, to be made without shareholder approval.

History.

I.C., § 30-29-1005, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 117, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote subsection (c), which formerly read: "To change the information required by section 30-405, Idaho Code, on its registered agent"; substituted "section 30-29-631(b), Idaho Code" for "section 30-29-631(2), Idaho Code" in subsections (f) and (g); and substituted "section 30-29-602(a) or (b), Idaho Code" for "section 30-29-602(1) or (2), Idaho Code" in subsection (h).

Compiler's Notes.

This section is derived from former § 30-1-1005.

Official Comment

The amendments described in subsections (a) through (h) are so routine and ministerial in nature as not to require approval by shareholders. None affects the substantive rights of shareholders in any meaningful way. Although the board of directors' designation of the preferences, rights and limitations of a new class or series of shares under section 6.02 [§ 30-29-602] may have substantive effects, amendments of the articles of incorporation to set forth the terms of a new class or series are already permitted by section 6.02(c). Amendments provided for in this section may be included in restated articles of incorporation under section 10.07 [§ 30-29-1007] or in articles of merger under chapter [part] 11.

§ 30-29-1006. Articles of amendment. — (a) After an amendment to the articles of incorporation has been adopted and approved in the manner required by this chapter and by the articles of incorporation, the corporation shall deliver to the secretary of state for filing articles of amendment, which must set forth:

(1) The name of the corporation; (2) The text of each amendment adopted or the information required by section 30-29-120(d)(5), Idaho Code; (3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself that may be made dependent upon facts objectively ascertainable outside the articles of amendment in accordance with section 30-29-120(d)(5), Idaho Code; (4) The date of each amendment's adoption; and (5) If an amendment:

(i) Was adopted by the incorporators or board of directors without shareholder approval, a statement that the amendment was duly adopted by the incorporators or by the board of directors, as the case may be, and that shareholder approval was not required; (ii) Required approval by the shareholders, a statement that the amendment was duly approved by the shareholders in the manner required by this chapter and by the articles of incorporation; or (iii) Is being filed pursuant to section 30-29-120(d)(5), Idaho Code, a statement to that effect.

(b) Articles of amendment shall take effect at the effective date determined in accordance with section 30-29-123, Idaho Code.

History.

I.C., § 30-29-1006, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 118, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, designated the existing text as subsection (a); in subsection (a), substituted “must set forth” for “shall set forth” at the end of the introductory paragraph, inserted “or the information required by section 30-29-120(d)(5), Idaho Code” at the end of paragraph (2), inserted “that may be made dependent upon facts objectively ascertainable outside the articles of amendment in accordance with section 30-29-120(d)(5), Idaho Code” at the end of paragraph (3), and, in paragraph (5), substituted “duly adopted” for “duly approved” near the middle of paragraph (i) and substituted “section 30-39-120(d)(5), Idaho Code” for “section 30-29-120(2)(e), Idaho Code” near the end of paragraph (iii); and added subsection (b).

Compiler’s Notes.

This section is derived from former § 30-1-1006.

Official Comment

Section 10.06(a)(3) [this section] requires the articles of amendment to contain a statement of the manner in which an exchange, reclassification, or cancellation of issued shares is to be put into effect if not set forth in the amendment itself. This requirement avoids confusion as to how the amendment is to be put into effect and also permits the amendment itself to be limited to provisions of permanent applicability, with transitional provisions having no long-range effect appearing only in the articles of amendment. If such transitional provisions are not part of the amendment itself, they are not required to be in a restatement of the articles of incorporation pursuant to section 10.07 [§ 30-29-1007].

§ 30-29-1007. Restated articles of incorporation. — (a) A corporation's board of directors may restate its articles of incorporation at any time, without shareholder approval, to consolidate all amendments into a single document.

(b) If the restated articles include one (1) or more new amendments that require shareholder approval, the amendments shall be adopted and approved as provided in section 30-29-1003, Idaho Code.

(c) A corporation that restates its articles of incorporation shall deliver to the secretary of state for filing articles of restatement setting forth the name of the corporation, the text of the restated articles of incorporation, a statement that the restated articles consolidate all amendments into a single document, and, if a new amendment is included in the restated articles, the statements required under section 30-29-1006, Idaho Code, with respect to the new amendment.

(d) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to the articles of incorporation.

(e) The secretary of state may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the statements required by subsection (c) of this section.

History.

I.C., § 30-29-1007, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 119, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "amendments shall" for "amendments must" near the middle of subsection (b); rewrote subsection (c), which formerly read: "A corporation

that restates its articles of incorporation shall deliver to the secretary of state for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate that states the restated articles consolidate all amendments into a single document and, if a new amendment is included in the restated articles, which also includes the statements required under section 30-29-1006, Idaho Code"; and substituted "statements required by subsection (c) of this section" for "certificate information required by subsection (3) of this section" at the end of subsection (e).

Compiler's Notes.

This section is derived from former § 30-1-1007.

Official Comment

Restated articles of incorporation permit articles of incorporation that have been amended over time, or are being concurrently amended, to be consolidated into a single document. A restatement of a corporation's articles of incorporation is not an amendment, but only a consolidation of amendments. A corporation that is restating its articles may concurrently amend the articles, and include the new amendments in the restated articles. In such a case, the provisions of this chapter that govern amendments of the articles of incorporation would apply to the new amendments. If it is unclear whether a provision of a restatement of the articles of incorporation might be deemed to be an amendment, rather than a consolidation, the prudent course for the corporation is to treat that provision as an amendment, and follow the procedures that apply to amendments under this chapter.

§ 30-29-1008. Amendment pursuant to reorganization. — (a) A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under the authority of a law of the United States.

(b) The individual or individuals designated by the court shall deliver to the secretary of state for filing articles of amendment setting forth: (1) The name of the corporation; (2) The text of each amendment approved by the court; (3) The date of the court's order or decree approving the articles of amendment; (4) The title of the reorganization proceeding in which the order or decree was entered; and (5) A statement that the court had jurisdiction of the proceeding under federal statute.

(c) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

History.

I.C., § 30-29-1008, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 120, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs.

Compiler's Notes.

This section is derived from former § 30-1-1008.

Official Comment

Section 10.08 [this section] provides a simplified method of conforming corporate documents filed under state law with the federal statutes relating to corporate reorganization. If a federal court confirms a plan of reorganization that requires articles of amendment to be filed, those amendments may be prepared and filed by the persons designated by the court and the approval of neither the shareholders nor the board of directors is required.

§ 30-29-1009. Effect of amendment. — (a) An amendment to the articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than the shareholders. An amendment changing a corporation's name does not affect a proceeding brought by or against the corporation in its former name.

(b) A shareholder who becomes subject to new interest holder liability in respect of the corporation as a result of an amendment to the articles of incorporation shall have that new interest holder liability only in respect of interest holder liabilities that arise after the amendment becomes effective.

(c) Except as otherwise provided in the articles of incorporation of the corporation, the interest holder liability of a shareholder who had interest holder liability in respect of the corporation before the amendment becomes effective and has new interest holder liability after the amendment becomes effective shall be as follows:

(1) The amendment does not discharge that prior interest holder liability with respect to any interest holder liabilities that arose before the amendment becomes effective.

(2) The provisions of the articles of incorporation of the corporation relating to interest holder liability as in effect immediately prior to the amendment shall continue to apply to the collection or discharge of any interest holder liabilities preserved by paragraph (1) of this subsection, as if the amendment had not occurred.

(3) The shareholder shall have such rights of contribution from other persons as are provided by the articles of incorporation relating to interest holder liability as in effect immediately prior to the amendment with respect to any interest holder liabilities preserved by paragraph (1) of this subsection, as if the amendment had not occurred.

(4) The shareholder shall not, by reason of such prior interest holder liability, have interest holder liability with respect to any interest holder liabilities that arise after the amendment becomes effective.

History.

I.C., § 30-29-1009, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 121, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section, which formerly read: "An amendment to the articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name."

Compiler's Notes.

This section is derived from former § 30-1-1009.

Official Comment

Under section 10.09 [this section], amendments to articles of incorporation do not interrupt the corporate existence. Sections 10.09(b) and (c) govern the effects of amendments to the articles of incorporation that impose or change interest holder liability.

§ 30-29-1010 through 30-29-1019. Reserved.

History.

I.C., § 30-29-1010, as added by 2015, ch. 243, § 65, p. 758.

§ 30-29-1020. Authority to amend. — (a) A corporation's shareholders may amend or repeal the corporation's bylaws.

(b) A corporation's board of directors may amend or repeal the corporation's bylaws unless:

(1) The articles of incorporation, section 30-29-1021, Idaho Code, or, if applicable, section 30-29-1022, Idaho Code, reserve that power exclusively to the shareholders in whole or part; or

(2) Except as provided in section 30-29-206(d), Idaho Code, the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or adopt that bylaw.

(c) A shareholder of the corporation does not have a vested property right resulting from any provision in the bylaws.

History.

I.C., § 30-29-1020, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 122, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1020.

Official Comment

The power to amend or repeal bylaws is shared by the board of directors and the shareholders, unless that power is reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. Section 10.20(b)(1) [this section] permits the reservation of amendment

power to the shareholders to be limited to specific articles or sections of the bylaws or to specific subjects or topics addressed in the bylaws.

The authority granted to the shareholders in section 10.20(b)(2) to prevent the board of directors from further changing a bylaw which the shareholders have amended, repealed, or adopted is expressly subject to section 2.06(d) [§ 30-29-206], which limits the authority of shareholders to restrict board action on bylaws with regard to procedures or conditions set forth in certain bylaws regulating the election of directors. See the Official Comment to section 2.06.

See section 10.21 [§ 30-29-1021] and its Official Comment describing limitations on the power of directors to adopt or amend supermajority provisions in bylaws.

See section 10.22 [§ 30-29-1022] and its Official Comment describing limitations on the power of directors to repeal a bylaw adopted by shareholders which elects the provisions of that section. Similar to section 10.01(b) [§ 30-29-1001], section 10.21(c) expressly confirms that an amendment to the bylaws may not be restricted or invalidated because it modifies particular rights conferred on shareholders by the original or a prior version of the bylaws.

§ 30-29-1021. Bylaw increasing quorum or voting requirement for directors. — (a) A bylaw that increases a quorum or voting requirement for the board of directors may be amended or repealed:

(1) If originally adopted by the shareholders, only by the shareholders unless the bylaw otherwise provides; or

(2) If adopted by the board of directors, either by the shareholders or by the board of directors.

(b) A bylaw adopted or amended by the shareholders that increases a quorum or voting requirement for the board of directors may provide that it can be amended or repealed only by a specified vote of either the shareholders or the board of directors.

(c) Action by the board of directors under subsection (a) of this section to amend or repeal a bylaw that changes a quorum or voting requirement for the board of directors shall meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

History.

I.C., § 30-29-1021, as added by 2015, ch. 243, § 65, p. 758; am. 2019, ch. 90, § 123, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted “subsection (a) of this section” for “subsection (1) of this section” near the beginning, substituted “change a quorum” for “changes the quorum” and substituted “directors shall meet” for “directors must meet” near the middle.

Compiler’s Notes.

This section is derived from former § 30-1-1021.

Official Comment

The bylaws may increase a quorum or voting requirement for the board over the requirement that would otherwise apply under the Act ("supermajority requirements") or require that a meeting of shareholders be held at a place rather than solely by means of remote participation. See sections 8.24(a) and (c) and 7.09 [§§ 30-29-824 and 30-29-709]. These requirements may be amended or repealed by the board of directors or shareholders as provided in section 10.21 [this section].

§ 30-29-1022. Bylaw provisions relating to the election of directors. — (a) Unless the articles of incorporation specifically prohibit the adoption of a bylaw pursuant to this section, alter the vote specified in section 30-29-728(a), Idaho Code, or provide for cumulative voting, a corporation may elect in its bylaws to be governed in the election of directors as follows:

(1) Each vote entitled to be cast may be voted for or against up to that number of candidates that is equal to the number of directors to be elected, or a shareholder may indicate an abstention, but without cumulating the votes;

(2) To be elected, a nominee shall have received a plurality of the votes cast by holders of shares entitled to vote in the election at a meeting at which a quorum is present, provided that a nominee who is elected but receives more votes against than for election shall serve as a director for a term that shall terminate on the date that is the earlier of:

(i) Ninety (90) days from the date on which the voting results are determined pursuant to part 7 of this chapter; or

(ii) The date on which an individual is selected by the board of directors to fill the office held by such director, which selection shall be deemed to constitute the filling of a vacancy by the board to which section 30-29-810, Idaho Code, applies. Subject to paragraph (3) of this subsection, a nominee who is elected but receives more votes against than for election shall not serve as a director beyond the ninety (90) day period referenced above; and

(3) The board of directors may select any qualified individual to fill the office held by a director who received more votes against than for election.

(b) Subsection (a) of this section does not apply to an election of directors by a voting group if at the expiration of the time fixed under a provision requiring advance notification of director candidates or absent such a provision, at a time fixed by the board of directors which is not more than fourteen (14) days before notice is given of the meeting at which the election is to occur, there are more candidates for election by the voting

group than the number of directors to be elected, one (1) or more of whom are properly proposed by shareholders. An individual shall not be considered a candidate for purposes of this subsection if the board of directors determines before the notice of meeting is given that such individual's candidacy does not create a bona fide election contest.

(c) A bylaw electing to be governed by this section may be repealed:

(1) If originally adopted by the shareholders, only by the shareholders, unless the bylaw otherwise provides; or

(2) If adopted by the board of directors, or the shareholders.

History.

I.C., § 30-29-1022, as added by 2019, ch. 90, § 124, p. 220.

Official Comment

Section 10.22 [this section] is effective only if a corporation elects in a bylaw to be governed by its terms. The provisions of section 10.22 effectively modify the term and holdover provisions of section 8.05 [§ 30-29-805] pursuant to a limited exception for section 10.22 that is recognized in section 8.05. Accordingly, a bylaw provision that would seek to alter the term and holdover provision of section 8.05 that varied in any manner from section 10.22 would not be effective.

1. Section 10.22(a).

The rule in subsection (a) is straightforward if the nominees for director equal the number of directorships up for election. In that case, and by way of example, the holder of a single share could vote either for or against each director. In the unusual case that section 10.22(a) were applicable to a contested election notwithstanding the provisions of section 10.22(b) (e.g., in the absence of an advance notice bylaw, a contest arises as a result of candidates for director being proposed subsequent to the determination date under section 10.22(b)), the holder of a share would have to choose whether to indicate opposition to a slate by voting in favor of a candidate on the preferred slate or by voting against a candidate on the disfavored slate, or to abstain. Because it would be in the interests of all contestants to explain in their proxy materials that against votes would not be counted in favor of

any candidate in a contested election, the rational voter in a contested election might be expected to vote in favor of all candidates on the preferred slate to promote a simple plurality victory rather than voting against candidates on the disfavored slate. Nothing in section 10.22 would prevent the holder of more than one share from voting differently with respect to each share held.

Section 10.22(a) specifically contemplates that a corporate ballot for the election of directors would provide for "against" votes. Although there is no prohibition in the Act against a corporation offering shareholders the opportunity to vote "against" candidates at any time, unless the corporation elects to be governed by section 10.22 or the articles of incorporation are amended to make such a vote meaningful, an "against" vote is given no effect under the Act.

Section 10.22(a)(2) does not conflict with or alter the plurality voting default standard. However, because section 10.22 shortens the term of a director who is elected but receives more votes against election than in favor of election, a vacancy will exist if no action is taken to fill the vacancy before the expiration of the shortened term. As contemplated by section 8.10 [§ 30-29-810], that vacancy may be filled by shareholders or by the board of directors, unless the articles of incorporation provide otherwise. In the alternative, action could be taken by amendment to, or in the manner provided in, the articles of incorporation or bylaws to reduce the size of the board of directors. See section 8.03 [§ 30-29-803].

Under section 8.05(d), the director appointed to fill the vacancy would be up for reelection at the next annual meeting, even if the term for that directorship would otherwise have been for more than one year, as in the case of a staggered board.

There is also no limitation in section 10.22 or elsewhere in the Act on the power of either the board of directors or shareholders to fill a vacancy with the person who held such directorship before the vacancy arose.

2. Section 10.22(b).

Under section 10.22(b), when there are more candidates for election as directors by a voting group (as defined in section 1.40) than director positions to be filled, the resulting election contest would not be subject to

the voting regime under section 10.22(a). Instead, it would be conducted by means of a plurality vote under section 7.28(a) [§ 30-29-728]. Such plurality voting is appropriate in that circumstance because shareholders will have a choice between competing candidates.

The timing provided in clauses (i) and (ii) of subsection (b) for determining when section 10.22(a) does not apply to an election assures that the voting regime that will apply will be known in advance of the giving of notice, and that the disclosure of the voting rules and the proxy appointment form will be clear and reflect the applicable voting regime. The determination of how many candidates there are to fill the number of director positions up for election may be made by the board of directors. The board's determination of whether an individual shall not be considered a candidate for purposes of section 10.22(b) because the candidacy does not create a bona fide election contest must be made before notice of the meeting is given. The board of directors might choose, for example, to exercise this authority to preserve the voting regime under section 10.22(a) when it is clear that an individual has designated himself or herself as a candidate without intending to solicit votes or for the purpose of frustrating the availability of the section 10.22(a) voting regime.

The contested or uncontested nature of the election can change following the date for determining the voting regime that will apply. For example, an election that is contested at that date could become uncontested if a candidate withdraws. Conversely, unless the bylaws require advance notice of director nomination, an uncontested election could become contested before the vote is taken but after notice of the meeting has been given because there is no limitation on the ability of shareholders to nominate candidates for directorships up until the time nominations are closed at the meeting. Section 10.22(b) does not authorize changing the voting regime in those circumstances.

Part 11
Mergers and Share Exchanges

Idaho Code § 30-29-1101

§ 30-29-1101. Definitions. — As used in this part:

(a) "New interest holder liability" means interest holder liability of a person, resulting from a merger or share exchange, that is:

(1) In respect of an entity that is different from the entity in which the person held shares or eligible interests immediately before the merger or share exchange became effective; or

(2) In respect of the same entity as the one in which the person held shares or eligible interests immediately before the merger or share exchange became effective if:

(i) The person did not have interest holder liability immediately before the merger or share exchange became effective; or

(ii) The person had interest holder liability immediately before the merger or share exchange became effective, the terms and conditions of which were changed when the merger or share exchange became effective.

(b) "Party to a merger" means any domestic or foreign corporation or eligible entity that will merge under a plan of merger but does not include a survivor created by the merger.

(c) "Survivor" in a merger means the domestic or foreign corporation or eligible entity into which one (1) or more other corporations or eligible entities are merged.

(d) The following definitions outside this chapter shall apply to this part:

(1) "Acquired entity" is as defined in section 30-22-102(a)(1), Idaho Code.

(2) "Acquiring entity" is as defined in section 30-22-102(a)(2), Idaho Code.

History.

I.C., § 30-29-1101, as added by 2019, ch. 90, § 126, p. 220.

Official Comment

INTRODUCTORY COMMENT

Transactions Permitted.

Chapter [Part] 11 deals with mergers and share exchanges. A merger is the traditional form for combining entities by operation of law, and the range of merger transactions chapter 11 permits is broad. In a merger, a domestic business corporation may merge with one or more of the following domestic or foreign entities: (i) business corporations; (ii) unincorporated entities (including limited liability companies, general and limited partnerships and business trusts); and (iii) nonprofit corporations (which are defined together with unincorporated entities as "eligible entities;" neither is included in the defined term "corporation"). These and other relevant terms used in this chapter are defined in sections 1.40 [§ 30-29-140] and 11.01 [this section].

The entity resulting from the merger may be one of the parties to the merger, or a new corporation or eligible entity created by the merger. Chapter 11 therefore may apply to a merger in which none of the parties is a domestic corporation, as long as the resulting entity (defined in section 11.01 as the "survivor") is a new domestic corporation. In the case of any merger involving a corporation or eligible entity organized under the laws of a foreign jurisdiction, the Act recognizes that whether and how those foreign entities may merge are matters governed by the law of the foreign jurisdiction.

Chapter 11 also permits share exchanges in which either (i) a domestic corporation acquires all of the shares or eligible interests of one or more classes or series of another domestic or foreign corporation or eligible entity, or (ii) all of the shares of one of more classes or series of a domestic corporation are acquired by another domestic or foreign corporation or eligible entity. As a result, in a share exchange, the existence of the acquired entity (the entity whose shares are acquired) continues. If enough shares or eligible interests are acquired, the acquired entity may become a subsidiary

of the acquiring entity. Each of these transactions is a share exchange, even if it involves no shares and only "eligible interests" (which are defined in section 1.40 as specified rights in unincorporated entities and memberships in nonprofit corporations). A foreign corporation or eligible entity may only be the acquired entity in a share exchange if it is permitted by the law governing the foreign corporation or eligible entity.

Other chapters of the Act permit transactions that once could only be effected by merger. For example, chapter [part] 9 provides for domestications, in which corporations can reincorporate in another jurisdiction, and conversions, in which corporations may convert to eligible entities. The Act's approach is generally to provide similar procedures for effecting any of these types of transactions and certain other fundamental actions, such as amendments to the articles of incorporation under chapter [part] 10 and sales of assets outside the usual and regular course of business under chapter [part] 12.

Requirements and Effects.

Section 11.02 [§ 30-21-201 et seq.] generally authorizes mergers and sets out requirements for their approval. For a domestic corporation, the requirements usually include a plan of merger, adopted by the board of directors and recommended by the board of directors to the shareholders, and approved by the shareholders. Section 11.03 [see § 30-22-301 et seq.] has similar provisions for share exchanges and plans of share exchange. These sections permit the holders of shares or eligible interests of a party to a merger or of an acquired class or series in a share exchange to receive a broad range of consideration for their shares or interests. Section 11.04 [§ 30-29-1104] sets out the approval requirements for domestic corporations that are parties to mergers or acquired entities in share exchanges, although section 11.05 [§ 30-29-1105] has special rules for certain parent-subsidiary transactions. Section 11.06 [see § 30-22-301 et seq.] relates to the preparation and filing of articles of merger and share exchange, and section 11.07 [§ 30-29-1107] states the effects of those transactions. Finally, section 11.08 [see § 30-29-304] provides how mergers and share exchanges may be abandoned after they are adopted and approved. Dissenting shareholders in certain mergers and share exchanges and certain other fundamental actions have appraisal rights under chapter [part] 13.

Section 11.01 defines the parties to a merger as the entities that merge. Thus the parties to a merger do not include, for example, a new corporation or entity created by the merger that is the survivor, even though it results from the merger, or a parent corporation or entity that issues its securities as part of the merger consideration but does not itself merge. The definition of "survivor" contemplates the possibility that the survivor may not exist prior to the merger, and not be a party to the merger, but rather be created by the merger of two or more other corporations or entities. In that case, the survivor will need to be specified as a new corporation or entity in the plan of merger.

Share exchange is defined in section 1.40 by reference to section 11.03, and the range of parties and types of consideration permitted in a transaction under that section is broad. It could include, for example, the acquisition by a corporation of eligible interests in a partnership for cash. While that transaction would not involve either the acquisition or issuance of a corporation's shares, it nevertheless falls within the definition of share exchange.

§ 30-29-1102, 30-29-1103. Reserved.

§ 30-29-1104. Action on a plan of merger or share exchange. — In the case of a domestic corporation that is a party to a merger or the acquired entity in a share exchange, the plan of merger or share exchange shall be adopted in the following manner notwithstanding the provisions of sections 30-22-203(a) and 30-22-303(a), Idaho Code:

(a) The plan of merger or share exchange shall first be adopted by the board of directors.

(b) Except as provided in subsections (h), (j), and (*l*) of this section and in section 30-29-1105, Idaho Code, the plan of merger or share exchange shall then be approved by the shareholders. In submitting the plan of merger or share exchange to the shareholders for approval, the board of directors shall recommend that the shareholders approve the plan or, in the case of an offer referred to in subsection (j)(2) of this section, that the shareholders tender their shares to the offeror in response to the offer, unless either the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, or section 30-29-826, Idaho Code, applies. In either case, the board shall inform the shareholders of the basis for its so proceeding.

(c) The board of directors may set conditions for the approval of the plan of merger or share exchange by the shareholders or the effectiveness of the plan of merger or share exchange.

(d) If the plan of merger or share exchange is required to be approved by the shareholders, and if the approval is to be given at a meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the plan is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. If the corporation is to be merged into an existing foreign or domestic corporation or eligible entity, the notice must

also include or be accompanied by a copy or summary of the articles of incorporation and bylaws of the organic rules of that corporation or eligible entity. If the corporation is to be merged with a domestic or foreign corporation or eligible entity and a new domestic or foreign corporation or eligible entity is to be created pursuant to the merger, the notice must include or be accompanied by a copy or a summary of the articles of incorporation and bylaws or the organic rules of the new corporation or eligible entity.

(e) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (c) of this section, require a greater vote or a greater quorum, approval of the plan of merger or share exchange requires the approval of the shareholders at a meeting at which a quorum exists consisting of a majority of the votes entitled to be cast on the plan, and, if any class or series of shares is entitled to vote as a separate group on the plan of merger or share exchange, the approval of each such separate voting group is present at a meeting at which a quorum of the voting group consisting of a majority of the votes entitled to be cast on the merger or share exchange by that voting group.

(f) Subject to subsection (g) of this section, separate voting by voting groups is required:

(1) On a plan of merger, by each class or series of shares that:

(i) Are to be converted under the plan of merger into shares, other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property, or any combination of the foregoing; or

(ii) Are entitled to vote as a separate group on a provision in the plan that constitutes a proposed amendment to the articles of incorporation of a surviving corporation that requires action by separate voting groups under section 30-29-1004, Idaho Code;

(2) On a plan of share exchange by each class or series of shares included in the exchange, with each class or series constituting a separate voting group; and

(3) On a plan of merger or share exchange, if the voting group is entitled under the articles of incorporation to vote as a voting group to approve a

plan of merger or share exchange, respectively.

(g) The articles of incorporation may expressly limit or eliminate the separate voting rights provided in paragraph (i) of subsection (f)(1) and subsection (f)(2) of this section as to any class or series of shares, except when the plan of merger or share exchange includes what is or would be in effect an amendment subject to paragraph (i) of subsection (f)(1) of this section and paragraph (ii) of subsection (f)(1) of this section will not effect a substantive business combination.

(h) Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger is not required if:

(1) The corporation will survive the merger;

(2) Except for amendments permitted by section 30-29-1005, Idaho Code, its articles of incorporation will not be changed;

(3) Each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, rights and limitations, immediately after the effective date of the merger; and

(4) The issuance in the merger of shares or other securities convertible into or rights exercisable for shares does not require a vote under section 30-29-621(f), Idaho Code.

(i) If as a result of a merger or share exchange one (1) or more shareholders of a domestic corporation would become subject to new interest holder liability, approval of the plan of merger or share exchange requires the signing in connection with the transaction, by each such shareholder, of a separate written consent to become subject to such new interest holder liability unless in the case of a shareholder that already has interest holder liability with respect to such domestic corporation, the new interest holder liability is with respect to a domestic or foreign corporation, which may be a different or the same domestic corporation in which the person is a shareholder; and the terms and conditions of the new interest holder liability are substantially identical to those of the existing interest holder liability other than for changes that eliminate or reduce such interest holder liability.

(j) Unless the articles of incorporation otherwise provide, approval by the shareholders of a plan of merger or share exchange is not required if:

(1) The plan of merger or share exchange expressly permits or requires the merger or share exchange to be effected under this subsection and provides that, if the merger or share exchange is to be effected under this subsection, the merger or share exchange will be effected as soon as practicable following the satisfaction of the requirement set forth in paragraph (6) of this subsection;

(2) Another party to the merger, the acquiring entity in the share exchange, or a parent of another party to the merger or the acquiring entity in the share exchange, makes an offer to purchase, on the terms provided in the plan of merger or share exchange, any and all of the outstanding shares of the corporation that, absent this subsection, would be entitled to vote on the plan of merger or share exchange, except that the offer may exclude shares of the corporation that are owned at the commencement of the offer by the corporation, the offeror, or any parent of the offeror, or by any wholly owned subsidiary of any of the foregoing;

(3) The offer discloses that the plan of merger or share exchange provides that the merger or share exchange will be effected as soon as practicable following the satisfaction of the requirement set forth in paragraph (6) of this subsection and that the shares of the corporation that are not tendered in response to the offer will be treated as set forth in paragraph (8) of this subsection;

(4) The offer remains open for at least ten (10) days;

(5) The offeror purchases all shares properly tendered in response to the offer and not properly withdrawn;

(6) The shares listed below are collectively entitled to cast at least the minimum number of votes on the merger or share exchange that, absent this subsection, would be required by this chapter and by the articles of incorporation for the approval of the merger or share exchange by the shareholders and by any other voting group entitled to vote on the merger or share exchange at a meeting at which all shares entitled to vote on the approval were present and voted:

(i) Shares purchased by the offeror in accordance with the offer;

(ii) Shares otherwise owned by the offeror or by any parent of the offeror or any wholly owned subsidiary of any of the foregoing; and

(iii) Shares subject to an agreement that they are to be transferred, contributed or delivered to the offeror, any parent of the offeror, or any wholly owned subsidiary of any of the foregoing in exchange for shares or eligible interests in such offeror, parent or subsidiary;

(7) The offeror or a wholly owned subsidiary of the offeror merges with or into, or effects a share exchange in which it acquires shares of, the corporation; and

(8) Each outstanding share of each class or series of shares of the corporation that the offeror is offering to purchase in accordance with the offer, and that is not purchased in accordance with the offer, is to be converted in the merger into, or into the right to receive, or is to be exchanged in the share exchange for, or for the right to receive, the same amount and kind of securities, eligible interests, obligations, rights, cash, or other property to be paid or exchanged in accordance with the offer for each share of that class or series of shares that is tendered in response to the offer, except that shares of the corporation that are owned by the corporation or that are described in paragraph (6)(ii) or (iii) of this subsection need not be converted into or exchanged for the consideration described in this paragraph.

(k) As used in subsection (j) of this section:

(1) “Offer” means the offer referred to in subsection (j)(2) of this section;

(2) “Offeror” means the person making the offer;

(3) “Parent” of an entity means a person that owns, directly or indirectly, through one (1) or more wholly owned subsidiaries, all of the outstanding shares of or eligible interests in that entity;

(4) Shares tendered in response to the offer shall be deemed to have been “purchased” in accordance with the offer at the earliest time as of which the offeror has irrevocably accepted those shares for payment; and either in the case of shares represented by certificates, the offeror, or the offeror’s designated depository or other agent, has physically received

the certificates representing those shares or in the case of shares without certificates, those shares have been transferred into the account of the offeror or its designated depository or other agent, or an agent's message relating to those shares has been received by the offeror or its designated depository or other agent; and

(5) "Wholly owned subsidiary" of a person means an entity of or in which that person owns, directly or indirectly, through one (1) or more wholly owned subsidiaries, all of the outstanding shares or eligible interests.

(*l*) Unless the articles of incorporation otherwise provide:

(1) Approval of a plan of share exchange by the shareholders of a domestic corporation is not required if the corporation is the acquiring entity in the share exchange; and

(2) Shares not to be exchanged under the plan of share exchange are not entitled to vote on the plan.

History.

I.C., § 30-29-1104, as added by 2015, ch. 243, § 66, p. 758; am. 2019, ch. 90, § 127, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1104.

Official Comment

1. In General.

Subject to the exceptions set forth in section 11.04(b) [this section], a plan of merger must always be approved by the shareholders of a corporation that is a party to a merger and a plan of share exchange must

always be approved by shareholders of the class or series that is being acquired in a share exchange. Under section 11.04(h) approval of a plan of merger by the shareholders of a surviving corporation is not required if the conditions stated in that section are satisfied. Under section 11.04(j), shareholder action by selling shares in a tender offer or exchange offer is accepted as an alternative to the traditional consent by voting if the conditions specified in section 11.04(j) are met.

Section 11.04(g), together with the appraisal rights provisions of chapter [part] 13, is designed to assure that in transactions or actions that may occur under chapters [parts] 9, 10, 11 and 12, a shareholder has either a group voting right or an appraisal right.

Under section 10.04(c) [§ 3-29-1004], and therefore under section 11.04(f)(1)(ii), if a change that requires voting by separate voting groups affects two or more classes or two or more series in the same or a substantially similar way, the relevant classes or series vote together, rather than separately, on the change, unless otherwise provided in the articles of incorporation or required by the board of directors. If separate voting by voting groups is required for a merger or a share exchange under section 11.04(f), it will not fall within the exception to shareholder approval provided by section 11.04(h). For the mechanics of voting where voting by voting groups is required under section 11.04(f), see sections 7.25 and 7.26 [§§ 30-29-725 and 30-29-726] and the Official Comments to those sections.

If a merger would amend the articles of incorporation of a survivor that is a domestic corporation in such a way as to affect the voting requirements on future amendments, the transaction must also be approved by the vote required by section 7.27 [§ 30-29-727].

2. Submission to the Shareholders.

When submitting a plan of merger or share exchange to shareholders, the board of directors must recommend the transaction, subject to two exceptions in section 11.04(b). The board might exercise the exception under clause (i) where the number of directors having a conflicting interest makes it inadvisable for them to recommend the transaction or where the board is evenly divided as to the merits of the transaction but is able to agree that shareholders should be permitted to consider the transaction. Alternatively, the board of directors might exercise the exception in clause

(ii), which recognizes that, under section 8.26 [§ 30-29-826], a board of directors may include a "force the vote" clause in a plan of merger or share exchange, agreeing to submit the plan to shareholders even if, after approving the plan, the board of directors determines that it no longer recommends the plan. Section 11.04(c) permits the board of directors to condition its submission of a plan of merger or share exchange to the shareholders or the effectiveness of a plan of merger or share exchange. Among the conditions that a board of directors might impose are that the plan will not be deemed approved (i) unless it is approved by a specified vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders or (ii) if shareholders holding more than a specified fraction of the outstanding shares assert appraisal rights.

Section 11.04(d) sets forth the notice requirements if a plan of merger or share exchange is to be considered by the shareholders at a meeting. Requirements concerning the timing and content of a notice of meeting are set out in section 7.05 [§ 30-29-705]. Section 11.04(d) does not address the notice to be given to nonvoting or nonconsenting shareholders where the merger or share exchange is approved, without a meeting, by written consent. However, that requirement is imposed by section 7.04 [§ 30-29-704].

3. Quorum and Voting.

Section 11.04(e) sets forth quorum and voting requirements applicable to a shareholder vote to approve a plan of merger or share exchange. See sections 7.25(f) and 10.04(c) for rules governing when separate classes or series vote together as a single voting group. If a quorum is present, and subject to any greater vote required by the articles of incorporation or the board of directors pursuant to section 11.04(c), under sections 7.25 and 7.26 the plan will be approved if more votes are cast in favor of the plan than against it by the voting group or each separate voting group, as the case may be, entitled to vote on the plan. In lieu of action at a meeting, shareholder approval may be by written consent under the procedures set forth in section 7.04.

Section 11.04(g) authorizes limiting or eliminating separate voting as a voting group for a class or series of shares in a merger or share exchange by

an express provision in the articles of incorporation. The authorization, however, does not apply to a plan of merger that includes amendments to the articles of incorporation of the survivor for which, under section 11.04(f)(1)(ii), a separate vote under section 10.04 is required. The authorization also would not apply if a plan of merger that is subject to section 11.04(f)(1)(i) or a share exchange that is subject to section 11.04(f)(2) has the same effect as an amendment to which section 10.04 would apply and the transaction has no substantive business combination effect, such as a reincorporation or recapitalization where there is no significant change in the enterprise on a consolidated basis. For example, if a corporation with preferred and common shares merges into a wholly-owned subsidiary with all shares being exchanged for common shares of the subsidiary, the authorization to eliminate the separate group vote of the preferred shares would not apply because the transaction would be in effect an amendment of the preferred stock without separate substance as a business combination. On the other hand, if the subsidiary (assuming it was significant) was only 60% owned and the holders of the remaining 40% were being cashed out in the merger, elimination of the separate group vote would be effective because the merger would have substance as a business combination. The requirement that a provision limiting or eliminating group voting rights on a merger or share exchange be "express" is meant to avoid any ambiguity that might arise from a provision that generally denies voting rights.

4. Two-Step Transactions.

Section 11.04(j) authorizes a two-step transaction meeting the requirements of that section to proceed without the shareholder vote that would otherwise be required by section 11.04(b). The first step is an offer to the shareholders to tender their shares in response to which enough shareholders tender so that, upon consummation of the offer, the offering party (and any parent or wholly owned subsidiary) owns or has the right to acquire shares with sufficient voting power to satisfy the shareholder approval that would otherwise be required to approve the plan of merger or share exchange pursuant to section 11.04. The second step is a merger or share exchange providing the remaining shareholders the same consideration as was offered to their class or series in the first step offer. The shareholder action in selling in response to the offer provides the

necessary consent for the transaction, in lieu of a shareholder vote, if the other conditions set forth in section 11.04(j) are met. The requirements of section 11.04(j), together with sections 11.04(b), 13.20, 13.21 and 13.22 [this section, § 30-29-1320, § 30-29-1321 and § 30-29-1233], are intended to ensure that shareholders are not disadvantaged by the absence of a vote, and that they receive the same protection in terms of timing, director duties and appraisal rights that they would in a transaction approved by a shareholder vote. For example, section 11.04(b) requires, subject to limited exceptions, that the board of directors make a recommendation with respect to the offer that shareholders tender their shares. This ensures that there is a corporate action implicated by the offer, and that the same director duties will apply to the recommendation to tender into the offer as to conversion or exchange pursuant to a plan of merger or share exchange.

5. Personal Liability of Shareholders.

The approval provisions of section 11.04(i) apply only in situations where a shareholder is becoming subject to “new interest holder liability” as defined in section 11.01 [§ 30-29-1101], for example, where a corporation is merging into a general partnership or a cap on the shareholder’s interest holder liability is increased. The effect of a merger or share exchange on interest holder liability will be determined as provided in section 11.07(e) [§ 30-29-1107].

§ 30-29-1105. Merger between parent and subsidiary or between subsidiaries. — (a) A domestic or foreign parent entity that owns shares of a domestic corporation that carry at least ninety percent (90%) of the voting power of each class and series of the outstanding shares of the subsidiary that has voting power may merge the subsidiary into itself, if it is a domestic or foreign corporation or eligible entity, or into another domestic or foreign corporation or eligible entity in which the parent entity owns at least ninety percent (90%) of the voting power of each class and series of the outstanding shares or eligible interests which have voting power, or merge itself, if it is a domestic or foreign corporation or eligible entity, into such subsidiary, in either case without the approval of the board of directors or shareholders of the subsidiary unless the articles of incorporation or organic rules of the parent entity or the articles of incorporation of the subsidiary corporation otherwise provide. Section 30-29-1104(k), Idaho Code, applies to a merger under this section. The articles of merger relating to a merger under this section do not need to be signed by the subsidiary.

(b) A parent entity shall, within ten (10) days after the effective date of a merger approved under subsection (a) of this section, notify each of the subsidiary's shareholders that the merger has become effective.

(c) Except as provided in subsections (a) and (b) of this section, a merger between a parent entity and a domestic subsidiary corporation shall be governed by the provisions of this part applicable to mergers generally.

History.

I.C., § 30-29-1105, as added by 2015, ch. 243, § 66, p. 758; am. 2019, ch. 90, § 128, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1105.

Official Comment If the conditions of section 11.05 [this section] are met, no approval is required by the board of directors and the shareholders of a subsidiary that is merged into the parent or another subsidiary. In other respects, mergers between parents and 90% -owned subsidiaries are governed by the other provisions of chapter [part] 11, including section 11.04(i) [§ 30-29-1104].

Idaho Code § 30-29-1106

§ 30-29-1106. [Reserved.]

Idaho Code § 30-29-1107

§ 30-29-1107. Effect of merger or share exchange. — (a) Notwithstanding the provisions of sections 30-22-206(c) and (d) and 30-22-306(c) and (d), Idaho Code, and except as otherwise provided in the articles of incorporation of a domestic corporation or the organic law governing or organic rules of a foreign corporation or a domestic or foreign eligible entity, the effect of a merger or share exchange on interest holder liability is as follows:

(1) A person who becomes subject to new interest holder liability in respect of an entity as a result of a merger or share exchange shall have that new interest holder liability only in respect of interest holder liabilities that arise after the merger or share exchange becomes effective.

(2) If a person had interest holder liability with respect to a party to the merger or the acquired entity before the merger or share exchange becomes effective with respect to shares or eligible interests of such party or acquired entity that were exchanged in the merger or share exchange; were canceled in the merger; or the terms and conditions of which relating to interest holder liability were amended pursuant to the merger:

(i) The merger or share exchange does not discharge that prior interest holder liability with respect to any interest holder liabilities that arose before the merger or share exchange becomes effective.

(ii) The provisions of the organic law governing any entity for which the person had that prior interest holder liability shall continue to apply to the collection or discharge of any interest holder liabilities preserved by subparagraph (i) of this paragraph, as if the merger or share exchange had not occurred.

(iii) The person shall have such rights of contribution from other persons as are provided by the organic law governing the entity for which the person had that prior interest holder liability with respect to

any interest holder liabilities preserved by subparagraph (i) of this paragraph, as if the merger or share exchange had not occurred.

(iv) The person shall not, by reason of such prior interest holder liability, have interest holder liability with respect to any interest holder liabilities that arise after the merger or share exchange becomes effective.

(3) If a person has interest holder liability both before and after a merger becomes effective with unchanged terms and conditions with respect to the entity that is the survivor by reason of owning the same shares or eligible interests before and after the merger becomes effective, the merger has no effect on such interest holder liability.

(4) A share exchange has no effect on interest holder liability related to shares or eligible interests of the acquired entity that were not exchanged in the share exchange.

(b) Upon a merger becoming effective, a foreign corporation, or a foreign eligible entity, that is the survivor of the merger is deemed to agree that it will promptly pay the amount, if any, to which shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights are entitled under part 13 of this chapter.

History.

I.C., § 30-29-1107, as added by 2019, ch. 90, § 129, p. 220.

Official Comment

Under section 11.07(a) [this section], in a merger the parties that merge become one. The survivor automatically becomes the owner of all real and personal property and becomes subject to all the liabilities, actual or contingent, of each other party to the merger. A merger is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer, or assignment. It does not give rise to a claim that a contract with a party to the merger is no longer in effect on the ground of nonassignability, unless the contract specifically addresses that issue. All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued.

In contrast to a merger, a share exchange does not vest in the acquiring entity the assets of the acquired entity, or render the acquiring entity liable for the liabilities of the acquired entity. The statements in sections 11.07(a)(8) and 11.07(b) regarding the rights of former holders of shares or eligible interests are not intended to preclude an otherwise proper question concerning the validity of the merger or share exchange, or to override or otherwise affect any provisions of chapter [part] 13 concerning the exclusiveness of rights under that chapter.

The deemed appointment and agreement in section 11.07(d) by a foreign survivor is based on the implied consent of such a foreign corporation, or foreign eligible entity, to the terms of chapter [part] 11 by reason of entering into an agreement that is governed by this chapter.

Section 11.07(e) sets forth the impact of mergers and share exchanges on interest holder liability. Section 11.04(i) [§ 30-29-1104] sets forth when approval of a merger or share exchange requires the consent of shareholders who would otherwise become subject to new interest holder liability.

Part 12
Disposition of Assets

Idaho Code § 30-29-1201

§ 30-29-1201. Disposition of assets not requiring shareholder approval. — No approval of the shareholders is required, unless the articles of incorporation otherwise provide:

(a) To sell, lease, exchange, or otherwise dispose of any or all of the corporation's assets in the usual and regular course of business;

(b) To mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of the corporation's assets, regardless of whether in the usual and regular course of business; or

(c) To transfer any or all of the corporation's assets to one (1) or more domestic or foreign corporations or other entities all of the shares or interests of which are owned by the corporation; or

(d) To distribute assets pro rata to the holders of one (1) or more classes or series of the corporation's shares.

History.

I.C., § 30-29-1201, as added by 2015, ch. 243, § 67, p. 758; am. 2019, ch. 90, § 130, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; deleted "of a corporation" following "shareholders" near the beginning of the introductory paragraph; substituted "regardless of whether" for "regardless of whether or not" near the end of subsection (b); and substituted "domestic or foreign corporations or other entities all of the shares" for "corporations or eligible entities all the shares" near the middle of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-1201.

Official Comment

Section 12.01 [this section] specifies dispositions for which shareholder approval is not required, and section 12.02 [§ 30-29-1202] specifies dispositions requiring shareholder approval.

Examples of dispositions in the usual and regular course of business under section 12.01(a) include the sale of a building that was the corporation's only major asset where the corporation was formed for the purpose of constructing and selling that building, the sale by a corporation of its only major business where the corporation was formed to buy and sell businesses and the proceeds of the sale are to be reinvested in the purchase of a new business, or sales of assets by an open-or closed-end investment company the portfolio of which turns over many times in short periods.

No shareholder approval is required for a transaction involving a pro rata distribution because it comes within section 12.01(d). An example is a spin-off in which shares of a subsidiary are distributed pro rata to the holders of one or more classes or series of shares. On the other hand, a non pro rata distribution — for example, a split-off in which shares of a subsidiary are distributed only to some shareholders in exchange for some or all of their shares — would require shareholder approval under section 12.02(a) if the disposition would leave the corporation without a significant continuing business activity. When the transaction involves a distribution in liquidation — for example, when two or more subsidiaries (whether they have existed previously or are newly formed) representing all of a dissolved corporation's business activities are distributed to shareholders (sometimes referred to as a split-up) — the transaction will be governed by chapter [part] 14 (dissolution), not by chapter [part] 12.

§ 30-29-1202. Shareholder approval of certain dispositions. — (a) A sale, lease, exchange or other disposition of assets, other than a disposition described in section 30-29-1201, Idaho Code, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. A corporation will conclusively be deemed to have retained a significant continuing business activity if it retains a business activity that represented, for the corporation and its subsidiaries on a consolidated basis, at least twenty-five percent (25%) of total assets at the end of the most recently completed fiscal year, and either twenty-five percent (25%) of income from continuing operations before taxes or twenty-five percent (25%) of revenues from continuing operations for the most recently completed fiscal year.

(b) To obtain the approval of the shareholders under subsection (a) of this section, the board of directors shall first adopt a resolution authorizing the disposition. The disposition shall then be approved by the shareholders. In submitting the disposition to the shareholders for approval, the board of directors shall recommend that the shareholders approve the disposition, unless either the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation; or section 30-29-826, Idaho Code, applies. In either case, the board shall inform the shareholders of the basis for its so proceeding.

(c) The board of directors may set conditions for the approval by the shareholders of a disposition or the effectiveness of the disposition.

(d) If a disposition is required to be approved by the shareholders under subsection (a) of this section, and if the approval is to be given at a meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the disposition is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the disposition and must contain a description of the disposition, including the terms and conditions of the disposition and the consideration to be received by the corporation.

(e) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (c) of this section, require a greater vote or a greater

quorum, the approval of a disposition by the shareholders shall require the approval of the shareholders at a meeting at which a quorum exists consisting of a majority of the votes entitled to be cast on the disposition.

(f) After a disposition has been approved by the shareholders under this part, and at any time before the disposition has been consummated, it may be abandoned by the corporation without action by the shareholders, subject to any contractual rights of other parties to the disposition.

(g) A disposition of assets in the course of dissolution under part 14 of this chapter is not governed by this section.

(h) The assets of a direct or indirect consolidated subsidiary shall be deemed to be the assets of the parent corporation for the purposes of this section.

History.

I.C., § 30-29-1202, as added by 2015, ch. 243, § 67, p. 758; am. 2019, ch. 90, § 131, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1202.

Official Comment

1. In General.

Section 12.02(a) [this section] requires shareholder approval for a sale, lease, exchange or other disposition of assets by a corporation that would leave the corporation without a significant continuing business activity, other than as provided in section 12.01 [§ 30-29-1201]. Whether a disposition leaves a corporation with a significant continuing business activity, within the meaning of section 12.02(a), depends on whether the corporation's remaining business activity is significant when compared to

the corporation's business before the disposition. The 25% safe harbor provides a measure of certainty in making this determination. The safe-harbor test is applied to assets and to revenue or income for the fiscal year ended immediately before the decision by the board of directors to make the disposition in question.

If a corporation disposes of assets for the purpose of reinvesting the proceeds of the disposition in substantially the same business in a somewhat different form (for example, by selling the corporation's only plant for the purpose of buying or building a replacement plant), the disposition and reinvestment should be treated together, so that the transaction should not be deemed to leave the corporation without a significant continuing business activity.

In determining whether a disposition would leave a corporation without a significant continuing business activity, the test combines a parent corporation with subsidiaries that are or should be consolidated with it under applicable accounting principles. For example, if a corporation's only significant business is owned by a consolidated subsidiary, a sale of that business requires approval of the parent's shareholders under section 12.02. Correspondingly, if a corporation owns one significant business directly, and several other significant businesses through one or more wholly or almost wholly owned subsidiaries, a sale by the corporation of the single business it owns directly does not require shareholder approval under section 12.02 (for example, the 25% retention tests of section 12.02(a) are met).

If all or a large part of a corporation's assets are held for investment, the corporation actively manages those assets, and it has no other significant business, for purposes of chapter [part] 12 the corporation should be considered to be in the business of investing in assets, so that a sale of most of those assets without a reinvestment should be considered a sale that would leave the corporation without a significant continuing business activity. In applying the 25% tests of section 12.02(a), an issue could arise if a corporation had more than one business activity, one or more of which might be traditional operating activities, such as manufacturing or distribution, and another of which might be considered managing investments in other securities or enterprises. If the activity constituting the management of investments is to be a continuing business activity as a

result of the active engagement of the management of the corporation in that process and the 25% retention tests were met upon the disposition of the other businesses, shareholder approval would not be required.

A board of directors may determine that a retained continuing business falls within the 25% bright-line tests of the safe harbor in section 12.02(a) based either on accounting principles and practices that are reasonable in the circumstances or (in applying the asset test) on a fair valuation or other method that is reasonable in the circumstances in a manner similar to that described in section 6.40(d) [§ 30-29-640] and the Official Comment 4 to that section.

The use of the term "significant" and the specific 25% safe harbor test for purposes of this section do not imply a standard for the test of significance or materiality for any other purposes under the Act or otherwise.

2. Submission to Shareholders.

When submitting a proposal to shareholders for a disposition of assets, the board of directors must recommend the disposition, subject to two exceptions in section 12.02(b). The board might exercise the exception under clause (i) where the number of directors having a conflicting interest makes it inadvisable for the board to recommend the disposition or where the board is evenly divided as to the merits of the proposal but is able to agree that shareholders should be permitted to consider it. Alternatively, the board of directors might exercise the exception under clause (ii), which recognizes that, under section 8.26 [§ 30-29-826], a board of directors may agree to submit a proposal for a disposition to a vote of shareholders even if, after approving the proposal, the board of directors determines that it no longer recommends the proposal.

Section 12.02(c) permits the board of directors to condition its submission to the shareholders of a proposal for a disposition of assets or the effectiveness of the disposition. Among the conditions that a board of directors might impose are that the proposal will not be deemed approved: (i) unless it is approved by a specified percentage of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders; or (ii) if shareholders holding more than a specified fraction of the outstanding shares exercise appraisal rights.

3. Quorum and Voting.

Requirements concerning the timing and content of a notice of meeting, as required by section 12.02(d), are set out in section 7.05 [§ 30-29-705]. Section 12.02(d) does not address the notice to be given to nonvoting or nonconsenting shareholders where the proposal is approved without a meeting by written consent. That requirement is imposed by section 7.04 [§ 30-29-704].

Section 12.02(e) sets forth quorum and voting requirements applicable to a shareholder vote to approve a disposition. In lieu of approval at a meeting, shareholder approval may be by written consent under the procedures set forth in section 7.04.

The Act does not mandate separate voting by voting groups on dispositions, because after a disposition under this chapter the rights of all classes or series of shares remain the same. Separate voting by voting groups may nevertheless be required if provided for in the articles of incorporation or by the board of directors, acting pursuant to section 12.02(c). Appraisal may be available to shareholders entitled to vote on the disposition. See chapter [part] 13.

Part 13
Appraisal Rights

Idaho Code § 30-29-1301

§ 30-29-1301. Definitions. — In this part:

(1) "Affiliate" means a person that directly or indirectly through one (1) or more intermediaries controls, is controlled by, or is under common control with another person or is a senior executive of such person. For purposes of section 30-29-1302(b)(4), Idaho Code, a person is deemed to be an affiliate of its senior executives.

(2) "Beneficial owner" means a person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares; except that a member of a national securities exchange is not deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person if the member is precluded by the rules of the exchange from voting without instruction on contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted. When two (2) or more persons agree to act together for the purpose of voting their shares of the corporation, each member of the group formed thereby is deemed to have acquired beneficial ownership, as of the date of the agreement, of all shares having voting power of the corporation beneficially owned by any member of the group.

(3) "Corporation" means the domestic corporation that is the issuer of the shares held by a shareholder demanding appraisal and, for matters covered in sections 30-29-1322 through 30-29-1331, Idaho Code, includes the survivor of a merger.

(4) "Excluded shares" means shares acquired pursuant to an offer for all shares having voting power if the offer was made within one (1) year before the corporate action for consideration of the same kind and of a value equal to or less than that paid in connection with the corporate action.

(5) "Fair value" means the value of the corporation's shares determined:

(a) Immediately before the effectiveness of the corporate action to which the shareholder objects;

(b) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and

(c) Without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles of incorporation pursuant to section 30-29-1302(a)(5), Idaho Code.

(6) “Interest” means interest from the date the corporate action becomes effective until the date of payment, at the rate of interest on judgments in this state on the effective date of the corporate action.

(7) “Interested person” means a person, or an affiliate of a person, who at any time during the one (1) year period immediately preceding approval by the board of directors of the corporate action:

(a) Was the beneficial owner of twenty percent (20%) or more of the voting power of the corporation, other than as owner of excluded shares;

(b) Had the power, contractually or otherwise, other than as owner of excluded shares, to cause the appointment or election of twenty-five percent (25%) or more of the directors to the board of directors of the corporation; or

(c) Was a senior executive or director of the corporation or a senior executive of any affiliate of the corporation, and that senior executive or director will receive, as a result of the corporate action, a financial benefit not generally available to other shareholders as such, other than:

(i) Employment, consulting, retirement, or similar benefits established separately and not as part of or in contemplation of the corporate action;

(ii) Employment, consulting, retirement, or similar benefits established in contemplation of, or as part of, the corporate action that are not more favorable than those existing before the corporate action or, if more favorable, that have been approved on behalf of the corporation in the same manner as is provided in section 30-29-862, Idaho Code; or

(iii) In the case of a director of the corporation who will, in the corporate action, become a director or governor of the acquiror or any of its affiliates, rights and benefits as a director or governor that are provided on the same basis as those afforded by the acquiror generally to other directors or governors of such entity or such affiliate.

(8) “Interested transaction” means a corporate action described in section 30-29-1302(a), Idaho Code, other than a merger pursuant to section 30-29-1105, Idaho Code, involving an interested person in which any of the shares or assets of the corporation are being acquired or converted.

(9) “Preferred shares” means a class or series of shares whose holders have preference over any other class or series of shares with respect to distributions.

(10) “Senior executive” means the chief executive officer, chief operating officer, chief financial officer, and any individual in charge of a principal business unit or function.

(11) “Shareholder” means a record shareholder, a beneficial shareholder, and a voting trust beneficial owner.

History.

I.C., § 30-29-1301, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 132, p. 220.

STATUTORY NOTES

Cross References.

Interest on judgments, § 28-22-104.

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler’s Notes.

This section is derived from former § 30-1-1301.

Official Comment

1. Overview.

Chapter [Part] 13 proceeds from the premise that judicial appraisal should be provided by statute only when two conditions co-exist. First, a proposed corporate action as approved by a majority will result in a fundamental change in the shares to be affected by the action. Second, uncertainty concerning the fair value of the affected shares may cause reasonable persons to differ about the fairness of the terms of the corporate action. Uncertainty is reduced, however, in the case of publicly traded shares. This explains both the market exception described below and the limits provided to that exception.

When these two conditions exist in connection with domestications and conversions under chapter 9, mergers and share exchanges under chapter [part] 11, and dispositions of assets requiring shareholder approval under chapter [part] 12, chapter [part] 13 provides for appraisal rights. Each of these actions will result in a fundamental change in the shares that a disapproving shareholder may believe was not adequately compensated by the terms approved by the majority. Shareholders are not entitled to appraisal, however, if the change will not alter the terms of the class or series of securities that they hold. For example, statutory appraisal rights are not available for shares of any class or series of the surviving corporation in a merger that are not being changed in the merger or for shares of any class or series that is not included in a share exchange. Appraisal is also not triggered by a voluntary dissolution under chapter [part] 14 because the dissolution does not affect liquidation rights of the shares of any class or series.

With the exception of reverse stock splits that result in cashing out some of the shares of a class or series, chapter 13 does not grant appraisal rights in connection with amendments to the articles of incorporation. This does not reflect a judgment that an amendment changing the terms of a particular class or series may not have significant economic effects. Rather, it reflects a judgment that distinguishing among different types of amendments for the purposes of statutory appraisal is necessarily arbitrary. Chapter 13 delineates in section 13.02(a)(5) [§ 30-29-1302] a list of actions for which the corporation may voluntarily choose to provide appraisal. It also allows, under section 13.02(c), a provision in the articles of incorporation that

eliminates, in whole or in part, statutory appraisal rights for preferred shares, subject to certain conditions.

Chapter 13 provides an exception to appraisal rights for publicly traded shares, referred to as the "market exception." This exception is available in those situations when shareholders are likely to receive fair value if they sell their shares in the market after the announcement of an appraisal-triggering transaction. For the market exception to apply under chapter 13, there must be a liquid market for the shares. The market exception does not apply where the appraisal-triggering action is a conflict transaction.

2. Definitions.

Section 13.01 [this section] contains specialized definitions applicable only to chapter 13.

A. CORPORATION.

The definition of "corporation" in section 13.01 includes, for purposes of the post-transaction matters covered in sections 13.22 through 13.31 [§§ 30-29-1322 through 30-29-1331], a successor entity in a merger where the corporation is not the surviving entity. The definition does not include an acquiring entity in a share exchange or disposition of assets because the corporation whose shares or assets were acquired continues in existence in both of these instances and remains responsible for the appraisal obligations. Whether a foreign corporation or other form of domestic or foreign entity is subject to appraisal rights in connection with any of these transactions depends upon the applicable law of the relevant jurisdiction.

B. FAIR VALUE.

Clause (i) of the definition of "fair value" in section 13.01 specifies that fair value is to be determined immediately before the effectiveness of the corporate action, which will be after the shareholder vote. Accordingly, section 13.01 permits consideration of changes in the value of the corporation's shares after the shareholder vote but before the effectiveness of the transaction, to the extent such changes are relevant. Similarly, in a two-step transaction culminating in a merger, fair value is determined immediately before the second step merger, taking into account any interim changes in value.

Clause (ii) of the definition of "fair value" in section 13.01 adopts the view that different transactions and different contexts may warrant different valuation methodologies. Customary valuation concepts and techniques will typically take into account numerous relevant factors, and will normally result in a range of values, not a particular single value. A court determining fair value under chapter 13 should give great deference to the aggregate consideration accepted or approved by a disinterested board of directors for an appraisal-triggering transaction.

Valuation discounts for lack of marketability or minority status are inappropriate in most appraisal actions, both because most transactions that trigger appraisal rights affect the corporation as a whole and because such discounts may give the majority the opportunity to take advantage of minority shareholders who have been forced against their will to accept the appraisal-triggering transaction. Clause (iii) of the definition of "fair value" adopts the view that appraisal should generally award a shareholder his or her proportional interest in the corporation after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone.

C. INTEREST.

The specification of the rate of interest on judgments, rather than a more subjective rate, eliminates a possible issue of contention and should facilitate voluntary settlements. Other state law determines whether interest is compound or simple.

D. INTERESTED TRANSACTION.

The term "interested transaction" addresses two groups of conflict transactions: those in subsections (i)(A) and (B) of the definition, which involve large shareholders; and those in subsection (i)(C), which involve senior executives and directors. The phrase "involving an interested person" as applied to subsections (i)(A) and (B) denotes participation beyond merely voting or participating on the same basis as other holders of securities of the same or a similar class or series. When a transaction fits within the definition of an interested transaction there are two consequences: the market exception will not be applicable, and the exclusion of other remedies under section 13.40 [§ 30-29-1340] will not be applicable unless certain disinterested approvals have been obtained.

The definition of "beneficial owner" in subsection (ii) of the definition of "interested transaction" is used to identify possible conflict situations by deeming each member of a group that agrees to vote in concert to be a beneficial owner of all the voting shares owned by the members of the group. (In contrast, the term "beneficial shareholder," as defined in section 1.40, is used to identify those persons entitled to appraisal rights.) When an acquisition is effected in two steps (a tender offer followed by a merger) within one year, and the consideration in the merger is of the same kind and of at least the same value as that in the tender offer, the two-step acquisition is properly considered a single transaction for purposes of identifying conflict transactions, regardless of whether the second-step merger is governed by section 11.04 or 11.05 [§ 30-29-1104 or 30-29-1105]. Therefore the shares acquired in such an offer (defined as "excluded shares" in subsection (iii)) are excluded in subsections (i)(A) and (B) from the determination of whether a person is an "interested person" for purposes of the second-step merger.

A reverse split in which small shareholders are cashed out will constitute an interested transaction if there is an affiliate of the corporation who satisfies the test in subsections (i)(A) or (B). In that case, the corporation itself will be considered an affiliate of the large shareholder and fall within the definition of "interested person," such that when the corporation acquires and cashes out the shares of the small shareholders the acquisition will be an interested transaction.

Subsection (i)(C) applies to management buyouts because management's participation in the buyout group is itself "a financial benefit not generally available to other shareholders." It also applies to transactions involving other types of economic benefits (excluding benefits afforded to shareholders generally) afforded to senior executives (as defined in section 13.01) and directors in specified conflict situations, unless specific objective or procedural standards are met. It would also apply to less common situations, such as where the vote of a director is manipulated by providing the director with special consideration to secure his or her vote in favor of the transaction. Section 13.01 specifically defines the term "affiliate" to include an entity of which a person is a senior executive. As a result of this definition, if a senior executive of the corporation is to continue and is to receive enumerated employment and other financial benefits after the

transaction, exempting the transaction from the category of "interested transactions" will depend on meeting one of the three conditions specified in subsection (i)(C), for example:

• If an individual has an arrangement under which benefits will be triggered on a "change of control," such as accelerated vesting of options, retirement benefits, deferred compensation and similar items, or is afforded the opportunity to retire or leave the employ of the enterprise with more favorable economic results than would be the case absent a change of control, the existence of these arrangements would not mean that the transaction is an interested transaction if the arrangements had been established as a general condition of the individual's employment or continued employment, rather than in contemplation of the particular transaction.

• If such arrangements are established as part of, or as a condition of, the transaction, the transaction will still not be considered an interested transaction if the arrangements are either not more favorable to the officer or director than those already in existence or, if they treat the director or officer more favorably, are approved by "qualified" directors (*i.e.*, meeting the standard specified in section 1.43 [§ 30-29-143]), in the same manner as provided for conflicting interest transactions generally with the corporation under section 8.62 [§ 30-29-862]. This category would include arrangements with the corporation that have been negotiated as part of, or as a condition to, the transaction or arrangements with the acquiring company or one or more of its other subsidiaries.

• If a person who is a director of the corporation and, in connection with the transaction, is to become a director of the acquiror or its parent, or to continue as a director of the corporation when it becomes a subsidiary of the acquiror, the transaction will not be considered an interested transaction as long as that person will not be treated more favorably as a director than are other persons who are serving in the same director positions.

F. SENIOR EXECUTIVE.

The definition of "senior executive" in section 13.01 encompasses the group of individuals in control of corporate information and the corporation's day-to-day operations. An employee of a subsidiary organization is a "senior executive" of the parent if the employee is "in

charge of a principal business unit or function" of the parent and its subsidiaries on a combined or consolidated basis.

F. SHAREHOLDER.

The definition of "shareholder" in section 13.01 encompasses beneficial shareholders and voting trust beneficial owners. This recognizes that these persons have or hold on behalf of others an economic interest in the shares. Use of the term "beneficial shareholder" for this purpose is to be contrasted with the use of the term "beneficial owner" in subsection (ii) of the definition of "interested transaction" to identify possible conflict situations. The distinction between "record shareholder" and "beneficial shareholder" appears primarily in section 13.03 [§ 30-29-1303], which establishes the manner in which beneficial shareholders, and record shareholders who are acting on behalf of beneficial shareholders, perfect appraisal rights.

§ 30-29-1302. Right to appraisal. — (a) A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares in the event of any of the following corporate actions:

(1) Consummation of a merger to which the corporation is a party:

(i) If shareholder approval is required for the merger by section 30-29-1104, Idaho Code, or would be required but for the provisions of section 30-29-1104(j), Idaho Code, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remain outstanding after consummation of the merger; or

(ii) If the corporation is a subsidiary and the merger is governed by section 30-29-1105, Idaho Code;

(2) Consummation of a share exchange to which the corporation is a party the shares of which will be acquired, except that appraisal rights shall not be available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not acquired in the share exchange;

(3) Consummation of a disposition of assets pursuant to section 30-29-1202, Idaho Code, if the shareholder is entitled to vote on the disposition, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series if:

(i) Under the terms of the corporate action approved by the shareholders, there is to be distributed to shareholders in cash the corporation's net assets, in excess of a reasonable amount reserved to meet claims of the type described in sections 30-29-1406 and 30-29-1407, Idaho Code, within one (1) year after the shareholders' approval of the action and in accordance with their respective interests determined at the time of distribution; and

(ii) The disposition of assets is not an interested transaction;

(4) An amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series

owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share so created;

(5) Any other merger, share exchange, disposition of assets, or amendment to the articles of incorporation, in each case to the extent provided by the articles of incorporation, bylaws or a resolution of the board of directors;

(6) Consummation of a domestication pursuant to part 9 of this chapter if the shareholder does not receive shares in the foreign corporation resulting from the domestication that have terms as favorable to the shareholder in all material respects, and represent at least the same percentage interest of the total voting rights of the outstanding shares of the foreign corporation, as the shares held by the shareholder before the domestication;

(7) Consummation of a conversion of the corporation to a nonprofit corporation pursuant to chapter 22, title 30, Idaho Code; or

(8) Consummation of a conversion of the corporation to an unincorporated entity pursuant to chapter 22, title 30, Idaho Code.

(b) Notwithstanding subsection (a) of this section, the availability of appraisal rights under subsection (a)(1) and (2) of this section shall be limited in accordance with the following provisions:

(1) Appraisal rights shall not be available for the holders of shares of any class or series of shares that are:

(i) A covered security under section 18(b)(1)(A) or (B) of the securities act of 1933;

(ii) Traded in an organized market and have at least two thousand (2,000) shareholders and a market value of at least twenty million dollars ($20,000,000), exclusive of the value of such shares held by the corporation's subsidiaries, senior executives, and directors and by any beneficial shareholder and any voting trust beneficial owner owning more than ten percent (10%) of such shares; or

(iii) Issued by an open end management investment company registered with the securities and exchange commission under the

investment company act of 1940 and which may be redeemed at the option of the holder at net asset value.

(2) The applicability of paragraph (1) of this subsection shall be determined as of:

(i) The record date fixed to determine the shareholders entitled to receive notice of the meeting of shareholders to act upon the corporate action requiring appraisal rights or, in the case of an offer made pursuant to section 30-29-1104(j), Idaho Code, the date of such offer; or

(ii) If there is no meeting of shareholders and no offer made pursuant to section 30-29-1104(j), Idaho Code, the day before the consummation of the corporate action or effective date of the amendment of the articles of incorporation, as applicable.

(3) Paragraph (1) of this subsection shall not be applicable and appraisal rights shall be available pursuant to subsection (a) of this section for the holders of any class or series of shares:

(i) Who are required by the terms of the corporate action requiring appraisal rights to accept for such shares anything other than cash or shares of any class or any series of shares of any corporation, or any other proprietary interest of any other entity, that satisfies the standards set forth in paragraph (1) of this subsection at the time the corporate action becomes effective; or

(ii) In the case of the consummation of a disposition of assets pursuant to section 30-29-1202, Idaho Code, unless the cash, shares, or proprietary interests received in the disposition are, under the terms of the corporate action approved by the shareholders, to be distributed to the shareholders, as part of a distribution to shareholders of the net assets of the corporation in excess of a reasonable amount to meet claims of the type described in sections 30-29-1406 and 30-29-1407, Idaho Code, within one (1) year after the shareholders' approval of the action, and in accordance with their respective interests determined at the time of the distribution.

(4) Paragraph (1) of this subsection shall not be applicable and appraisal rights shall be available pursuant to subsection (a) of this section for the

holders of any class or series of shares where the corporate action is an interested transaction.

(c) Notwithstanding any other provision of this section, the articles of incorporation as originally filed or any amendment to the articles of incorporation may limit or eliminate appraisal rights for any class or series of preferred shares, except that no such limitation or elimination shall be effective if the class or series does not have the right to vote separately as a voting group, alone or as part of a group, on the action or if the action is a conversion under chapter 22, title 30, Idaho Code, or a merger having a similar effect as a conversion in which the converted entity is an eligible entity; and any such limitation or elimination contained in an amendment to the articles of incorporation that limits or eliminates appraisal rights for any of such shares that are outstanding immediately before the effective date of such amendment or that the corporation is or may be required to issue or sell thereafter pursuant to any conversion, exchange or other right existing immediately before the effective date of such amendment shall not apply to any corporate action that becomes effective within one (1) year after the effective date of such amendment if such action would otherwise afford appraisal rights.

History.

I.C., § 30-29-1302, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 133, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1302.

CASE NOTES

Dissenter's Rights.

Because the shareholder was not a shareholder of the corporation at the time of the shareholder meeting, he was not entitled to vote on the sale or exchange of the corporation's assets at the shareholders' meeting held on that date; because he was not entitled to vote, he did not have rights as a dissenting shareholder and was not entitled to assert dissenters' rights. Gilman v. Davis, 138 Idaho 599, 67 P.3d 78 (2003).

Official Comment

1. Transactions Requiring Appraisal Rights.

Section 13.02(a) [this section] establishes the scope of appraisal rights by identifying those transactions that afford this right. Statutory appraisal is made available only for corporate actions that will result in a fundamental change in the shares to be affected by the action and then only when uncertainty concerning the fair value of the affected shares may cause reasonable differences about the fairness of the terms of the corporate action. The transactions that satisfy both of these criteria are set forth in section 13.02(a), subject to the exceptions set forth in section 13.02(b). In a two-step transaction authorized by section 11.04(j) [§ 30-29-1104], shareholders at the time of the second step merger could have appraisal rights even though there is no shareholder vote. Shareholders who tender in response to the offer in the first step of such a transaction would not have appraisal rights; their tendering in response to the offer has the same effect on appraisal rights as if they had voted for the transaction.

Under section 13.02(b)(4), the reasons for granting appraisal rights in a reverse stock split in which shares are cashed out are similar to those for granting such rights in cases of cash-out mergers, as both transactions could compel affected shareholders to accept cash for their investment in an amount established by the corporation. Appraisal is afforded only for those shareholders of a class or series whose interest is so affected by the amendment. As provided in section 12.02(g) [§ 30-29-1202], a disposition of assets by a corporation in the course of dissolution under chapter [part] 14 is governed by that chapter, not chapter [part] 12, and thus does not implicate appraisal rights.

An express grant of voluntary appraisal rights under section 13.02(a)(5) overrides any of the exceptions to the availability of appraisal rights in

section 13.02(a). Any voluntary grant of appraisal rights by the corporation to the holders of one or more of its classes or series of shares in connection with a corporate action will automatically make all of the provisions of chapter 13 applicable to the corporation and such holders regarding that corporate action.

2. Market Exception to Appraisal Rights.

Chapter [Part] 13 provides a limited exception to appraisal rights for those situations where shareholders may either accept the appraisal-triggering corporate action or sell their shares in an organized market described in section 13.02(b)(1). For purposes of this chapter, the market exception is provided for a class or series of shares if two tests are satisfied: the market in which the shares are traded must be liquid, as described in section 13.02(b)(1), and the value of the shares established by the appraisal-triggering event must be the result of a process reasonably calculated to arrive at a price reflective of an arm's length transaction.

Because section 13.02(b)(3)(i) excludes from the market exception those transactions that require shareholders to accept anything other than cash or securities that also meet the liquidity tests of section 13.02(b)(1), shareholders are assured of receiving either appraisal rights, cash from the transaction, or shares or other proprietary interests in the survivor entity that are liquid. Section 13.02(b)(2) specifies the date on which the corporation must satisfy the requirements of section 13.02(b)(1) for the market exception to be applicable. Section 13.02(b)(4) recognizes that the market price of, or consideration for, shares of a corporation that proposes to engage in an interested transaction of the type listed in section 13.02(a) may be subject to influences where a corporation's management, controlling shareholders or directors have conflicting interests that could, if not dealt with appropriately, adversely affect the consideration that otherwise could have been expected. Section 13.02(b)(4) thus provides that the market exception will not apply in those instances where the transaction constitutes an interested transaction (as defined in section 13.01 [§ 30-29-1301]).

3. Elimination of Appraisal Rights for Preferred Shares.

Section 13.02(c) permits the corporation to eliminate or limit appraisal rights that would otherwise be available for the holders of one or more series or classes of preferred shares provided that the standards in that

section are met. Chapter 13 does not permit the corporation to eliminate or limit the appraisal rights of common shares.

§ 30-29-1303. Assertion of rights by nominees and beneficial shareholders. — (a) A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder or a voting trust beneficial owner only if the record shareholder objects with respect to all shares of a class or series owned by the beneficial shareholder or the voting trust beneficial owner and notifies the corporation in writing of the name and address of each beneficial shareholder or voting trust beneficial owner on whose behalf appraisal rights are being asserted. The rights of a record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.

(b) A beneficial shareholder and a voting trust beneficial owner may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:

(1) Submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in section 30-29-1322(b)(2)(ii), Idaho Code; and

(2) Does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder or the voting trust beneficial owner.

History.

I.C., § 30-29-1303, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 134, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, substituted "shareholders" for "owners" at the end of the section heading; redesignated the existing paragraphs;

inserted "voting trust beneficial owner" throughout the section; and inserted "of any class or series" near the middle of the introductory paragraph in subsection (b).

Compiler's Notes.

This section is derived from former § 30-1-1303.

Official Comment

Section 13.03 [this section] addresses the relationship between those who are entitled to assert appraisal rights and the widespread practice of nominee or street name ownership of publicly traded shares. Generally, a shareholder must demand appraisal for all the shares of a class or series which the shareholder owns. If a record shareholder is a nominee for several beneficial shareholders, some of whom wish to demand appraisal and some of whom do not, section 13.03(a) permits the record shareholder to assert appraisal rights with respect to a portion of the shares held of record by the record shareholder but only with respect to all the shares beneficially owned by a single person. The same rule applies to shares held by voting trustees. A shareholder who owns shares in more than one class or series, however, may assert appraisal rights for only some rather than all classes or series that the shareholder owns.

Voting trustees hold shares on behalf of voting trust beneficial owners and may want to or be required to pass the decision on asserting appraisal rights on to the voting trust beneficial owners. To make appraisal rights effective without burdening record shareholders, beneficial shareholders and voting trust beneficial owners are allowed to assert their own claims as provided in section 13.03(b). After the corporation has received the form of consent required by section 13.03(b)(1), the corporation must deal with the beneficial shareholder, or, in the case of a voting trust, the voting trust beneficial owner.

§ 30-29-1304 through 30-29-1319. Reserved.

History.

I.C., § 30-29-1304, as added by 2015, ch. 243, § 68, p. 758.

§ 30-29-1320. Notice of appraisal rights. — (a) Where any corporate action specified in section 30-29-1302(a), Idaho Code, is to be submitted to a vote at a shareholders' meeting, the meeting notice, or where no approval of such action is required pursuant to section 30-29-1104(j), Idaho Code, the offer made pursuant to section 30-29-1104(j), Idaho Code, must state that the corporation has concluded that appraisal rights are, are not, or may be available under this part. If the corporation concludes that appraisal rights are or may be available, a copy of this part must accompany the meeting notice or offer sent to those record shareholders entitled to exercise appraisal rights.

(b) In a merger pursuant to section 30-29-1105, Idaho Code, the parent entity shall notify in writing all record shareholders of the subsidiary who are entitled to assert appraisal rights that the corporate action became effective. Such notice shall be sent within ten (10) days after the corporate action became effective and include the materials described in section 30-29-1322, Idaho Code.

(c) Where any corporate action specified in section 30-29-1302(a), Idaho Code, is to be approved by written consent of the shareholders pursuant to section 30-29-704, Idaho Code:

(1) Written notice that appraisal rights are, are not, or may be available shall be sent to each record shareholder from whom a consent is solicited at the time consent of such shareholder is first solicited and, if the corporation has concluded that appraisal rights are or may be available, the notice must be accompanied by a copy of this chapter; and

(2) Written notice that appraisal rights are, are not, or may be available must be delivered together with the notice to nonconsenting and nonvoting shareholders required by section 30-29-704(e) and (f), Idaho Code, may include the materials described in section 30-29-1322, Idaho Code, and, if the corporation has concluded that appraisal rights are or may be available, must be accompanied by a copy of this chapter.

(d) Where corporate action described in section 30-29-1302(a), Idaho Code, is proposed, or a merger pursuant to section 30-29-1105, Idaho Code,

is effected, the notice referred to in subsection (a) or (c) of this section, if the corporation concludes that appraisal rights are or may be available, and in subsection (b) of this section must be accompanied by:

(1) Financial statements of the corporation that issued the shares that may be subject to appraisal, consisting of a balance sheet as of the end of a fiscal year ending not more than sixteen (16) months before the date of the notice, an income statement for that year, and a cash flow statement for that year; provided that, if such financial statements are not reasonably available, the corporation shall provide reasonably equivalent financial information; and

(2) The latest interim financial statements of such corporation, if any.

(e) The right to receive the information described in subsection (d) of this section may be waived in writing by a shareholder before or after the corporate action.

History.

I.C., § 30-29-1320, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 135, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1320.

Official Comment

The notices required by sections 13.20(a), (b) and (c) [this section] are necessary because many shareholders do not know what appraisal rights they may have or how to assert them. Because appraisal is an "opt in" remedy, shareholders otherwise entitled to an appraisal of their shares by reason of corporate actions specified in section 13.02 [§ 30-29-1302] must elect whether to seek that remedy or accept the results of that action.

Section 13.20(d) specifies certain disclosure requirements for corporate actions for which appraisal rights are provided. Disclosure of additional information may be necessary under common law disclosure duties.

By specifying certain disclosure requirements, section 13.20(d) reduces the risk, in the transactions to which it applies, of an uninformed shareholder decision whether to exercise appraisal rights. Section 13.31(b)(1) [§ 30-29-1331] provides that a corporation may be liable for the fees and expenses of counsel and experts for the respective parties for failure to comply substantially with sections 13.20 and 13.24 [§ 30-29-1324].

§ 30-29-1321. Notice of intent to demand payment — Consequences of voting or consenting. — (a) If a corporate action specified in section 30-29-1302(a), Idaho Code, is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares:

(1) Shall deliver to the corporation, before the vote is taken, written notice of the shareholder's intent to demand payment if the proposed action is effectuated; and

(2) Shall not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed action.

(b) If a corporate action specified in section 30-29-1302(a), Idaho Code, is to be approved by written consent, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares shall not sign a consent in favor of the proposed action with respect to that class or series of shares.

(c) If a corporate action specified in section 30-29-1302(a), Idaho Code, does not require shareholder approval pursuant to section 30-29-1104(j), Idaho Code, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares shall deliver to the corporation before the shares are purchased pursuant to the offer written notice of the shareholder's intent to demand payment if the proposed action is effected; and shall not tender, or cause or permit to be tendered, any shares of such class or series in response to such offer.

(d) A shareholder who fails to satisfy the requirements of subsection (a), (b), or (c) of this section is not entitled to payment under this part.

History.

I.C., § 30-29-1321, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 136, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1321.

Official Comment

Section 13.21 [this section] applies to all transactions requiring appraisal, except short-form mergers under section 11.05 [§ 30-29-1105] in which shareholders of the subsidiary do not vote on the transaction but are nevertheless entitled to appraisal.

The notice from the shareholder required by section 13.21(a) enables the corporation, among other things, to estimate how much of a cash payment may be required by reference to the maximum number of shares for which appraisal may be sought. It also limits the number of persons to whom the corporation must give further notice during the remainder of the appraisal process.

§ 30-29-1322. Appraisal notice and form. — (a) If a corporate action requiring appraisal rights under section 30-29-1302(a), Idaho Code, becomes effective, the corporation shall deliver a written appraisal notice and form required by subsection (b) of this section to all shareholders who satisfy the requirements of section 30-29-1321(a), (b), or (c), Idaho Code. In the case of a merger under section 30-29-1105, Idaho Code, the parent shall deliver an appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights.

(b) The appraisal notice shall be delivered no earlier than the date the corporate action specified in section 30-29-1302(a), Idaho Code, became effective, and no later than ten (10) days after such date and must:

(1) Supply a form that:

(i) Specifies the first date of any announcement to shareholders made before the date the corporate action became effective of the principal terms of the proposed corporate action;

(ii) If such announcement was made, requires the shareholder asserting appraisal rights to certify whether or not beneficial ownership of those shares for which appraisal rights are asserted was acquired before that date; and

(iii) Requires the shareholder asserting appraisal rights to certify that such shareholder did not vote for or consent to the transaction as to the class or series of shares for which appraisal is sought;

(2) State:

(i) Where the form shall be sent and where certificates for certificated shares must be deposited and the date by which those certificates shall be deposited, which date may not be earlier than the date by which the corporation must receive the required form under subparagraph (ii) of this paragraph;

(ii) A date by which the corporation shall receive the form, which date may not be fewer than forty (40) days nor more than sixty (60) days after the date the appraisal notice in subsection (a) of this section is

sent, and state that the shareholder shall have waived the right to demand appraisal with respect to the shares unless the form is received by the corporation by such specified date;

(iii) The corporation's estimate of the fair value of the shares;

(iv) That, if requested in writing, the corporation will provide, to the shareholders so requesting, within ten (10) days after the date specified in subparagraph (ii) of this paragraph the number of shareholders who return the forms by the specified date and the total number of shares owned by them; and

(v) The date by which the notice to withdraw under section 30-29-1323, Idaho Code, shall be received, which date shall be within twenty (20) days after the date specified in subparagraph (ii) of this paragraph; and

(3) Be accompanied by a copy of this part.

History.

I.C., § 30-29-1322, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 137, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1322.

Official Comment

The purpose of section 13.22 [this section] is to require the corporation to provide shareholders with information and a form for perfecting appraisal rights.

Section 13.22(b)(1) requires that the corporation specify the date of the first announcement of the terms of the proposed corporate action. This date

determines the rights of shareholder-transferees. Persons who became shareholders before that date are entitled to full appraisal rights, while persons who became shareholders on or after that date are entitled only to the more limited rights provided by section 13.25. See the Official Comments to sections 13.23 and 13.25 [§§ 30-29-1323 and 30-29-1325]. The date the principal terms of the transaction were announced by the corporation to shareholders may be the day the terms were communicated directly to the shareholders, included in a public filing with the Securities and Exchange Commission, published in a newspaper of general circulation that can be expected to reach the financial community, or any earlier date on which such terms were first announced by any other person or entity to such persons or sources. Any announcement to news media or to shareholders that relates to the proposed transaction but does not contain the principal terms of the transaction to be authorized at the shareholders' meeting is not considered to be an announcement for the purposes of section 13.22 [§ 30-29-1322]. If a corporation or other person does not make a public announcement of the terms of a proposed corporation action, the requirement of section 13.22(b)(1) is not applicable.

The information required by sections 13.22(b)(2)(iii) and (iv) is intended to help shareholders assess whether they wish to demand payment or to withdraw their demand for appraisal, although the information under section 13.22(b)(2)(iv) is required to be sent only to those shareholders from whom the corporation has received a written request.

§ 30-29-1323. Perfection of rights — Right to withdraw. — (a) A shareholder who receives notice pursuant to section 30-29-1322, Idaho Code, and who wishes to exercise appraisal rights shall sign and return the form sent by the corporation and, in the case of certificated shares, deposit the shareholder's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to section 30-29-1322(b)(2)(ii), Idaho Code. In addition, if applicable, the shareholder shall certify on the form whether the beneficial owner of such shares acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to section 30-29-1322(b)(2)(ii), Idaho Code. If a shareholder fails to make this certification, the corporation may elect to treat the shareholder's shares as after-acquired shares under section 30-29-1325, Idaho Code. Once a shareholder deposits that shareholder's certificates or, in the case of uncertificated shares, returns the signed forms, that shareholder loses all rights as a shareholder, unless the shareholder withdraws pursuant to subsection (b) of this section.

(b) A shareholder who has complied with subsection (a) of this section may nevertheless decline to exercise appraisal rights and withdraw from the appraisal process by so notifying the corporation in writing by the date set forth in the appraisal notice pursuant to section 30-29-1322(b)(2)(v), Idaho Code. A shareholder who fails to so withdraw from the appraisal process may not thereafter withdraw without the corporation's written consent.

(c) A shareholder who does not sign and return the form and, in the case of certificated shares, deposit that shareholder's share certificates where required, each by the date set forth in the notice described in section 30-29-1322(b), Idaho Code, shall not be entitled to payment under this part.

History.

I.C., § 30-29-1323, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 138, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; rewrote subsection (a), which formerly read: “A shareholder who receives notice pursuant to section 30-29-1322, Idaho Code, and who wishes to exercise appraisal rights must certify on the form sent by the corporation whether the beneficial owner of such shares acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to section 30-29-1322(2)(a), Idaho Code. If a shareholder fails to make this certification, the corporation may elect to treat the shareholder’s shares as after-acquired shares under section 30-29-1325, Idaho Code. In addition, a shareholder who wishes to exercise appraisal rights must execute and return the form and, in the case of certificated shares, deposit the shareholder’s certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to section 30-29-1322(2)(b)(ii), Idaho Code. Once a shareholder deposits that shareholder’s certificates or, in the case of uncertificated shares, returns the executed forms, that shareholder loses all rights as a shareholder, unless the shareholder withdraws pursuant to subsection (2) of this section”; in subsection (b), in the first sentence, substituted “subsection (a) of this section” for “subsection (1) of this section” near the beginning and substituted “section 30-29-1322(b)(2)(v), Idaho Code” for “section 30-29-1322(2)(b)(v), Idaho Code” at the end; and, in subsection (c), substituted “sign and return” for “execute and return” near the beginning and substituted “section 30-29-1322(b), Idaho Code” for “section 30-29-1322(2), Idaho Code” near the end.

Compiler’s Notes.

This section is derived from former § 30-1-1323.

Official Comment

In the case of a transaction involving a vote by shareholders, returning the signed form and, in the case of certificated shares, depositing the shares are the shareholder’s confirmation of the intention expressed earlier under section 13.21(a) [§ 30-29-1321] to pursue appraisal rights. In the case of a merger of a subsidiary under section 11.05 [§ 30-29-1105], the form required by section 13.23 [this section] is the shareholder’s first statement of this intention.

Information on the appraisal form regarding whether the beneficial shareholder acquired beneficial ownership of the shares before, on or after the date the transaction was announced permits the corporation to exercise its right under section 13.25 [§ 30-29-1325] to defer payment of compensation for certain shares. The corporation may elect to proceed under section 13.25 with respect to those shareholders who were required to make the certification but did not do so.

Once a shareholder deposits that shareholder's shares as required by section 13.23(a), that shareholder loses all rights as a shareholder unless the shareholder withdraws from the appraisal process pursuant to section 13.23(b).

Under section 13.23(c), a shareholder who fails to comply with the requirements of section 13.23(a) loses all rights to pursue appraisal and obtain payment under this chapter. If a beneficial shareholder wishes to assert appraisal rights in place of the record shareholder, the beneficial shareholder must also comply with section 13.03(b) [§ 30-29-1303].

§ 30-29-1324. Payment. — (a) Except as provided in section 30-29-1325, Idaho Code, within thirty (30) days after the form required by section 30-29-1322(b)(2)(ii), Idaho Code, is due, the corporation shall pay in cash to those shareholders who complied with section 30-29-1323(a), Idaho Code, the amount the corporation estimates to be the fair value of their shares, plus interest.

(b) The payment to each shareholder pursuant to subsection (a) of this section must be accompanied by: (1) Financial statements of the corporation that issued the shares to be appraised, consisting of a balance sheet as of the end of a fiscal year ending not more than sixteen (16) months before the date of payment, an income statement for that year, a cash flow statement for that year, and the latest interim financial statements of such corporation, if any; provided however, that if such annual financial statements are not reasonably available, the corporation shall provide reasonably equivalent financial information; (2) A statement of the corporation's estimate of the fair value of the shares, which estimate shall equal or exceed the corporation's estimate given pursuant to section 30-29-1322(b)(2)(iii), Idaho Code; and (3) A statement that shareholders described in subsection (a) of this section have the right to demand further payment under section 30-29-1326, Idaho Code, and that if any such shareholder does not do so within the time period specified in section 30-29-1326(b), Idaho Code, such shareholder shall be deemed to have accepted the payment under subsection (a) of this section in full satisfaction of the corporation's obligations under this part.

History.

I.C., § 30-29-1324, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 139, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a) substituted "section 30-29-1322(b)(2)(ii), Idaho Code" for

"section 30-29-1322(2)(b)(ii), Idaho Code" near the beginning and substituted "section 30-29-1323(a), Idaho Code" for "section 30-29-1323(1), Idaho Code" near the middle; and, in subsection (b), rewrote paragraph (1), which formerly read: "Financial statements of the corporation that issued the shares to be appraised, consisting of a balance sheet as of the end of a fiscal year ending not more than sixteen (16) months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any"; in paragraph (2), substituted "estimate shall" for "estimate must" near the middle and substituted "section 30-29-1322(b)(2)(iii), Idaho Code" for "section 30-29-1322(2)(b)(iii), Idaho Code" near the end, and rewrote paragraph (3), which formerly read: "A statement that shareholders described in subsection (1) of this section have the right to demand further payment under section 30-29-1326, Idaho Code, and that if any shareholder does not do so within the time period specified therein, such shareholder shall be deemed to have accepted such payment in full satisfaction of the corporation's obligations under this part."

Compiler's Notes.

This section is derived from former § 30-1-1324.

Official Comment

Section 13.24 [this section] is applicable to shareholders who have complied with section 13.23(a) [§ 30-29-1323] and to shareholders described in section 13.25(a) if the corporation so chooses. The corporation must, however, elect to treat all shareholders described in section 13.25(a) either under section 13.24 or under section 13.25 [§ 30-29-1325]; it may not treat some shareholders described in section 13.25(a) under section 13.24 but treat others under section 13.25.

The requirement of section 13.24 that the corporation pay its estimate of the fair value of the stock plus interest reflects a judgment that a difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed. Because a former shareholder must decide whether to accept that payment in full satisfaction, the corporation must include with the payment the information specified in section 13.24(b), which includes a reminder of the former shareholder's further rights.

Even though the information specified in section 13.24(b) was previously furnished under section 13.20(d) [§ 30-29-1320] at the time notice of appraisal rights was given, it must still be furnished under section 13.24(b) at the time of payment. That information may need to be updated to satisfy the requirements of section 13.24(b).

§ 30-29-1325. After acquired shares. — (a) A corporation may elect to withhold payment required by section 30-29-1324, Idaho Code, from any shareholder who was required to but did not certify that beneficial ownership of all of the shareholder's shares for which appraisal rights are asserted was acquired before the date set forth in the appraisal notice sent pursuant to section 30-29-1322(b)(1), Idaho Code.

(b) If the corporation elected to withhold payment under subsection (a) of this section, it shall, within thirty (30) days after the form required by section 30-29-1322(b)(2)(ii), Idaho Code, is due, notify all shareholders who are described in subsection (a) of this section:

(1) Of the information required by section 30-29-1324(b)(1), Idaho Code;

(2) Of the corporation's estimate of fair value pursuant to section 30-29-1324(b)(2), Idaho Code;

(3) That they may accept the corporation's estimate of fair value, plus interest, in full satisfaction of their demands or demand appraisal under section 30-29-1326, Idaho Code;

(4) That those shareholders who wish to accept such offer shall so notify the corporation of their acceptance of the corporation's offer within thirty (30) days after receiving the offer; and

(5) That those shareholders who do not satisfy the requirements for demanding appraisal under section 30-29-1326, Idaho Code, shall be deemed to have accepted the corporation's offer.

(c) Within ten (10) days after receiving the shareholder's acceptance pursuant to subsection (b)(4) of this section, the corporation shall pay in cash the amount it offered under subsection (b)(2) of this section plus interest to each shareholder who agreed to accept the corporation's offer in full satisfaction of the shareholder's demand.

(d) Within forty (40) days after delivering the notice described in subsection (b) of this section, the corporation shall pay in cash the amount it offered to pay under subsection (b)(2) of this section plus interest to each shareholder described in subsection (b)(5) of this section.

History.

I.C., § 30-29-1325, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 140, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; updated internal references throughout the section; inserted "was required to but" near the beginning of subsection (a); substituted "shall" for "must" throughout subsections (b) to (d); inserted "plus interest" near the middle of subsection (c); and, in subsection (d), substituted "delivering the notice" for "sending the notice" near the beginning and inserted "plus interest" near the end.

Compiler's Notes.

This section is derived from former § 30-1-1325.

Official Comment

If a public announcement of the proposed corporate action is made, section 13.25(a) [this section] gives the corporation the option not to make payment under section 13.24(a) [§ 30-29-1324] to holders of shares acquired on or after the date of that announcement or to holders of shares who are required to but do not certify under section 13.23(a) [§ 30-29-1323] when they acquired beneficial ownership. Instead, the corporation may give these shareholders an offer of payment which is conditioned on their agreement to accept it in full satisfaction of their claim.

The date used as a cut-off for determining the application of this section is when "the principal terms" of the proposed transaction are first announced to shareholders. See the Official Comment to section 13.22 [§ 30-29-1322]. The cut-off is not set at an earlier date, such as when the first public statement that the corporate action was under consideration was made, because the goal of this section is to discourage use of appraisal rights as a speculative device only after the principal terms of the proposed transaction are announced.

A shareholder may accept the offered payment in full satisfaction of that shareholder's claim; alternatively, a shareholder may reject the corporation's offer and demand a judicial determination under section 13.26 [§ 30-29-1326] and payment of the amount so determined at the termination of the proceeding. A shareholder who does not satisfy the requirements of section 13.26 shall be deemed to have accepted the corporation's offer.

§ 30-29-1326. Procedure if shareholder dissatisfied with payment or offer. — (a) A shareholder paid pursuant to section 30-29-1324, Idaho Code, who is dissatisfied with the amount of the payment shall notify the corporation in writing of that shareholder's estimate of the fair value of the shares and demand payment of that estimate, less any payment under section 30-29-1324, Idaho Code, plus interest. A shareholder offered payment under section 30-29-1325, Idaho Code, who is dissatisfied with that offer shall reject the offer and demand payment of the shareholder's stated estimate of the fair value of the shares plus interest.

(b) A shareholder who fails to notify the corporation in writing of that shareholder's demand to be paid the shareholder's stated estimate of the fair value plus interest under subsection (a) of this section within thirty (30) days after receiving the corporation's payment or offer of payment under section 30-29-1324 or 30-29-1325, Idaho Code, respectively, waives the right to demand payment under this section and shall be entitled only to the payment made or offered pursuant to those respective sections.

History.

I.C., § 30-29-1326, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 141, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1) and (2) as subsections (a) and (b); in subsection (a), substituted "shall" for "must" twice and substituted "estimate, less any payment under section 30-29-1324, Idaho Code, plus interest" for "estimate plus interest, less any payment under section 30-29-1324, Idaho Code" at the end of the first sentence; and substituted "subsection (a) of this section" for "subsection (1) of this section" near the middle of subsection (b).

Compiler's Notes.

This section is derived from former § 30-1-1326.

Official Comment A shareholder who is not content with the corporation's remittance under section 13.24 [§ 30-29-1324], or offer of remittance under section 13.25 [§ 30-29-1325], and wishes to pursue appraisal rights further must state in writing the amount the shareholder is willing to accept. A shareholder whose demand is deemed arbitrary, unreasonable or not in good faith, however, runs the risk of being assessed litigation expenses under section 13.31 [§ 30-29-1331]. These provisions are designed to encourage settlement without a judicial proceeding.

A shareholder to whom the corporation has made payment (or who has been offered payment under section 13.25) must make a supplemental demand within 30 days after receipt of the payment or offer of payment to permit the corporation to make an early decision on initiating appraisal proceedings. A failure to make such demand causes the shareholder to relinquish under section 13.26(b) anything beyond the amount the corporation paid or offered to pay.

§ 30-29-1327 through 30-29-1329. Reserved.

History.

I.C., § 30-29-1327, as added by 2015, ch. 243, § 68, p. 758.

§ 30-29-1330. Court action. — (a) If a shareholder makes demand for payment under section 30-29-1326, Idaho Code, that remains unsettled, the corporation shall commence a proceeding within sixty (60) days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty (60) day period, it shall pay in cash to each shareholder the amount the shareholder demanded pursuant to section 30-29-1326, Idaho Code, plus interest.

(b) The corporation shall commence the proceeding in the appropriate court of the county where the corporation's principal office is located, or, if none in this state, Ada county. If the corporation is a foreign corporation, it shall commence the proceeding in the county in this state where the principal office of the domestic corporation merged with the foreign corporation was located or, if the domestic corporation did not have its principal office in this state at the time of the transaction, in Ada county.

(c) The corporation shall make all shareholders, regardless of whether they are residents of this state, whose demands remain unsettled parties to the proceeding, as in an action against their shares, and all parties shall be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) of this section is plenary and exclusive. The court may appoint one (1) or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have the powers described in the order appointing them or in any amendment to it. The shareholders demanding appraisal rights are entitled to the same discovery rights as parties in other civil proceedings. There shall be no right to a jury trial.

(e) Each shareholder made a party to the proceeding is entitled to judgment:

(1) For the amount, if any, by which the court finds the fair value of the shareholder's shares exceeds the amount paid by the corporation to the

shareholder for such shares, plus interest; or

(2) For the fair value, plus interest, of the shareholder's shares for which the corporation elected to withhold payment under section 30-29-1325, Idaho Code.

History.

I.C., § 30-29-1330, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 142, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; inserted "the shareholder" near the end of the second sentence in subsection (a); in subsection (c), in the first sentence, substituted "regardless of whether they are residents" for "whether or not they are residents" and substituted "shall" for "must" near the end; substituted "subsection (b) of this section" for "subsection (2) of this section" near the middle of the first sentence in subsection (d); and substituted "shares exceeds the amount paid by the corporation to the shareholder for such shares, plus interest; or" for "shares, plus interest, exceeds the amount paid by the corporation to the shareholder for such shares; or" at the end of paragraph (e)(1).

Compiler's Notes.

This section is derived from former § 30-1-1330.

Official Comment

Section 13.30 [this section] provides for judicial appraisal as the ultimate means of determining fair value. All demands for payment made under section 13.26 [§ 30-29-1326] are to be resolved in a single proceeding brought in the court specified by section 13.30(b). All shareholders making demands under section 13.26 must be made parties, with service by publication authorized if necessary. Because the nature of the proceeding is similar to a proceeding in equity or for an accounting, section 13.30(d) provides that there is no right to a jury trial. The final judgment establishes

not only the fair value of the shares in the abstract but also determines how much each shareholder who made a section 13.26 demand should receive.

§ 30-29-1331. Court costs and expenses. — (a) The court in an appraisal proceeding commenced under section 30-29-1330, Idaho Code, shall determine all court costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the court costs against the corporation, except that the court may assess court costs against all or some of the shareholders demanding appraisal, in amounts that the court finds equitable, to the extent the court finds such shareholders acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this part.

(b) The court in an appraisal proceeding may also assess the expenses of the respective parties, in amounts the court finds equitable:

(1) Against the corporation and in favor of any or all shareholders demanding appraisal if the court finds the corporation did not substantially comply with the requirements of section 30-29-1320, 30-29-1322, 30-29-1324 or 30-29-1325, Idaho Code; or

(2) Against either the corporation or a shareholder demanding appraisal, in favor of any other party, if the court finds that the party against whom expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this part.

(c) If the court in an appraisal proceeding finds that the expenses incurred by any shareholder were of substantial benefit to other shareholders similarly situated and that such expenses should not be assessed against the corporation, the court may direct that such expenses be paid out of the amounts awarded the shareholders who were benefited.

(d) To the extent the corporation fails to make a required payment pursuant to section 30-29-1324, 30-29-1325 or 30-29-1326, Idaho Code, the shareholder may sue directly for the amount owed and, to the extent successful, shall be entitled to recover from the corporation all expenses of the suit.

History.

I.C., § 30-29-1331, as added by 2015, ch. 243, § 68, p. 758; am. 2019, ch. 90, § 143, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, substituted “expenses” for “counsel fees” at the end of the section heading; redesignated the existing paragraphs; in subsection (a), inserted “court” preceding “costs” near the middle of the first sentence and twice in the last sentence; in subsection (b), substituted “assess the expenses of” for “assess the fees and expenses of counsel and experts for” in the introductory paragraph and deleted “the fees and” following “party against whom” near the middle of paragraph (2); rewrote subsection (c), which formerly read: “If the court in an appraisal proceeding finds that the services of counsel for any shareholder were of substantial benefit to other shareholders similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to such counsel reasonable fees to be paid out of the amounts awarded to shareholders who were benefited”; and substituted “corporation all expenses of the suit” for “corporation all costs and expenses of the suit, including counsel fees” at the end of subsection (d).

Compiler’s Notes.

This section is derived from former § 30-1-1331.

CASE NOTES

Non-Shareholder.

Trial court was not entitled to award the shareholder costs and attorney fees because the shareholder was not entitled to vote on the sale of assets; because he was not entitled to vote, he did not have rights as a dissenting shareholder and was not the prevailing party in the case. Gilman v. Davis, 138 Idaho 599, 67 P.3d 78 (2003).

Official Comment

The purpose of the grants of discretion to the court under section 13.31 [this section] with respect to expenses of appraisal proceedings is to increase the incentives of both sides to proceed in good faith under this

chapter to attempt to resolve their disagreement without the need of a formal judicial appraisal of the value of shares.

While subsections (a) through (c) allocate court costs and expenses in an appraisal proceeding, subsection (d) covers the situation where the corporation was obligated to make payment and did not meet this obligation.

§ 30-29-1332 through 30-29-1339. Reserved.

§ 30-29-1340. Other remedies limited. — (a) The legality of a proposed or completed corporate action described in section 30-29-1302(a), Idaho Code, may not be contested, nor may the corporate action be enjoined, set aside, or rescinded, in a legal or equitable proceeding by a shareholder after the shareholders have approved the corporate action.

(b) Subsection (a) of this section does not apply to a corporate action that:

(1) Was not authorized and approved in accordance with the applicable provisions of:

(i) Part 9, 10, 11, or 12 of this chapter;

(ii) The articles of incorporation or bylaws; or

(iii) The resolution of the board of directors authorizing the corporate action;

(2) Was procured as a result of fraud, a material misrepresentation, or an omission of a material fact necessary to make statements made, in light of the circumstances in which they were made, not misleading;

(3) Is an interested transaction, unless it has been recommended by the board of directors in the same manner as is provided in section 30-29-862, Idaho Code, and has been approved by the shareholders in the same manner as is provided in section 30-29-863, Idaho Code, as if the interested transaction were a director's conflicting interest transaction; or

(4) Is approved by less than unanimous consent of the voting shareholders pursuant to section 30-29-704, Idaho Code, if:

(i) The challenge to the corporate action is brought by a shareholder who did not consent and as to whom notice of the approval of the corporate action was not effective at least ten (10) days before the corporate action was effected; and

(ii) The proceeding challenging the corporate action is commenced within ten (10) days after notice of the approval of the corporate action is effective as to the shareholder bringing the proceeding.

History.

I.C., § 30-29-1340, as added by 2019, ch. 90, § 144, p. 220.

Official Comment

The principle underlying section 13.40 [this section] generally is that when the holders of a majority of the shares have approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous. The existence of an appraisal remedy recognizes that shareholders may disagree about the financial consequences that a corporate action may have and that some may hold such strong views that they will want to vindicate them in a judicial proceeding. Accordingly, if an appraisal proceeding results in an award of additional consideration to the shareholders who pursued appraisal, no inference should be drawn that the judgment of the majority was wrong or that compensation is now owed to shareholders who did not seek appraisal. The limitations are not confined to cases where appraisal is available. The liquidity and reliability considerations that justify the market exception also justify imposing the same limitation on post-shareholder approval remedies that apply when appraisal is available.

Section 13.40 permits proceedings contesting the legality of a transaction, or seeking to enjoin, rescind or set aside the corporate action after the action has been approved by shareholders under the four circumstances described in section 13.40(b)(1). In the case of a corporate action that is an interested transaction, the same reasoning that supports the provision of appraisal rights in situations where the market exception would otherwise apply under section 13.02(b) [§ 30-29-1302] also supports the approach in section 13.40(b)(3) not to preclude judicial review or relief in connection with such transactions, unless other strong safeguards are present. Those safeguards are drawn from the treatment of director conflicting interest transactions in sections 8.60 through 8.63 [§§ 30-29-860 through 30-29-863]. In those sections, a conflict of interest transaction may be protected if either qualified director or disinterested shareholder approval

is obtained after required disclosure. Here, the protection is made available only if both those requirements are met. Absent compliance with those safeguards, the standard of review to be applied, and the extent of the relief that may be available is not addressed by this section.

The scope of section 13.40(b) is limited and does not otherwise affect applicable state law. Section 13.40(b) does not create any cause of action; it merely removes the bar to the types of post-transaction claims provided in section 13.40(a). Even then, whether the specific facts of a transaction subject to section 13.40(b) warrant invalidation or rescission is left to the discretion of the court. Similarly, section 13.40 leaves to applicable state law the question of remedies, such as injunctive relief, that may be available before the corporate action is approved by shareholders in light of other remedies that may be available after the transaction is approved or completed. Where post-shareholder approval claims outside the scope of section 13.40 are asserted, the availability of judicial review, the remedies (such as damages) that shareholders may have, and questions relating to election of remedies, will be determined by applicable state law. Section 13.40 addresses challenges only to the corporate action and does not address remedies, if any, that shareholders may have against directors or other persons as a result of the corporate action, even where subsection (b)(4) applies. See section 8.31 [§ 30-29-831] and the related Official Comment and the introductory Official Comment to chapter 8F under the heading "Scope of Subchapter F [following § 30-29-860]."

Part 14
Dissolution

Idaho Code § 30-29-1401

§ 30-29-1401. Dissolution by incorporators or initial directors. — A majority of the incorporators or initial directors of a corporation that has not issued shares or has not commenced business may dissolve the corporation by delivering to the secretary of state for filing articles of dissolution that set forth:

(a) The name of the corporation; (b) The date of its incorporation; (c) Either:

(1) That none of the corporation's shares has been issued; or (2) That the corporation has not commenced business; (d) That no debt of the corporation remains unpaid; (e) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and (f) That a majority of the incorporators or initial directors authorized the dissolution.

History.

I.C., § 30-29-1401, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 145, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; Compiler's Notes.

This section is derived from former § 30-1-1401.

Official Comment

Under the Act, a corporation is dissolved on the effective date of its articles of dissolution. The Act uses the term “dissolution” in this specialized sense, and not to describe the final step in the liquidation of the corporate business. Section 14.05 [§ 30-29-1405] provides that dissolution does not terminate the corporation’s existence, but that section does require the corporation to wind up its affairs and liquidate.

Section 14.01 [this section] provides a simple method for voluntary dissolution if the corporation has not issued shares (even though it has commenced business) or if it has issued shares but has not commenced business. Section 14.01 takes these situations into account by requiring statements in the articles of dissolution that no debts remain unpaid and that the net assets of the corporation remaining after winding up have been distributed to the shareholders. Dissolution may be accomplished in either situation simply by a majority vote of the incorporators or initial directors.

§ 30-29-1402. Dissolution by board of directors and shareholders. — (a) The board of directors may propose dissolution for submission to the shareholders by first adopting a resolution authorizing the dissolution.

(b) For a proposal to dissolve to be adopted, the proposal to dissolve shall then be approved by the shareholders. In submitting the proposal to dissolve to the shareholders for approval, the board of directors shall recommend that the shareholders approve the dissolution, unless either the board of directors determines that because of conflicts of interest or other special circumstances it should make no recommendation or section 30-29-826, Idaho Code, applies. In either case, the board shall inform the shareholders of the basis for its so proceeding.

(c) The board of directors may set conditions for the approval of the proposal for dissolution by shareholders or the effectiveness of the dissolution.

(d) If the approval of the shareholders is to be given at a meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the dissolution is to be submitted for approval. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider dissolving the corporation.

(e) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (c) of this section, require a greater vote, a greater quorum, or a vote by voting groups, adoption of the proposal to dissolve shall require the approval of the shareholders at a meeting at which a quorum exists consisting of a majority of the votes entitled to be cast on the proposal to dissolve.

History.

I.C., § 30-29-1402, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 146, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1402.

Official Comment

When submitting a proposal to dissolve to shareholders, the board of directors must recommend the dissolution, subject to two exceptions in section 14.02(b) [this section]. The board might exercise the exception under clause (i) where the number of directors having a conflicting interest makes it inadvisable for the board to recommend the proposal or where the board is evenly divided as to the merits of the proposal but is able to agree that shareholders should be permitted to consider it. Alternatively, the board of directors might exercise the exception under clause (ii), which recognizes that, under section 8.26 [§ 30-29-826], a board of directors may agree to submit a proposal to dissolve to a vote of shareholders even if, after approving the proposal, the board of directors determines that it no longer recommends the proposal.

Section 14.02(c) permits the board of directors to condition its submission to the shareholders of a proposal for dissolution or the effectiveness of the dissolution. Among the conditions that a board might impose are that the proposal will not be deemed approved unless it is approved by a specified percentage of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders.

Requirements concerning the timing and content of a notice of meeting, as required by section 14.02(d), are set out in section 7.05 [§ 30-29-705]. Section 14.02(d) does not address the notice to be given to nonvoting or nonconsenting shareholders where the proposal is approved, without a meeting, by written consent. However, that requirement is imposed by section 7.04 [§ 30-29-704].

Section 14.02(e) sets forth the quorum and voting requirements applicable to a shareholder vote to approve a dissolution. In lieu of approval

at a meeting, shareholder approval may be by written consent under the procedures set forth in section 7.04.

The Act does not mandate separate voting by voting groups or appraisal rights in relation to dissolution proposals because upon dissolution, the rights of all classes or series of shares are fixed by the articles of incorporation. Separate voting by voting groups may nevertheless be required if provided for in the articles of incorporation or by the board of directors, acting pursuant to section 14.02(c).

§ 30-29-1403. Articles of dissolution. — (a) At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state for filing articles of dissolution setting forth:

(1) The name of the corporation; (2) The date that dissolution was authorized; and (3) If dissolution was approved by the shareholders, a statement that the proposal to dissolve was duly approved by the shareholders in the manner required by this chapter and by the articles of incorporation.

(b) The articles of dissolution shall take effect at the effective date determined in accordance with section 30-29-123, Idaho Code. A corporation is dissolved upon the effective date of its articles of dissolution.

(c) For purposes of sections 30-29-1401 through 30-29-1409, Idaho Code, "dissolved corporation" means a corporation whose articles of dissolution have become effective and includes a successor entity to which the remaining assets of the corporation are transferred subject to its liabilities for purposes of liquidation.

History.

I.C., § 30-29-1403, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 147, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; added the first sentence in subsection (b); and substituted "sections 30-29-1401 through 30-29-1409, Idaho Code" for "this part" near the beginning of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-1403.

Official Comment

Filing the articles of dissolution makes the decision to dissolve a matter of public record and establishes the time when the corporation must begin the process of winding up and cease carrying on its business except to the extent necessary for winding up. Under the Act, articles of dissolution may be filed at the commencement of winding up or at any time thereafter. This is the only filing required for voluntary dissolution; no filing is required to mark the completion of winding up as the existence of the corporation continues for certain purposes even after the business is wound up and the assets remaining after satisfaction of all creditors are distributed to the shareholders. No time limit for filing the articles of dissolution is specified, although filing must precede making distributions to shareholders unless there is compliance with section 6.40 [§ 30-29-640].

After the effective date of the articles of dissolution, the corporation is referred to as a "dissolved corporation," although its existence continues under section 14.05 [§ 30-29-1405] for purposes of winding up. The inclusion of a successor entity within the definition of "dissolved corporation" under section 14.03(c) [this section] covers the situation where a liquidating trust or other successor liquidating entity is used to complete the liquidation.

§ 30-29-1404. Revocation of dissolution. — (a) A corporation may revoke its dissolution within one hundred twenty (120) days after its effective date.

(b) Revocation of dissolution shall be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action.

(c) After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the secretary of state for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(1) The name of the corporation;

(2) The effective date of the dissolution that was revoked;

(3) The date that the revocation of dissolution was authorized;

(4) If the corporation's board of directors or incorporators revoked the dissolution, a statement to that effect;

(5) If the corporation's board of directors revoked a dissolution as authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(6) If shareholder action was required to revoke the dissolution, a statement that the revocation was duly approved by the shareholders in the manner required by this chapter and by the articles of incorporation.

(d) The articles of revocation of dissolution shall take effect at the effective date determined in accordance with section 30-29-123, Idaho Code.

(e) Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.

(f) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation

resumes carrying on its business as if dissolution had never occurred.

History.

I.C., § 30-29-1404, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 148, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "days after" for "days of" in subsection (a); substituted "shall" for "must" near the beginning of subsection (b); rewrote paragraph (c)(6), which formerly read: "If shareholder action was required to revoke the dissolution, the information required by section 30-29-1403(1)(c), Idaho Code"; and added subsection (d).

Compiler's Notes.

This section is derived from former § 30-1-1404.

Official Comment

Section 14.04 [this section] provides a procedure to revoke dissolution. Revocation generally requires the same authorization as the dissolution, although section 14.04(b) allows shareholders to authorize the board of directors to act alone in revoking dissolution. This authority could be useful, for example, in proposals to dissolve that are contingent upon the effectiveness of another transaction, such as a sale of corporate assets not in the ordinary course of business.

Articles of revocation of dissolution must be filed before resuming the business of the corporation. The information required in the articles of revocation parallels the information required in the articles of dissolution.

Effectiveness of articles of revocation of dissolution dates back to the effective date of the articles of dissolution and permits the corporation to resume its business without limitation.

§ 30-29-1405. Effect of dissolution. — (a) A corporation that has dissolved continues its corporate existence, but the dissolved corporation may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(1) Collecting its assets;

(2) Disposing of its properties that will not be distributed in kind to its shareholders; (3) Discharging or making provision for discharging its liabilities; (4) Making distributions of its remaining assets among its shareholders according to their interests; and (5) Doing every other act necessary to wind up and liquidate its business and affairs.

(b) Dissolution of a corporation does not:

(1) Transfer title to the corporation's property; (2) Prevent transfer of its shares or securities; (3) Subject its directors or officers to standards of conduct different from those prescribed in part 8 of this chapter; (4) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws; (5) Prevent commencement of a proceeding by or against the corporation in its corporate name; (6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or (7) Terminate the authority of the registered agent of the corporation.

(c) A distribution in liquidation under this section may only be made by a dissolved corporation. For purposes of determining the shareholders entitled to receive a distribution in liquidation, the board of directors may fix a record date for determining shareholders entitled to a distribution in liquidation, which date may not be retroactive. If the board of directors does not fix a record date for determining shareholders entitled to a distribution in liquidation, the record date is the date the board of directors authorizes the distribution in liquidation.

History.

I.C., § 30-29-1405, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 149, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), substituted "A corporation that has dissolved continues its corporate existence, but the dissolved corporation" for "A dissolved corporation continues its corporate existence but" at the beginning of the introductory paragraph, substituted "Making distributions of its remaining assets" for "Distributing its remaining property" at the beginning of paragraph (4); deleted "although the authorization to dissolve may provide for closing the corporation's share transfer records" at the end of paragraph (b)(2); and added subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-1405.

CASE NOTES

Assets.

Bankruptcy debtors improperly scheduled assets of a dissolved corporation of which the debtors were the sole shareholders as assets of the debtors, since the assets remained property of the corporation after dissolution which could only be used to satisfy the debts of the corporation and, until satisfaction of such debts, title to the assets did not pass to the debtors as shareholders of the corporation. In re Young, 409 B.R. 508 (Bankr. D. Idaho 2009).

Despite language in the bankruptcy petition and other filings which appeared to state that the debtors' personal bankruptcy included the debts of the corporation they had owned and for which they had just filed dissolution papers, the bankruptcy was personal only. The assets of the corporation remained with the corporation during the winding up period, and were not immediately transferred to debtors. In re Burch, 2013 Bankr. LEXIS 897 (Bankr. D. Idaho Mar. 11, 2013).

Piercing the Corporate Veil.

Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v. DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

Official Comment

Although section 14.05(a) [this section] provides that dissolution does not terminate the corporate existence, it does require the corporation to wind up its affairs and liquidate its assets. After dissolution, the corporation may not carry on its business except as may be appropriate for winding up. Because distributions in liquidation that occur after dissolution are distinct from the pre-dissolution distributions governed by section 6.40 [§ 30-29-640], section 14.05(c) sets forth a separate provision for establishing a record date for determining shareholders entitled to receive a distribution in liquidation.

§ 30-29-1406. Known claims against dissolved corporation. — (a) A dissolved corporation may dispose of the known claims against it by notifying its known claimants in writing of the dissolution at any time after its effective date.

(b) The written notice must:

(1) Describe information that must be included in a claim; (2) Provide a mailing address where a claim may be sent; (3) State the deadline, which may not be fewer than one hundred twenty (120) days after the written notice is effective, by which the dissolved corporation shall receive the claim; and (4) State that the claim will be barred if not received by the deadline.

(c) A claim against the dissolved corporation is barred: (1) If a claimant who was given written notice under subsection (b) of this section does not deliver the claim to the dissolved corporation by the deadline; or (2) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within ninety (90) days after the rejection notice is effective.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

History.

I.C., § 30-29-1406, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 150, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "after the written notice is effective, by which the dissolved corporation shall" for "from the effective date of the written notice, by which the dissolved corporation must" near the end of paragraph (b)(3); and, in subsection (c), substituted "subsection (b) of this section" for

"subsection (2) of this section" near the beginning of paragraph (1) and substituted "after the rejection notice is effective" for "from the effective date of the rejection notice" at the end of paragraph (2).

Compiler's Notes.

This section is derived from former § 30-1-1406.

Official Comment

Sections 14.06 [this section] and 14.07 [§ 30-29-1407] provide a simplified system for handling claims against a dissolved corporation. Section 14.06 deals solely with known claims while section 14.07 deals with unknown or subsequently arising claims. Known claims may be unliquidated, but a claim that is contingent or has not yet matured (or in certain cases has matured but has not been asserted) is not a "claim" for purposes of section 14.06(d). For example, an unmatured liability under a guarantee, a potential default under a lease, or an unasserted claim based upon a defective product manufactured by the dissolved corporation would not be a "claim" under section 14.06.

Known claims are handled in section 14.06 through a process of written notice to claimants, which must provide the information described in section 14.06(b). See section 1.41 [§ 30-29-141] with respect to notices and communications generally. Section 14.06(c) then provides fixed deadlines by which known claims are barred under various circumstances. Section 14.06(c), however, does not bar a claim if the dissolved corporation does not act on it or fails to notify the claimant of the rejection of the claim. Section 14.07 bars certain claims not covered by section 14.06.

The principles of sections 14.06 and 14.07 do not lengthen statutes of limitation applicable under general state law. Thus, claims that are not barred under the foregoing rules — for example, if the corporation does not give notice to the claimant under section 14.06(a) or does not act on a claim — will nevertheless be subject to the general statute of limitations applicable to claims of that type. The Act does not require that a dissolved corporation take the actions set out in sections 14.06 and 14.07, but if it does not do so the protections those sections provide are not available to it.

§ 30-29-1407. Other claims against dissolved corporation. — (a) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice.

(b) The notice must:

(1) Be published one (1) time in a newspaper of general circulation in the county where the dissolved corporation's principal office is or was located or, if none in this state, in Ada county, or be posted conspicuously for at least thirty (30) days on the dissolved corporation's website;

(2) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(3) State that a claim against the dissolved corporation will be barred unless a proceeding to enforce the claim is commenced within two (2) years after the publication of the notice.

(c) If the dissolved corporation publishes a notice in accordance with subsection (b) of this section, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within three (3) years after the publication date of the notice:

(1) A claimant who was not given written notice under section 30-29-1406, Idaho Code;

(2) A claimant whose claim was timely sent to the dissolved corporation but not acted on by the corporation; and

(3) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim that is not barred by section 30-29-1406(c), Idaho Code, or subsection (c) of this section may be enforced:

(1) Against the dissolved corporation, to the extent of its undistributed assets; or

(2) Except as provided in section 30-29-1408(d), Idaho Code, if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of the shareholder's pro rata share of the claim or the corporate assets distributed to the shareholder in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to the shareholder.

History.

I.C., § 30-29-1407, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 151, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; deleted "also" preceding "publish notice" near the beginning of subsection (a); added "or be posted conspicuously for at least thirty (30) days on the dissolved corporation's website" at the end of paragraph (b)(1); in subsection (c), in the introductory paragraph, twice deleted "newspaper" preceding "notice", substituted "subsection (b) of this section" for "subsection (2) of this section" near the beginning, and substituted "three (3) years" for "two (2) years" near the end, and inserted "by the corporation; and" at the end of paragraph (2); and, in subsection (d), substituted "section 30-29-1406(c), Idaho Code, or subsection (c)" for "section 30-29-1406(3), Idaho Code, or subsection (3)" in the introductory paragraph and substituted "section 30-29-1408(d), Idaho Code" for "section 30-29-1408(4), Idaho Code" near the beginning of paragraph (2).

Compiler's Notes.

This section is derived from former § 30-1-1407.

Official Comment

Section 14.07 [this section] addresses the problems created by possible claims that might arise long after the dissolution process is completed and the corporate assets distributed to shareholders. One example would be

claims based on personal injuries occurring after dissolution but caused by allegedly defective products sold before dissolution. The problems raised by such claims are difficult. On one hand, the application of a mechanical limitation period to a claim for injury that occurs after the period has expired may involve injustice to the plaintiff. On the other hand, to permit these suits generally makes it impossible ever to complete the winding up of the corporation, make suitable provision for creditors, and distribute the balance of the corporate assets to the shareholders.

The approach adopted in section 14.07 is to continue the liability of a dissolved corporation for subsequent claims for a period of three years after it publishes notice of dissolution. The three-year cut-off, although arbitrary, provides a reasonable compromise between the competing interests of potential injured plaintiffs, the ability of dissolved corporations to distribute remaining assets free of all claims, and the interests of shareholders in receiving those assets secure in the knowledge that they may not be reclaimed.

Directors must generally discharge or make provision for discharging the corporation's liabilities before distributing the remaining assets to the shareholders. See section 14.09(a) [§ 30-29-1409]. Under section 14.07(d)(1), unbarred claimants will continue to have recourse to the remaining assets of the dissolved corporation. Further, where unbarred claims arise after distributions have been made to shareholders in liquidation, section 14.07(d)(2) authorizes recovery against the shareholders receiving those distributions. That section limits recovery, however, to the smaller of the recipient shareholder's pro rata share of the claim or the total amount of assets received as liquidating distributions by the shareholder from the corporation. The provision encourages claimants seeking to recover distributions from shareholders to try to recover from the entire class of shareholders rather than concentrating only on the larger shareholders and protects the limited liability of shareholders. Shareholders also may be liable to directors for recoupment under section 8.32(b)(2) [§ 30-29-802].

§ 30-29-1408. Court proceedings. — (a) A dissolved corporation that has published a notice under section 30-29-1407, Idaho Code, may file an application with the district court of the county where the dissolved corporation's principal office is located, or, if none in this state, Ada county, for a determination of the amount and form of security to be provided for payment of claims that are contingent or have not been made known to the dissolved corporation or that are based on an event occurring after the effective date of dissolution but that, based on the facts known to the dissolved corporation, are reasonably estimated to arise after the effective date of dissolution. Provision need not be made for any claim that is or is reasonably anticipated to be barred under section 30-29-1407(c), Idaho Code.

(b) Within ten (10) days after the filing of the application, notice of the proceeding shall be given by the dissolved corporation to each claimant holding a contingent claim whose contingent claim is shown on the records of the dissolved corporation.

(c) The court may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section. The reasonable fees and expenses of such guardian, including all reasonable expert witness fees, shall be paid by the dissolved corporation.

(d) Provision by the dissolved corporation for security in the amount and the form ordered by the court under subsection (a) of this section shall satisfy the dissolved corporation's obligations with respect to claims that are contingent, have not been made known to the dissolved corporation or are based on an event occurring after the effective date of dissolution, and such claims may not be enforced against a shareholder who received assets in liquidation.

History.

I.C., § 30-29-1408, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 152, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "section 30-29-1407(c), Idaho Code" for "section 30-29-1407(3), Idaho Code" at the end of the last sentence in subsection (a); and substituted "subsection (a) of this section" for "subsection (1) of this section" near the middle of subsection (c).

Compiler's Notes.

This section is derived from former § 30-1-1408.

Official Comment

Section 14.08 [this section] allows a dissolved corporation to initiate a court proceeding to establish the provision that should be made for contingent or unknown claims that are not reasonably expected to be barred after the three-year period in section 14.07(c) [§ 30-29-1407]. By following this procedure, a corporation removes the risk of director and shareholder liability for inadequate provision for claims.

Section 14.08 is designed to permit the court to adopt procedures appropriate to the circumstances. Estimates for contingent or unknown claims, such as product liability injury claims that might arise after dissolution, need only be made for those claims that the court determines are reasonably anticipated to be asserted within three years after dissolution.

The notice required by section 14.08(b) would include notice to holders of guarantees made by the corporation.

If the dissolved corporation provides for security for claims as set forth in section 14.08(d), that section protects shareholders who receive distributions against those claims, and section 14.09(b) [§ 30-29-1409] similarly protects directors from liability for those distributions.

§ 30-29-1409. Director duties. — (a) Directors shall cause the dissolved corporation to discharge or make reasonable provision for the payment of claims and make distributions in liquidation of assets to shareholders after payment or provision for claims.

(b) Directors of a dissolved corporation that has disposed of claims under section 30-29-1406, 30-29-1407, or 30-29-1408, Idaho Code, shall not be liable for breach of subsection (a) of this section, with respect to claims against the dissolved corporation that are barred or satisfied under section 30-29-1406, 30-29-1407, or 30-29-1408, Idaho Code.

History.

I.C., § 30-29-1409, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 153, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; inserted "in liquidation" near the end of subsection (a); in subsection (b), deleted "been" preceding "disposed of claims" near the beginning and substituted "subsection (a) of this section" for "subsection (1) of this section" near the middle.

Compiler's Notes.

This section is derived from former § 30-1-1409.

CASE NOTES

Piercing the Corporate Veil.

Where a creditor sought to establish a cause of action against debtors for nondischargeability of debt based on fraud by the manager of debtors' transmission company, although piercing the corporate veil was warranted because corporate formalities were not appropriately observed, the claim failed because the creditor's mistrust precluded justified reliance. Fetty v.

DL Carlson Enters. Inc. (In re Carlson), 426 B.R. 840 (Bankr. D. Idaho 2010).

Official Comment Section 14.09(a) [this section] establishes the duty of directors to discharge or make provision for claims and to make distributions of the remaining assets to shareholders. Section 14.09(b) protects directors of a dissolved corporation from liability under section 14.09(a) with respect to claims that are disposed of under section 14.06, 14.07 or 14.08 [§ 30-29-1406, 30-29-1407 or 30-29-1408]. For example, directors need not make provision for claims of known creditors who are barred under section 14.06 by failure to file a claim or commence a proceeding within the specified times, for contingent claimants whose claims are barred by the three-year period after publication pursuant to section 14.07(c), or for claimants such as guarantors if provision for their claims has been approved by a court under section 14.08(d). Section 14.09(b) does not change the provision in section 8.32 [§ 30-29-832] that director liability is to the corporation.

§ 30-29-1410 through 30-29-1429. Reserved.

History.

I.C., § 30-29-1410, as added by 2015, ch. 243, § 69, p. 758.

§ 30-29-1430. Grounds for judicial dissolution. — (a) The Idaho district court designated in section 30-29-1431(a), Idaho Code, may dissolve a corporation:

(1) In a proceeding by the attorney general if it is established that:

(i) The corporation obtained its articles of incorporation through fraud; or

(ii) The corporation has continued to exceed or abuse the authority conferred upon it by law;

(2) In a proceeding by a shareholder if it is established that:

(i) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;

(ii) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;

(iii) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two (2) consecutive annual meeting dates to elect successors to directors whose terms have expired; or

(iv) The corporate assets are being misapplied or wasted;

(3) In a proceeding by a creditor if it is established that:

(i) The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent; or

(ii) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent;

(4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision; or

(5) In a proceeding by a shareholder if the corporation has abandoned its business and has failed within a reasonable time to liquidate and distribute its assets and dissolve.

(b) The provisions of subsection (a)(2) of this section shall not apply in the case of a corporation that, on the date of the filing of the proceeding, has a class or series of shares that is:

(1) A covered security under section 18(b)(1)(A) or (B) of the securities act of 1933; or

(2) Not a covered security, but is held by at least three hundred (300) shareholders and the shares outstanding have a market value of at least twenty million dollars ($20,000,000), exclusive of the value of such shares held by the corporation's subsidiaries, senior executives, directors, and beneficial shareholders and voting trust beneficial owners owning more than ten percent (10%) of such shares.

(c) As used in subsection (a) of this section, "shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner; and in subsection (b) of this section, "shareholder" means a record shareholder, a beneficial shareholder, and a voting trust beneficial owner.

History.

I.C., § 30-29-1430, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 154, p. 220.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1430.

CASE NOTES

Irreparable Injury.

"Irreparable injury" in subsection (2) is any impossible to repair injury that results from illegality, oppression, or fraud to the corporation and which is neither remote nor speculative, or it is being suffered: a monetary loss can constitute irreparable injury to a corporation, if the money cannot be recovered. McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012).

Official Comment

Section 14.30 [this section] provides grounds for the judicial dissolution of a corporation at the request of the state, a shareholder, a creditor, or when a corporation that has commenced voluntary dissolution seeks judicial oversight. Judicial oversight may be useful to protect the corporation from suits by creditors or shareholders. Under this section, the court has discretion as to whether dissolution is appropriate even though the specified grounds for judicial dissolution exist.

1. Involuntary Dissolution by State.

Section 14.30(a)(1) provides a means by which the state may ensure compliance with the fundamentals of corporate existence and prevent abuse. That section limits the power of the state in this regard to grounds that are reasonably related to this objective.

2. Involuntary Dissolution by Shareholders.

Section 14.30(a)(2) provides for involuntary dissolution at the request of a shareholder under circumstances involving deadlock or significant abuse of power by controlling shareholders or directors. Section 14.30(c) extends the ability to seek judicial dissolution under section 14.30(a)(2) to beneficial shareholders and unrestricted voting trust beneficial owners, as these persons have, or hold on behalf of others, an economic interest in the shares. The remedy of judicial dissolution is available only for shareholders of corporations that do not meet the tests in section 14.30(b). Even for those corporations to which section 14.30(a)(2) applies, however, the court can take into account the number of shareholders and the nature of the trading market for the shares in deciding whether to exercise its discretion to order

dissolution. Shareholders of corporations that meet the tests of section 14.30(b) may often have the ability to sell their shares if they are dissatisfied with current management or may seek other remedies under the Act. See, for example, sections 7.48(a) and 8.09 [§§ 30-29-748 and 30-29-809]. The grounds for dissolution under section 14.30(a)(2) are broader than those required to be shown for the appointment of a custodian or receiver under section 7.48(a). The difference is attributable to the different focus of the two proceedings. Although some of the circumstances listed in 14.30(a)(2), such as deadlock, may implicate the welfare of the corporation as a whole, the primary focus is on the effect of actions by those in control on the value of the complaining shareholder's individual investment. For example, "oppressive" behavior in section 14.30(a)(2)(ii) generally describes action directed against a particular shareholder. In contrast, the focus of protection in an action to appoint a custodian or receiver under section 7.48(a) is the corporate entity, and the remedy is intended to protect the interests of all shareholders, creditors and others who may have an interest therein. In other instances, action that is "illegal" or "fraudulent" under section 14.30(a)(2)(ii) may be severely prejudicial to the interests of an individual shareholder, whereas conduct that is illegal with respect to the entire corporation may be remedied by other causes of action under the Act.

Section 14.30(a)(5) provides a basis for a shareholder to obtain involuntary dissolution in the event the corporation has abandoned its business, but those in control of the corporation have delayed unreasonably in either liquidating and distributing its assets or completing the necessary procedures to dissolve the corporation

3. Involuntary Dissolution by Creditors.

Creditors may obtain involuntary dissolution only when the corporation is insolvent and only in the limited circumstances set forth in section 14.30(a)(3). Typically, a proceeding under the federal bankruptcy laws is an alternative in these situations.

4. Judicial Supervision of Dissolution.

A corporation that has commenced voluntary dissolution may petition a court to supervise its dissolution. Such an action may be appropriate to permit the orderly liquidation of the corporate assets and to protect the

corporation from a multitude of creditors' suits or suits by dissatisfied shareholders.

§ 30-29-1431. Procedure for judicial dissolution. — (a) Venue for a proceeding by the attorney general to dissolve a corporation lies in Ada county. Venue for a proceeding brought by any other party named in section 30-29-1430(a), Idaho Code, lies in the county where a corporation's principal office is or was located or, if none in this state, in Ada county.

(b) It is not necessary to make shareholders parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian during the proceeding with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held.

(d) Within ten (10) days of the commencement of a proceeding to dissolve a corporation under section 30-29-1430(a)(2), Idaho Code, the corporation shall deliver to all shareholders, other than the petitioner, a notice stating that the shareholders are entitled to avoid the dissolution of the corporation by electing to purchase the petitioner's shares under section 30-29-1434, Idaho Code, and accompanied by a copy of section 30-29-1434, Idaho Code.

History.

I.C., § 30-29-1431, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 155, p. 220.

STATUTORY NOTES

Cross References.

Attorney general, § 67-1401 et seq.

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "during the proceeding" for "pendente lite" near the beginning of subsection (c); and rewrote subsection (d), which formerly read: "Within

ten (10) days of the commencement of a proceeding under section 30-29-1430(2), Idaho Code, to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one (1) or more members of a national or affiliated securities association, the corporation must send to all shareholders, other than the petitioner, a notice stating that the shareholders may be entitled to avoid the dissolution of the corporation by electing to purchase the petitioner's shares under section 30-29-1434, Idaho Code, and accompanied by a copy of section 30-29-1434, Idaho Code."

Compiler's Notes.

This section is derived from former § 30-1-1431.

Official Comment

Section 14.31 [this section] designates the attorney general as the officer to bring suits for involuntary dissolution by the state. It also sets out procedures for judicial dissolution generally.

§ 30-29-1432. Receivership or custodianship. — (a) Unless an election to purchase has been filed under section 30-29-1434, Idaho Code, a court in a judicial proceeding brought to dissolve a corporation may appoint one (1) or more receivers to wind up and liquidate, or one (1) or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has jurisdiction over the corporation and all of its property, wherever located.

(b) The court may appoint an individual or a domestic or foreign corporation or eligible entity as a receiver or custodian, which, if a foreign corporation or foreign eligible entity, must be registered to do business in this state. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(1) The receiver:

(i) May dispose of all or any part of the assets of the corporation, wherever located, at a public or private sale; and

(ii) May sue and defend in the receiver's own name as receiver of the corporation in all courts of this state;

(2) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors;

The receiver or custodian shall have such other powers and duties as the court may provide in the appointing order, which may be amended from time to time.

(d) The court during a receivership, may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a

receiver.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expenses paid or reimbursed to the receiver or custodian and his counsel from the assets of the corporation or proceeds from the sale of the assets.

History.

I.C., § 30-29-1432, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 156, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; in subsection (a), added "Unless an election to purchase has been filed under section 30-29-1434, Idaho Code" at the beginning and deleted "exclusive" preceding "jurisdiction" near the end; rewrote the first sentence in subsection (b), which formerly read: "The court may appoint an individual or a domestic or foreign corporation, authorized to transact business in this state, as a receiver or custodian"; in subsection (c), deleted "if authorized by the court" following "private sale" near the end of paragraph (1)(i), and added the ending paragraph; deleted "if doing so is in the best interests of the corporation, its shareholders, and creditors" from the end of paragraph (d); and substituted "expenses paid or reimbursed" for "expense disbursements or reimbursements made" near the middle of subsection (e).

Compiler's Notes.

This section is derived from former § 30-1-1432.

Official Comment

Although the court always has discretion to appoint a receiver or custodian under section 14.31 [§ 30-29-1431] (which would be temporary), an appointment under section 14.32 [this section] may not be made during the 90-day period the corporation or other shareholders are given in section 14.34 [§ 30-29-1434] to file an election to purchase the shares of a shareholder who has commenced a proceeding seeking dissolution under

section 14.30(a)(2) [§ 30-29-1430]. After that 90-day period has expired, the court may grant leave to file an election. If no such election is filed, or if the court declines to permit a later filing, the court may choose to appoint a receiver or custodian under section 14.32.

General statutes or rules of court may regulate the appointment of receivers or custodians and define their duties. Section 14.32 is designed to supplement these general provisions and grant the court power to take the steps it considers necessary to resolve the internal corporate problem or to effect liquidation of the corporation in an efficient manner.

§ 30-29-1433. Decree of dissolution. — (a) If after a hearing the court determines that one (1) or more grounds for judicial dissolution described in section 30-29-1430, Idaho Code, exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the secretary of state for filing.

(b) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with section 30-29-1405, Idaho Code, and the notification of claimants in accordance with sections 30-29-1406 and 30-29-1407, Idaho Code.

History.

I.C., § 30-29-1433, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 157, p. 220.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Amendments.

The 2019 amendment, by ch. 90, redesignated existing subsections (1) and (2) as subsections (a) and (b) and substituted "state for filing" for "state, who shall file it" at the end of subsection (a).

Compiler's Notes.

This section is derived from former § 30-1-1433.

Official Comment A court decree ordering that a corporation be dissolved involuntarily has the same legal effect as articles of dissolution. Section 14.33 [this section] requires that the secretary of state receive and file a copy of the decree. Thereafter the corporation's business and affairs are to be wound up as provided in sections 14.05, 14.06 and 14.07 [§§ 30-29-1405, 30-29-1406 and 30-29-1407].

§ 30-29-1434. Election to purchase in lieu of dissolution. — (a) In a proceeding under section 30-29-1430(a)(2), Idaho Code, to dissolve a corporation, the corporation may elect or, if it fails to elect, one (1) or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

(b) An election to purchase pursuant to this section may be filed with the court at any time within ninety (90) days after the filing of the petition under section 30-29-1430(a)(2), Idaho Code, or at such later time as the court in its discretion may allow. If the election to purchase is filed by one (1) or more shareholders, the corporation shall, within ten (10) days thereafter, give written notice to all shareholders, other than the petitioner. The notice must state the name and number of shares owned by the petitioner and the name and number of shares owned by each electing shareholder and must advise the recipients of their right to join in the election to purchase shares in accordance with this section. Shareholders who wish to participate shall file notice of their intention to join in the purchase no later than thirty (30) days after the effectiveness of the notice to them. All shareholders who have filed an election or notice of their intention to participate in the election to purchase thereby become parties to the proceeding and shall participate in the purchase in proportion to their ownership of shares as of the date the first election was filed, unless they otherwise agree or the court otherwise directs. After an election has been filed by the corporation or one (1) or more shareholders, the proceeding under section 30-29-1430(a)(2), Idaho Code, may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of his or her shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale, or other disposition.

(c) If, within sixty (60) days of the filing of the first election, the parties reach agreement as to the fair value and terms of purchase of the petitioner's shares, the court shall enter an order directing the purchase of

the petitioner’s shares upon the terms and conditions agreed to by the parties.

(d) If the parties are unable to reach an agreement as provided for in subsection (c) of this section, the court, upon application of any party, shall stay the proceedings under section 30-29-1430(a)(2), Idaho Code, and determine the fair value of the petitioner’s shares as of the day before the date on which the petition under section 30-29-1430(a)(2), Idaho Code, was filed or as of such other date as the court deems appropriate under the circumstances.

(e) Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include payment of the purchase price in installments, where necessary in the interests of equity, provision for security to assure payment of the purchase price and any additional expenses as may have been awarded, and, if the shares are to be purchased by shareholders, the allocation of shares among them. In allocating the petitioner’s shares among holders of different classes or series of shares, the court should attempt to preserve the existing distribution of voting rights among holders of different classes or series insofar as practicable and may direct that holders of a specific class or classes or series shall not participate in the purchase. Interest may be allowed at the rate and from the date determined by the court to be equitable, but if the court finds that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or otherwise not in good faith, no interest shall be allowed. If the court finds that the petitioning shareholder had probable grounds for relief under section 30-29-1430(a)(2)(ii) or (iv), Idaho Code, it may award expenses to the petitioning shareholder.

(f) Upon entry of an order under subsection (c) or (e) of this section, the court shall dismiss the petition to dissolve the corporation under section 30-29-1430(a)(2), Idaho Code, and the petitioning shareholder shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded by the order of the court that shall be enforceable in the same manner as any other judgment.

(g) The purchase ordered pursuant to subsection (e) of this section shall be made within ten (10) days after the date the order becomes final.

(h) Any payment by the corporation pursuant to an order under subsection (c) or (e) of this section, other than an award of expenses pursuant to subsection (e) of this section, is subject to the provisions of section 30-29-640, Idaho Code.

History.

I.C., § 30-29-1434, as added by 2015, ch. 243, § 69, p. 758; am. 2019, ch. 90, § 158, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1434.

CASE NOTES

Discounts.

Valuation date.

Value of shares.

Discounts.

Minority shareholders' expert opinions and lack of marketability discounts are just facts that a court may consider in determining fair value; their use is not required as a matter of law. Wagner v. Wagner, 160 Idaho 294, 371 P.3d 807 (2016).

Valuation Date.

District court did not abuse its discretion in selecting the valuation date, where that date was the day before the majority elected to close the economically viable mill and liquidate its assets. Wagner v. Wagner, 160 Idaho 294, 371 P.3d 807 (2016).

Value of Shares.

District court's fair value determination of a corporation's shares under paragraph (4) was supported by substantial and competent evidence, where the testimony of the majority shareholders' expert was rejected based upon a lack of credentials to evaluate a mill's safety issues and his refusal to place a value on the mill as a going concern; and the value relied upon was generated by a prior attorney and was buttressed by the valuation proffered by the minority shareholders' expert. Wagner v. Wagner, 160 Idaho 294, 371 P.3d 807 (2016).

Official Comment

It is not always necessary to dissolve a corporation and liquidate its assets to provide relief for the situations covered in section 14.30(a)(2) [§ 30-29-1430]. Section 14.34 [this section] provides an alternative by means of which a dissolution proceeding under section 14.30(a)(2) can be terminated upon payment of the fair value of the petitioner's shares, allowing the corporation to continue in existence for the benefit of the remaining shareholders.

1. Availability.

There are two prerequisites to filing an election to purchase under section 14.34. First, a proceeding to dissolve the corporation under section 14.30(a)(2) must have been commenced. Second, the election may be made only by the corporation or by shareholders other than the shareholder who is seeking to dissolve the corporation under section 14.30(a)(2).

2. Effect of Filing.

The election to purchase is wholly voluntary, but it may only be made as a matter of right within 90 days after the filing of the petition under section 14.30(a)(2). After 90 days, leave of court is required to make an election to purchase.

Sections 14.34(a) and (b) include provisions with respect to the irrevocability of an election and the inability to discontinue a dissolution proceeding or dispose of shares following the filing of an election. These provisions are intended to reduce the risk that either the dissolution proceeding or the buyout election will be used other than in good faith, because under section 14.34 a petitioner using section 14.30(a)(2) becomes

irrevocably committed to sell these shares pursuant to section 14.34 once an election is filed. The petitioning shareholder may not thereafter discontinue the dissolution proceeding or dispose of the petitioner's shares without permission of the court, which is specifically directed to consider whether such action would be equitable from the standpoint of the corporation and the other shareholders.

If the corporation or the other shareholders fail to elect to purchase the petitioner's shares within the first 90 days, they run the risk that the court will decline to accept a subsequent election and will, instead, allow the dissolution proceeding to go forward. The dissolution proceeding is not affected by the filing of an election; it will be stayed only upon an application to the court to determine the fair value of the petitioner's shares filed after the expiration of the 60-day negotiating period provided for in section 14.34(c).

Once an election is filed, it may be set aside or modified only for reasons that the court finds equitable. If the court sets aside the election, the corporation or the electing shareholders are released from their obligation to purchase the petitioner's shares. Under section 14.34(a), the court also has discretion to "modify" the election by releasing one or more electing shareholders without releasing the others.

3. Election by Corporation or Shareholders.

Because any change in the allocation of shareholdings may upset control or other arrangements that have been previously negotiated by the parties, the corporation's election to purchase is given preference during the 90-day period provided for in section 14.34(b). This preference does not affect the order of filing, and any shareholder may file an election (thus triggering the provisions of subsection (b)) as soon as the dissolution proceeding is commenced. If the corporation thereafter files an election within the 90-day period, its election takes precedence over any previously filed election by shareholders. An election by the corporation after 90 days may be filed only with the court's approval. Section 14.34 does not affect an agreement between the corporation and the other shareholders to participate jointly in the purchase of the petitioner's shares.

Section 14.34(b) requires the corporation to notify all other shareholders of their right to join in the purchase "in proportion to their ownership of

shares as of the date the first election was filed." This may raise the question of whether shareholders of a class different from the class of shares owned by the petitioner may participate in the purchase. Given the wide variety of capital structures adopted by corporations, it is not possible to state a general rule that would be appropriate in all cases. Any allocation that is agreed to by the electing shareholders controls regardless of whether the other terms and conditions of the purchase are set by the parties' agreement pursuant to subsection (c) or are determined by the court pursuant to subsection (e). If electing shareholders cannot agree, the court, under subsection (e), must determine an allocation.

4. Court Order.

If the parties come to terms within the 60-day negotiating period provided for in section 14.34(c), their agreement will be incorporated in an order of the court and will thereafter be enforceable as such. If the parties are unable to reach agreement, any party may apply to the court to determine the fair value of the shares. After the court makes that determination, section 14.34(e) requires it to enter an order directing the sale on such terms as the court finds appropriate. Section 14.34(e) does place some limitations on when the court may provide for installment payments or award interest or expenses and does state that the court should attempt to preserve the distribution of certain voting rights. Otherwise, the contents of the order under subsection (e) are subject to the court's discretion.

The entry of an order under section 14.34(c) or (e) requires the court to dismiss the dissolution proceeding under section 14.30(a)(2) and terminates all rights of the petitioner as a shareholder. Thus, the order also terminates all claims that the petitioner may have had in his or her capacity as a shareholder, and the value of such claims must either be asserted as part of the "fair value" of the petitioner's shares or forever lost. Under subsection (f), claims asserted by the petitioner in any nonshareholder capacity, such as claims for back wages or indemnification, are not affected by the entry of an order nor does the order affect any rights the petitioner may have as a creditor with respect to shares pledged as security for the purchase price. Otherwise, the order is enforceable only in the same manner as any other judgment, and the petitioner may not seek to reopen the proceedings in the event of a default.

After the entry of an order under section 14.34(c) or (e), the petitioner is a creditor with respect to the electing shareholders who participate in the purchase, but any payments to be made by the corporation, other than expenses awarded under section 14.34(e), fall within the definition of "distribution" and are subject to section 6.40 [§ 30-29-640].

§ 30-29-1435 through 30-29-1439. Reserved.

History.

I.C., § 30-29-1435, as added by 2015, ch. 243, § 69, p. 758.

§ 30-29-1440. Deposit with state treasurer. — Assets of a dissolved corporation that should be transferred to a creditor, claimant or shareholder of the corporation who cannot be found or who is not competent to receive them shall be reduced to cash and deposited with the state.

History.

I.C., § 30-29-1440, as added by 2015, ch. 243, § 69, p. 758.

STATUTORY NOTES

Cross References.

State treasurer, § 67-1201 et seq.

Unclaimed property law, § 14-501 et seq.

Compiler's Notes.

This section is derived from former § 30-1-1440.

Official Comment Section 14.40 [this section] is a deposit provision, not an escheat provision. It does not provide for ultimate disposition of unclaimed funds. The handling and ultimate disposition of unclaimed funds by the state treasurer or other appropriate state official is to be determined by state law other than the Act.

Part 15
[Reserved]

Part 16
Records and reports

Idaho Code § 30-29-1601

§ 30-29-1601. Corporate records. — (a) A corporation shall maintain the following records:

(1) Its articles of incorporation as currently in effect;

(2) Any notices to shareholders referred to in section 30-29-120(d)(5), Idaho Code, specifying facts on which a filed document is dependent if those facts are not included in the articles of incorporation or otherwise available as specified in section 30-29-120(d)(5), Idaho Code;

(3) Its bylaws currently in effect;

(4) All written communications within the past three (3) years to shareholders generally;

(5) Minutes of all meetings of, and records of all actions taken without a meeting by, its shareholders, its board of directors, and board committees established under section 30-29-825, Idaho Code;

(6) A list of the names and business addresses of its current directors and officers; and

(7) Its most recent annual report delivered to the secretary of state pursuant to section 30-21-213, Idaho Code.

(b) A corporation shall maintain all annual financial statements prepared for the corporation for its last three (3) fiscal years, or such shorter period of existence, and any audit or other reports with respect to such financial statements.

(c) A corporation shall maintain accounting records in a form that permits preparation of its financial statements.

(d) A corporation shall maintain a record of its current shareholders in alphabetical order by class or series of shares showing the number and class or series of shares held by each shareholder. Nothing contained in this subsection shall require the corporation to include in such record the

electronic mail address or other electronic contact information of a shareholder.

(e) A corporation shall maintain the records specified in this section in a manner so that they may be made available for inspection within a reasonable time.

History.

I.C., § 30-29-1601, as added by 2015, ch. 243, § 71, p. 758; am. 2017, ch. 58, § 12, p. 91; am. 2019, ch. 90, § 159, p. 220.

STATUTORY NOTES

Amendments.

The 2017 amendment, by ch. 58, substituted "section 30-21-213, Idaho Code" for "section 30-29-1622, Idaho Code" at the end of paragraph (5)(g).

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1601.

Official Comment

1. Records to be Maintained.

Section 16.01(a) [this section] requires certain basic records to be maintained by the corporation. The Act does not generally specify how records must be maintained (other than in a manner so that they may be made available for inspection within a reasonable time), where they must be located or, with the exception of section 16.02(a) [§ 30-29-1602], where they must be available. They may be maintained in one or more offices within or without the state and in some cases, such as shareholder records, may be maintained by agents of the corporation; indeed, in the case of records in intangible form, it may be impossible to determine where they are located.

2. Minutes and Related Documents.

Section 16.01(a) does not address the amount of detail that should appear in minutes or written actions. Minutes of meetings customarily include the formalities of notice, the time and place of the meeting, those in attendance, and the results of any votes. Minutes of meetings and written actions without a meeting show formal action taken. The extent to which further detail is included is a matter of judgment which may depend upon the circumstances. Section 7.04, which addresses written actions taken by shareholders, requires that written consents by shareholders be delivered to the corporation for filing with corporate records.

3. Financial Statements and Accounting Records.

The Act does not provide normative standards for the financial statements and accounting records to be prepared or maintained. The financial statements to be maintained under section 16.01(b) are those that the corporation prepares in the operation of its business, including in response to third party requirements. The form of the financial statements prepared by a corporation depends to some extent on the nature and complexity of the corporation's business and third party requirements such as those governing the preparation and filing of tax returns with applicable tax authorities. To accommodate the needs of the many different types of business corporations that may be subject to these provisions, including closely held corporations, the Act does not require that the corporation prepare and maintain financial statements on the basis of generally accepted accounting principles ("GAAP") if it is not otherwise required to prepare GAAP financial statements. The Act does not define what accounting records must be maintained or mandate how long they must be maintained. The accounting records to be maintained under section 16.01(c) depend upon the form of the corporation's financial statements. For example, annual tax returns filed with the relevant taxing authorities may be the only annual financial statements prepared by small businesses operating on a cash basis and, in those instances, the requisite accounting records to be maintained might consist of only a check register, vouchers and receipts.

4. Shareholders' Lists.

Section 16.01(d) requires the corporation to maintain such records of its shareholders as will permit it to compile a list of current shareholders when required. These records may vary from stubs from which certificates have

been detached in the case of corporations with a few shareholders to elaborate electronic data in the case of large corporations whose shares are publicly traded. The record may be maintained by the corporation or an agent, who traditionally is the transfer agent but may be another agent. A corporation may maintain additional information regarding its shareholders, such as a list of nominees and nonobjecting beneficial owners if its shares are publicly traded.

§ 30-29-1602. Inspection rights of shareholders. — (a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 30-29-1601(a), Idaho Code, excluding minutes of meetings of, and records of actions taken without a meeting by, the corporation's board of directors and board committees established under section 30-29-825, Idaho Code, if the shareholder gives the corporation a signed written notice of the shareholder's demand at least five (5) business days before the date on which the shareholder wishes to inspect and copy.

(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) of this section and gives the corporation a signed written notice of the shareholder's demand at least five (5) days before the date on which the shareholder wishes to inspect and copy:

(1) The financial statements of the corporation maintained in accordance with section 30-29-1601(b), Idaho Code;

(2) Accounting records of the corporation;

(3) Excerpts from minutes of any meeting of, or records of any actions taken without a meeting by the corporation's board of directors and board committees maintained in accordance with section 30-29-1601(a), Idaho Code; and

(4) The record of shareholders maintained in accordance with section 30-29-1601(d), Idaho Code.

(c) A shareholder may inspect and copy the records described in subsection (b) of this section only if:

(1) The shareholder's demand is made in good faith and for a proper purpose;

(2) The shareholder's demand describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect; and

(3) The records are directly connected with the shareholder's purpose.

(d) The corporation may impose reasonable restrictions on the confidentiality, use, or distribution of records described in subsection (b) of this section.

(e) For any meeting of shareholders for which the record date for determining shareholders entitled to vote at the meeting is different than the record date for notice of the meeting, any person who becomes a shareholder subsequent to the record date for notice of the meeting and is entitled to vote at the meeting is entitled to obtain from the corporation upon request the notice and any other information provided by the corporation to shareholders in connection with the meeting, unless the corporation has made such information generally available to shareholders by posting it on its website or by other generally recognized means. Failure of a corporation to provide such information does not affect the validity of action taken at the meeting.

(f) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(g) This section does not affect:

(1) The right of a shareholder to inspect records under section 30-29-720, Idaho Code, or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant; or

(2) The power of a court, independently of this chapter, to compel the production of corporate records for examination and to impose reasonable restrictions as provided in section 30-29-1604(c), Idaho Code, provided that, in the case of production of records described in subsection (b) of this section at the request of a shareholder, the shareholder has met the requirements of subsection (c) of this section.

(h) For purposes of this section, "shareholder" means a record shareholder, a beneficial shareholder, and an unrestricted voting trust beneficial owner.

History.

I.C., § 30-29-1602, as added by 2015, ch. 243, § 71, p. 758; am. 2019, ch. 90, § 160, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1602.

CASE NOTES

In General.

Summary judgment was properly granted because plaintiff's requests for the corporate records did not comply with statutory requirements. Win of Mich., Inc. v. Yreka United, Inc., 137 Idaho 747, 53 P.3d 330 (2002).

Official Comment

1. Section 16.02(a).

Under section 16.02(a) [this section], each shareholder is entitled to inspect all documents that deal with the shareholder's interest in the corporation. The right to inspection includes the right to make copies, as further described in section 16.03 [§ 30-29-1603]. Although some of these documents may also be a matter of public record in the office of the secretary of state, a shareholder should not be compelled to go to a public office that may be physically distant to examine the basic documents relating to the corporation. The "principal office" of the corporation is defined in section 1.40 [§ 30-29-140] to be the location of the executive offices of the corporation at its address as set forth by the corporation in its annual report required by section 16.21 [see § 30-29-1620].

2. Section 16.02(b).

In contrast to the right to inspect minutes of meetings of, and written actions taken without a meeting by, shareholders, a shareholder is entitled to inspect only excerpts of meetings of, and records of written actions taken by, the board of directors and board committees related to the purpose of the inspection. A shareholder is entitled to inspect the record of

shareholders under section 16.02(b) without regard to the size or value of the shareholder's holding. This right is independent of the right to inspect a shareholders' list under section 7.20 § 30-29-720].

3. Section 16.02(c).

Section 16.02(c) permits inspection of the financial statements and records described in section 16.02(b) by a shareholder only if the demand is made in good faith and for a "proper purpose." Although not defined in the Act, "proper purpose" under section 16.02(c) has been defined in case law to involve a purpose that is reasonably relevant to the demanding shareholder's interest as a shareholder.

Section 16.02(c) requires that a shareholder designate "with reasonable particularity" the purpose for the demand and the records he or she desires to inspect. Also, the records demanded must be "directly connected" with that purpose. If disputed by the corporation, the "connection" of the records to the shareholder's purpose may be determined by a court's examination of the records.

4. Section 16.02(d).

The reasonable restrictions on the confidentiality, use or distribution of financial statements and records permitted by section 16.02(d) allow for the protection of confidential or proprietary information in the corporation's records or sensitive matters that might be disclosed in a shareholder inspection. Such restrictions might include, for example, requiring the demanding shareholder to sign a confidentiality and use agreement. A similar provision is found in section 16.04(d) [§ 30-29-1604] in connection with court ordered inspections.

5. Section 16.02(e).

Section 16.02(e) provides shareholders of a corporation the right to receive from the corporation the notice and other information provided by the corporation to shareholders in connection with a meeting if the record date for voting is subsequent to the record date for notice and the shareholder became entitled to vote after the record date for notice. This provision does not apply to information provided to shareholders by persons other than the corporation.

6. Sections 16.02(f) and (g).

The prohibition in section 16.02(f) does not apply to a shareholder agreement permissible under section 7.32 [§ 30-29-732]. No inference should be drawn from the prohibition in section 16.02(f) as to whether other, unrelated sections of the Act may be modified by provisions in the articles of incorporation or bylaws.

Section 16.02(g) preserves whatever independent rights of inspection exist under the referenced sources and does not create any rights, either expressly or by implication. A shareholder also has the right to obtain financial statements under section 16.20 [§ 30-29-1620].

§ 30-29-1603. Scope of inspection right. — (a) A shareholder may appoint an agent or attorney to exercise the shareholder's inspection and copying rights under section 30-29-1602, Idaho Code.

(b) The corporation may, if reasonable, satisfy the right of a shareholder to copy records under section 30-29-1602, Idaho Code, by furnishing to the shareholder copies by photocopy or other means chosen by the corporation, including furnishing copies through an electronic transmission.

(c) The corporation may comply at its expense with a shareholder's demand to inspect the record of shareholders under section 30-29-1602(b)(4), Idaho Code, by providing the shareholder with a list of shareholders that was compiled no earlier than the date of the shareholder's demand.

(d) The corporation may impose a reasonable charge to cover the costs for providing copies of documents to the shareholder that may be based on an estimate of such costs.

History.

I.C., § 30-29-1603, as added by 2015, ch. 243, § 71, p. 758; am. 2019, ch. 90, § 161, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1603.

Official Comment

Section 16.03(a) [this section] provides that the rights of inspection and copying granted to shareholders in section 16.02 [§ 30-29-1602] may be exercised by agents and attorneys of shareholders appointed by shareholders to conduct such inspection and copying. Providing the

corporation with the right to choose among alternative delivery methods for copies in section 16.03(b), including by electronic transmissions, is intended to reduce burdens on the corporation. No consent by the shareholder is required under section 1.41 [§ 30-29-141] for the corporation to furnish copies to the shareholder under section 16.03 by electronic transmission.

Section 16.03(c) gives the corporation, at its option and expense, the right to provide a list of its shareholders instead of granting the right of inspection. Such a list must be compiled no earlier than the date of the written demand.

Section 16.03(d) permits the corporation to be reimbursed for the expense of providing copies of documents to a shareholder.

§ 30-29-1604. Court-ordered inspection. — (a) If a corporation does not allow a shareholder who complies with section 30-29-1602(a), Idaho Code, to inspect and copy any records required by that section to be available for inspection, the Idaho district court of the county where the corporation's principal office is located or, if none in this state, Ada county, may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the shareholder.

(b) If a corporation does not within a reasonable time allow a shareholder who complies with section 30-29-1602(b), Idaho Code, to inspect and copy the records required by that section, the shareholder who complies with section 30-29-1602(c), Idaho Code, may apply to the Idaho district court of the county where the corporation's principal office is located or, if none in this state, Ada county, for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded under section 30-29-1602(b), Idaho Code, it may impose reasonable restrictions on their confidentiality, use, or distribution by the demanding shareholder, and it shall also order the corporation to pay the shareholder's expenses incurred to obtain the order unless the corporation establishes that it refused inspection in good faith because the corporation had:

(1) A reasonable basis for doubt about the right of the shareholder to inspect the records demanded; or

(2) Required reasonable restrictions on the confidentiality, use, or distribution of the records demanded to which the demanding shareholder had been unwilling to agree.

History.

I.C., § 30-29-1604, as added by 2015, ch. 243, § 71, p. 758; am. 2019, ch. 90, § 162, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, redesignated the existing paragraphs; substituted "section 30-29-1602(a), Idaho Code, to inspect and copy any records required by that section" for "section 30-29-1602(1), Idaho Code, to inspect and copy any records required by that subsection" near the beginning of subsection (a); substituted "shareholder who complies with section 30-29-1602(b), Idaho Code, to inspect and copy the records required by that section, the shareholder who complies with section 30-29-1602(c), Idaho Code, may" for "shareholder to inspect and copy any other record the shareholder who complies with section 30-29-1602(2) and (3), Idaho Code, may" near the beginning of the first sentence in subsection (b); rewrote subsection (c), which formerly read: "If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded"; and deleted former subsection (4), which read: "If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder."

Compiler's Notes.

This section is derived from former § 30-1-1604.

Official Comment

Section 16.04 [this section] provides a judicial remedy if a corporation refuses to grant the right of inspection provided by section 16.02 [§ 30-29-1602].

If the right of inspection under section 16.02(a) is invoked and the corporation refuses to grant inspection, the shareholder may seek a summary order compelling inspection at the corporation's expense. A summary order is appropriate since the right of inspection under section 16.02(a) is either automatic or subject only to a determination that the person is in fact a shareholder of the corporation. By contrast, if inspection is demanded under section 16.02(b), a number of matters may be at issue, including the shareholder's good faith and proper purpose for demands

under section 16.02(c) or the reasonableness of the restrictions required by the corporation on the confidentiality, use or distribution of the records. Accordingly, section 16.04(b) directs the court to handle the proceeding "on an expedited basis" instead of in a summary proceeding. The purpose of this phrase is to discourage dilatory tactics to avoid or delay inspection without requiring the court to resolve these issues on a summary basis.

The principal sanction against unreasonable delay or refusal to grant inspection is provided by section 16.04(c), which imposes on the corporation the shareholder's expenses to obtain the order unless the corporation establishes that it refused inspection in good faith on the grounds specified in section 16.04(c)(1) or (2). For example, a corporation may point to conduct of the shareholder involving improper use of information obtained from the corporation in the past as indicating that reasonable doubt existed as to the shareholder's present purpose or by showing that the corporation refused inspection because the shareholder had been unwilling to agree to reasonable restrictions on the confidentiality, use or distribution of records demanded under section 16.02(b).

§ 30-29-1605. Inspection rights of directors. — (a) A director of a corporation is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director's duties as a director, including duties as a member of a board committee, but not for any other purpose or in any manner that would violate any duty to the corporation.

(b) The district court of the county where the corporation's principal office is located, or if none in this state, Ada county, may order inspection and copying of the books, records and documents at the corporation's expense upon application of a director who has been refused such inspection rights unless the corporation establishes that the director is not entitled to such inspection rights. The court shall dispose of an application under this subsection on an expedited basis.

(c) If an order is issued, the court may include provisions protecting the corporation from undue burden or expense, and prohibiting the director from using information obtained upon exercise of the inspection rights in a manner that would violate a duty to the corporation, and may also order the corporation to reimburse the director for the director's expenses incurred in connection with the application.

History.

I.C., § 30-29-1605, as added by 2015, ch. 243, § 71, p. 758; am. 2019, ch. 90, § 163, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, rewrote the section heading, which formerly read: "Inspection of records by directors"; redesignated existing subsections (1) to (3) as subsections (a) to (c); inserted "board" near the end of subsection (a); and substituted "director's expenses incurred" for "director's costs, including reasonable counsel fees, incurred" near the end of subsection (c).

Official Comment

The purpose of section 16.05(a) [this section] is to confirm the principle that a director always is entitled to inspect books, records and documents to the extent reasonably related to the performance of the director's duties, provided that the requested inspection is not for an improper purpose and the director's use of the information obtained would not violate any duty to the corporation. In addition, section 16.05 sets forth a remedy for the director in circumstances where the corporation improperly denies the right of inspection.

Section 16.05(b) provides for a court order on an expedited basis because there is a presumption that significant latitude and discretion should be granted to the director, and the corporation has the burden of establishing that the director is not entitled to inspection of the documents requested. There may be circumstances where the director's inspection right might be denied, for example, when it would be contrary to the interest of the corporation because of adversity with the director, and the courts have broad discretion to address these circumstances. Section 16.05 does not directly deal with the ability of a director to inspect records of a subsidiary of which he or she is not also a director. A director's ability to inspect records of a subsidiary generally should be exercised through the parent's rights or power and section 16.05(a) does not independently provide that right or power to a director of the parent. In the case of wholly-owned subsidiaries, a director's ability to inspect should approximate his or her rights with respect to the parent.

§ 30-29-1606. Exception to notice requirement. [Repealed.]

Repealed by S.L. 2019, ch. 90, § 164, effective July 1, 2019.

History.

I.C., § 30-29-1606, as added by 2015, ch. 243, § 71, p. 758.

§ 30-29-1607 through 30-29-1619. Reserved.

History.

I.C., § 30-29-1607, as added by 2015, ch. 243, § 71, p. 758.

§ 30-29-1620. Financial statements for shareholders. — (a) Upon the written request of a shareholder, a corporation shall deliver or make available to such requesting shareholder by posting on its website, or by other generally recognized means, annual financial statements for the most recent fiscal year of the corporation for which annual financial statements have been prepared for the corporation. If financial statements have been prepared for the corporation on the basis of generally accepted accounting principles for such specified period, the corporation shall deliver or make available such financial statements to the requesting shareholder. If the annual financial statements to be delivered or made available to the requesting shareholder are audited or otherwise reported upon by a public accountant, the report shall also be delivered or made available to the requesting shareholder.

(b) A corporation shall deliver, or make available and provide written notice of availability of, the financial statements required under subsection (a) of this section to the requesting shareholder within five (5) business days of delivery of such written request to the corporation.

(c) A corporation may fulfill its responsibilities under this section by delivering the specified financial statements, or otherwise making them available, in any manner permitted by the applicable rules and regulations of the United States securities and exchange commission.

(d) Notwithstanding the provisions of subsections (a), (b), and (c) of this section:

(1) As a condition to delivering, or making available, financial statements to a requesting shareholder, the corporation may require the requesting shareholder to agree to reasonable restrictions on the confidentiality, use, and distribution of such financial statements; and

(2) The corporation may, if it reasonably determines that the shareholder's request is not made in good faith or for a proper purpose, decline to deliver or make available such financial statements to that shareholder.

(e) If a corporation does not respond to a shareholder's request for annual financial statements pursuant to this section in accordance with subsection (b) of this section within five (5) business days of delivery of such request to the corporation:

(1) The requesting shareholder may apply to the Idaho district court of the county where the corporation's principal office is located or, if none in this state, Ada county, for an order requiring delivery of or access to the requested financial statements. The court shall dispose of an application under this subsection on an expedited basis.

(2) If the court orders delivery or access to the requested financial statements, it may impose reasonable restrictions on their confidentiality, use, or distribution.

(3) In such proceeding, if the corporation has declined to deliver or make available such financial statements because the shareholder had been unwilling to agree to restrictions proposed by the corporation on the confidentiality, use, and distribution of such financial statements, the corporation shall have the burden of demonstrating that the restrictions proposed by the corporation were reasonable.

(4) In such proceeding, if the corporation has declined to deliver or make available such financial statements pursuant to subsection (d) (2) of this section, the corporation shall have the burden of demonstrating that it had reasonably determined that the shareholder's request was not made in good faith or for a proper purpose.

(5) If the court orders delivery or access to the requested financial statements, it shall order the corporation to pay the shareholder's expenses incurred to obtain such order unless the corporation establishes that it had refused delivery or access to the requested financial statements because the shareholder had refused to agree to reasonable restrictions on the confidentiality, use, or distribution of the financial statements or that the corporation had reasonably determined that the shareholder's request was not made in good faith or for a proper purpose.

History.

I.C., § 30-29-1620, as added by 2019, ch. 90, § 167, p. 220.

STATUTORY NOTES

Prior Laws.

Former § 30-29-1620, which comprised I.C., § 30-29-1620, as added by 2015, ch. 243, § 71, p. 758, was repealed by S.L. 2019, ch. 90, § 165, effective July 1, 2019.

Compiler's Notes.

This section is derived from former § 30-1-1620.

Official Comment

1. Section 16.20(a).

Although section 16.20 [this section] requires a corporation, upon the written request of a shareholder, to deliver or make available annual financial statements that have been prepared, it does not require a corporation to prepare financial statements. This recognizes that many small, closely held corporations do not regularly prepare formal financial statements unless required by banks, suppliers or other third parties.

Section 16.20 does not limit the financial statements to be delivered or made available to shareholders to financial statements prepared on the basis of generally accepted accounting principles. Many small corporations have never prepared financial statements on the basis of GAAP. "Cash basis" financial statements (often used in preparing the tax returns of small corporations) do not comply with GAAP. Smaller corporations that keep accrual basis records, and file their federal income tax returns on that basis, frequently do not make the adjustments that may be required to present their financial statements on a GAAP basis. Internally or externally prepared financial statements prepared on the basis of other accounting practices and principles that are reasonable in the circumstances, including tax returns filed with the U.S. Internal Revenue Service (if that is all that is prepared), will suffice for these types of corporations and they may satisfy their obligations under section 16.20 by delivering or making available the requested financial statements in whatever form that they have been prepared for other purposes. If a corporation does prepare financial statements on a GAAP basis for any purpose for the particular year,

however, it must send or make available those statements to the requesting shareholder as provided by section 16.20(a).

The last sentence of section 16.20(a) requires that if the financial statements to be delivered or made available have been reported upon by a public accountant, that report must be furnished. Section 16.20(a) refers to a "public accountant." The same terminology is used in section 8.30 [§ 30-29-830] (standards of conduct for directors). In various states different terms are employed to identify those persons who are permitted under the state licensing requirements to act as professional accountants. Phrases like "independent public accountant," "certified public accountant," "public accountant," and others may be used. In adopting the term "public accountant," the Act uses the words in a general sense to refer to any class or classes of persons who, under the applicable requirements of a particular jurisdiction, are professionally entitled to practice accountancy.

Failure to comply with the requirements of section 16.20 does not adversely affect the existence or good standing of the corporation. Rather, failure to comply gives an aggrieved shareholder rights to compel compliance or to obtain damages, if they can be established, under general principles of law.

A shareholder may also seek access to the financial statements of the corporation through the inspection rights established in section 16.02 [§ 30-29-1602].

2. Section 16.20(d).

In establishing restrictions with respect to confidentiality, use or distribution that are reasonable under the circumstances, a corporation may consider a number of factors, including the potential competitive harm to the corporation and its other shareholders that could result if the confidential financial information were used to compete with the corporation or disclosed to third parties such as competitors. As provided in section 16.20(d)(2), a corporation may withhold delivery or making available its financial statements to a requesting shareholder if it reasonably determines that the shareholder's request is not made in good faith and for a proper purpose.

3. Section 16.20(e).

If a corporation fails to comply with section 16.20(b) in a timely manner the judicial remedy of 16.20(e) directs the court to handle the proceeding on an expedited basis to discourage dilatory tactics to avoid or delay delivery or access to financial statements, but does not require the court to resolve these issues on a summary basis. Section 16.20(e), like section 16.04 [§ 30-29-1604], establishes a sanction against unreasonable delay or refusal to deliver or provide access to financial statements by imposing on the corporation the shareholder's expenses in obtaining the court's order unless the corporation can establish that the shareholder had been unwilling to agree to reasonable restrictions on the confidentiality, use or distribution of the requested financial statements or the corporation had reasonably determined that the shareholder's request was not made in good faith or for a proper purpose.

§ 30-29-1621. Other reports to shareholders. [Repealed.]

Repealed by S.L. 2019, ch. 90, § 166, effective July 1, 2019.

History.

I.C., § 30-29-1621, as added by 2015, ch. 243, § 71, p. 758.

Part 17
Transition Provisions

§ 30-29-1701. Application to existing domestic corporations. — This chapter applies to all domestic corporations in existence on its effective date that were incorporated under any general statute of this state providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved.

History.

I.C., § 30-29-1701, as added by 2015, ch. 243, § 72, p. 758; am. 2019, ch. 90, § 168, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, deleted "of chapter" following "Application" at the beginning of the section heading and substituted "existence on its effective date" for "existence on the effective date of this chapter" near the beginning of the section.

Compiler's Notes.

The reference in this section to the effective date of "this chapter" is a reference to the effective date of chapter 29, title 30, Idaho Code, enacted by S.L. 2015, Chapter 243, effective July 1, 2015. See § 30-21-708.

This section is derived from former § 30-1-1701.

Official Comment

NOTE ON ADOPTION OF THE ACT

Chapter [Part] 17 addresses various transitional and interpretational issues that merit consideration by the legislature adopting the Act, especially as an entirety. This Note summarizes and explains some of those

issues. Each adopting state will need to consider the differences between the Act and its existing corporation statute to determine if additional transitional provisions will be necessary.

Special Circumstances Warranting Delayed Effectiveness.

The Act has been drafted to apply to domestic business corporations in existence on its effective date. See section 17.01 [this section]. To the extent that some of the provisions of the Act differ in significant respects from earlier laws, it may be appropriate to delay the effective date of such provisions to give existing corporations adequate time to revise controlling corporate documents to take into account the provisions of the Act, or in unusual circumstances, to allow existing corporations to continue to be governed by a preexisting law until a later election to be governed by the pertinent provision of the Act. Two examples of such transitional problems are discussed below.

• Changes in Voting Requirements The Act, unlike some corporation statutes, requires by virtue of section 7.25 [§ 30-29-725] only that votes cast in favor exceed votes cast against, in a meeting at which a quorum is present, to approve transactions such as mergers, sale of assets outside the usual and regular course of business, important amendments to the articles of incorporation, and dissolution. When considering adoption of the Act's voting requirements, it is important to recognize that specific control arrangements may have been established on the assumption that the existing statutory voting requirements would not be reduced. Rather than defeat those reasonable assumptions by effectively eliminating a shareholder's power to veto changes when there was a higher statutory vote requirement, a state that adopts the Act's lesser voting requirement may wish to consider "grandfathering" existing corporations and afford them an option to elect to be governed by the new requirement.

• Increased Power of the Board of Directors The Act generally grants the board of directors authority to increase or decrease its own size without specific authority (section 8.03 [§ 30-29-803]) unless the articles of incorporation restrict this power. Some corporation statutes do not grant this power to the board of directors unless express provision is made in the articles or bylaws. Corporations that have not granted this express power to

the board of directors may in effect do so when they become subject to the Act, and a delayed effective date therefore may be appropriate.

Foreign Corporations.

Although chapter [part] 15 of the Act may change the rules applicable to foreign corporations in some states, these changes are not of a type that requires a transition period. It is therefore recommended that only a single effective date be provided for the application of the Act to foreign corporations and that delayed effective dates for specific provisions in this regard are unnecessary. See section 17.02 [§ 30-29-1702].

Savings and Severability Provisions.

The Act contains its own savings and severability provisions, in sections 17.03 and 17.04 [§§ 30-29-1703 and 30-29-1704], respectively. If the state has a savings statute of general application, however, it may be unnecessary to adopt section 17.03. Likewise, if the state has a severability provision of general application, or if the state's highest court has established a general rule of severability, it may be unnecessary to adopt section 17.04.

Repeal.

Although section 17.05 [§ 30-29-1705] provides for repeal of previously enacted general corporation statutes that are specified, such repeal is generally unnecessary with regard to statutes providing special incorporation and regulatory provisions for corporations engaged in specific businesses, like banking and insurance. If these specialized statutes expressly incorporate by reference provisions from the general business corporation act, however, these statutes should be amended to refer specifically to the present Act rather than to an earlier statute; an appropriate provision would apply this Act to all these corporations except to the extent the specialized statute expressly provides that a different principle should apply.

*

The Act's application to all domestic corporations in existence on the effective date of the Act, as well as to all new domestic corporations formed after that date, avoids a confusing coexistence of different and overlapping rules of corporation law. The Act does not, however, supersede statutes governing nonprofit corporations or associations, nor does it apply to

corporations formed for the purpose of engaging in a business for which the state has provided a separate incorporation procedure.

Section 17.01 applies the Act to all corporations to which that application is constitutionally permissible. In view of the universal adoption of "reservation of power" clauses in all states for more than a century, there are very few active domestic corporations to which the Act will not be applicable under this section.

§ 30-29-1702. Application to existing foreign corporations. — A foreign corporation registered or authorized to do business in this state on the effective date of this chapter is subject to this chapter, is deemed to be registered to do business in this state, and is not required to file a foreign registration statement under this chapter.

History.

I.C., § 30-29-1702, as added by 2015, ch. 243, § 72, p. 758; am. 2019, ch. 90, § 169, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section, which formerly read: "**Application to qualified foreign corporations.** A foreign corporation authorized to transact business in this state on the effective date of this chapter is subject to this chapter, but is not required to obtain a new certificate of authority to transact business under this chapter."

Compiler's Notes.

The phrase "the effective date of this chapter" refers to the effective date of chapter 29, title 30, Idaho Code, enacted by S.L. 2015, Chapter 243, effective July 1, 2015. See § 30-21-708.

This section is derived from former § 30-1-1702.

Official Comment Section 17.02 [this section] makes the Act applicable on its effective date to all foreign corporations that are registered or authorized to do business in the state on that date without action by the foreign corporation.

§ 30-29-1703. Saving provisions. — (a) Except as to procedural provisions, this chapter does not affect a pending action, proceeding, or a right accrued before the effective date of this chapter, and a pending civil action or proceeding may be completed, and a right accrued may be enforced, as if this chapter had not become effective.

(b) If a penalty or punishment for violation of a statute or rule is reduced by this chapter, the penalty, if not already imposed, shall be imposed in accordance with this chapter.

History.

I.C., § 30-29-1703, as added by 2015, ch. 243, § 72, p. 758; am. 2019, ch. 90, § 170, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, rewrote the section to the extent that a detailed comparison is impracticable.

Compiler's Notes.

This section is derived from former § 30-1-1703.

§ 30-29-1704. Severability. — If any provision of this chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable.

History.

I.C., § 30-29-1704, as added by 2015, ch. 243, § 72, p. 758; am. 2019, ch. 90, § 171, p. 220.

STATUTORY NOTES

Amendments.

The 2019 amendment, by ch. 90, substituted "this chapter" for "the chapter" following "or applications of."

Compiler's Notes.

This section is derived from former § 30-1-1704.

Chapter 30
IDAHO NONPROFIT CORPORATION ACT

Part 1. General Provisions

Sec.

Part 2. Incorporation

Part 3. Purposes and Powers

Part 4. Membership

Part 5. Member Meetings

Part 1
General Provisions

§ 30-30-101. Short title. — This act [chapter] shall be known and may be cited as the "Idaho Nonprofit Corporation Act" and shall apply to any type of lawful nonprofit corporation formed under the provisions of this act [chapter] or other laws of this state.

History.

I.C., § 30-30-101, as added by 2015, ch. 243, § 74, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-1.

The bracketed insertion twice in this section was added by the compiler to supply the probable intended term.

§ 30-30-102. Filing requirements. — (1) Except as otherwise permitted by subsection (2) of this section, a record delivered to the secretary of state for filing pursuant to this chapter must be signed as follows:

(a) By the presiding officer of its board of directors of a domestic or foreign nonprofit corporation, by its president, or by another of its officers; (b) If the corporation has not been formed, by an incorporator; or (c) If the corporation is in the hands of a receiver, trustee or other court-appointed fiduciary, by that fiduciary.

(2) The annual report delivered to the secretary of state for filing under section 30-21-213, Idaho Code, shall be executed by one (1) of the persons identified in subsection (1) of this section or by another person who is authorized by the board of directors to execute the report.

History.

I.C., § 30-30-102, as added by 2015, ch. 243, § 74, p. 758; am. 2018, ch. 28, § 1, p. 52.

STATUTORY NOTES

Amendments.

The 2018 amendment, by ch. 28, deleted “directors have not been selected or” following “If” at the beginning of paragraph (2)(b).

Compiler’s Notes.

This section is derived from former § 30-3-2.

§ 30-30-103. Definitions. — Unless the context otherwise requires in this chapter:

(1) "Approved by or approval by the members" means approved or ratified by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present, which affirmative votes also constitute a majority of the required quorum, or by a written ballot or written consent in conformity with this act [chapter] or by the affirmative vote, written ballot or written consent of such greater proportion, including the votes of all the members of any class, unit or grouping as may be provided in the articles, bylaws or this act [chapter] for any specified member action.

(2) "Articles of incorporation" or "articles" includes amended and restated articles of incorporation and articles of merger.

(3) "Board" or "board of directors" means the board of directors by whatever name it is designated, except that no person or group of persons are the board of directors merely because of powers delegated to that person or group pursuant to section 30-30-601, Idaho Code.

(4) "Bylaws" means the code or codes of rules, other than the articles, adopted pursuant to this act [chapter] for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.

(5) "Class" refers to a group of memberships that have the same rights with respect to voting, dissolution, redemption and transfer. For the purpose of this section, rights shall be considered the same if they are determined by a formula applied uniformly.

(6) "Cooperative corporation" or "cooperative" means any nonprofit corporation, operating on a cooperative basis, owned, operated, organized and maintained by its members, for the purpose of providing goods or services to its members.

(7) "Delegates" means those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

(8) “Directors” means individuals, designated in the articles or bylaws or elected by the incorporators, and their successors and individuals elected or appointed by any other name or title to act as members of the board.

(9) “Distribution” means the payment of a dividend or any part of the income or profit of a corporation to its members, directors or officers.

(10) “Employee” does not include an officer or director who is not otherwise employed by the corporation.

(11) “Foreign nonprofit corporation” means a corporation organized under a law other than the laws of this state that would be a nonprofit corporation if formed under the laws of this state.

(12) “Governmental subdivision” includes authority, county, district and municipality.

(13) “Member” shall also mean stockholder or shareholder, wherever and whenever those terms are used in this act [chapter], and shall apply to all nonprofit corporations formed under this act [chapter] or other laws of this state that have stockholders or shareholders and issue shares of stock instead of memberships.

(14) “Membership” refers to the rights and obligations a member or members have pursuant to a corporation’s articles, bylaws and this act [chapter].

(15) “Notice” is defined in section 30-30-104, Idaho Code.

(16) “Record date” means the date on which a corporation determines the identity of its members for the purposes of this act [chapter].

(17) “Secretary” means the corporate officer to whom the board of directors has delegated responsibility under section 30-30-621(2), Idaho Code, for custody of the minutes of the director and member meetings and for authenticating the records of the corporation.

(18) “United States” includes district, authority, bureau, commission, department and any other agency of the United States.

(19) “Vote” includes authorization by written ballot, absentee ballot and written consent.

(20) “Voting power” means the total number of votes entitled to be cast for the election of directors at the time the determination of voting power is made, excluding a vote that is contingent upon the happening of a condition or event that has not occurred at the time. Where a class is entitled to vote as a class for directors, the determination of voting power of the class shall be based on the percentage of the number of directors the class is entitled to elect out of the total number of authorized directors.

History.

I.C., § 30-30-103, as added by 2015, ch. 243, § 74, p. 758.

STATUTORY NOTES

Compiler’s Notes.

This section is derived from former § 30-3-11.

The bracketed insertions in subsections (1), (4), (13), (14), and (16) were added by the compiler to supply the probable intended term.

§ 30-30-104. Notice. — (1) Notice may be oral or written. Notice by electronic transmission is written notice.

(2) Notice may be communicated: in person; by telephone or voice mail; by telegraph, teletype or other electronic means; or by mail or private carrier; if these forms of personal notice are impracticable, notice may be communicated by publication for ten (10) days pursuant to section 60-109, Idaho Code.

(3) Oral notice is effective when communicated, if communicated in a comprehensible manner.

(4) Written notice, if in a comprehensible form, is effective at the earliest of the following:

(a) When received;

(b) Five (5) days after its deposit in the United States mail, as evidenced by sworn affidavit or postmark, if mailed correctly addressed and with first class postage affixed;

(c) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee;

(d) When electronically transmitted to a member in a manner authorized by the members.

(5) Written notice is correctly addressed to a member of a domestic or foreign nonprofit corporation if addressed to the member's address shown in the corporation's current list of members.

(6) A written notice or report delivered as part of a newsletter, magazine or other publication regularly sent to members shall constitute a written notice or report if addressed or delivered to the member's address shown in the corporation's current list of members, or in the case of members who are residents of the same household and who have the same address in the corporation's current list of members, if addressed or delivered to one of such members, at the address appearing on the current list of members.

(7) Written notice is correctly addressed to a domestic or foreign nonprofit corporation authorized to transact business in this state, other than in its capacity as a member, if addressed to its registered agent or to its secretary at its principal office shown in its most recent annual report or, in the case of a foreign nonprofit corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(8) If section 30-30-505(2), Idaho Code, or any other provision of this act [chapter] prescribes notice requirements for particular circumstances, those requirements govern. If articles or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this act [chapter], those requirements govern.

History.

I.C., § 30-30-104, as added by 2015, ch. 243, § 74, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-12.

The bracketed insertions in subsection (8) was added by the compiler to supply the probable intended term.

§ 30-30-105. Private foundation. — Except where otherwise determined by a court of competent jurisdiction, a corporation that is a private foundation as defined in section 509(a) of the Internal Revenue Code of 1986, as amended:

(1) Shall distribute such amounts for each taxable year at such time and in such manner as not to subject the corporation to tax under section 4942 of the code.

(2) Shall not engage in any act of self-dealing as defined in section 4941(d) of the code.

(3) Shall not retain any excess business holdings as defined in section 4943(c) of the code.

(4) Shall not make any taxable expenditures as defined in section 4944 of the code.

(5) Shall not make any taxable expenditures as defined in section 4945(d) of the code.

(6) Shall be authorized to terminate its status as a private foundation in a manner described in section 507(b)(1) of the Internal Revenue Code.

All references in this section to sections of the code shall be to such sections of the Internal Revenue Code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws of the United States.

History.

I.C., § 30-30-105, as added by 2015, ch. 243, § 74, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-13.

Federal References.

The references in this section to the internal revenue code are codified as 26 U.S.C.S. §§ 509, 4942, 4941, 4943, 4944, 4945, and 507, respectively.

§ 30-30-106. Judicial relief. — (1) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates or directors, or otherwise obtain their consent, in the manner prescribed by its articles, bylaws or this act [chapter], then upon petition of a director, officer, delegate or member, the district court may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.

(2) The court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws and this act [chapter], whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section the court may determine who the members or directors are.

(3) The order issued pursuant to this section may dispense with any requirements relating to the holding of or voting at meetings or obtaining votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws or this act [chapter].

(4) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section; provided however, that an order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger or sale of assets.

(5) Any meeting or other method of obtaining the vote of members, delegates or directors conducted pursuant to an order issued under this section, and that complies with all the provisions of such order, is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by the articles, bylaws and this act [chapter].

(6) Any member of a cooperative association that provides electric service may apply to the district court of the county where the member's service entrance is located for a determination that the cooperative association's charges for electric service to that member are fair, just and reasonable and are not discriminatory or preferential. In the event that the court determines that the rate is not fair, just and reasonable or is discriminatory or preferential, the court shall remand the matter to the cooperative association to alter or amend the rate in conformance with the standards set forth herein.

History.

I.C., § 30-30-106, as added by 2015, ch. 243, § 74, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-14.

The bracketed insertions in subsections (1), (2), (3), and (5) were added by the compiler to supply the probable intended term.

§ 30-30-107. Religious corporations — Constitutional protections. — If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this act [chapter] on the same subject, the religious doctrine shall control to the extent required by the constitution of the United States or the constitution of this state or both.

History.

I.C., § 30-30-107, as added by 2015, ch. 243, § 74, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-15.

The bracketed insertion near the middle of the section was added by the compiler to supply the probable intended term.

Part 2
Incorporation

§ 30-30-201. Incorporators. — One (1) or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the secretary of state for filing.

History.

I.C., § 30-30-201, as added by 2015, ch. 243, § 75, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-16.

§ 30-30-202. Articles of incorporation. — (1) The articles of incorporation must set forth:

(a) A corporate name for the corporation that satisfies the requirements of sections 30-21-301 and 30-21-302(a), Idaho Code;

(b) The purpose or purposes for which the corporation is organized, which may be, either alone or in combination with other purposes, the transaction of any lawful activity;

(c) The names and addresses of the individuals who are to serve as the initial directors;

(d) The information required by section 30-21-404(a), Idaho Code;

(e) The name and address of each incorporator;

(f) Whether or not the corporation will have members; and

(g) Provisions not inconsistent with law regarding the distribution of assets on dissolution.

(2) The articles of incorporation may set forth:

(a) Provisions not inconsistent with law regarding:

(i) Managing and regulating the affairs of the corporation;

(ii) Defining, limiting and regulating the powers of the corporation, its board of directors, and members or any class of members; and

(iii) The characteristics, qualifications, rights, limitations and obligations attaching to each or any class of members.

(b) Any provision that under this act [chapter] is required or permitted to be set forth in the bylaws.

(3) The articles of incorporation need not set forth any of the corporation powers enumerated in this act [chapter].

(4) The articles of incorporation may authorize assessments to be levied upon all members or classes of membership alike, or upon the outstanding shares of stock of the corporation that issues shares of stock instead of

memberships pursuant to its articles of incorporation, or in different amounts or proportions or upon a different basis upon different members or classes of membership, and may exempt some members or classes of membership from assessments. The articles of incorporation may fix the amount and method of collection of assessments, or may authorize the board of directors to fix the amount thereof, from time to time, and may make them payable at such times or intervals, and upon such notice and by such methods as the directors may prescribe. Assessments may be made enforceable by civil action or by the forfeiture of membership, or both, or by the sale of shares of the capital stock of a stockholder in a corporation that issues shares of stock instead of memberships, when authorized by the articles of incorporation of said corporation, upon notice given in writing twenty (20) days before commencement of such action or such forfeiture. If the articles of incorporation so provide, assessments may be secured by a lien upon real property to which membership rights are appurtenant, if appropriate, or upon the shares of stock of a stockholder or shareholder corporation, when authorized by its articles of incorporation.

History.

I.C., § 30-30-202, as added by 2015, ch. 243, § 75, p. 758; am. 2018, ch. 28, § 2, p. 52.

STATUTORY NOTES

Amendments.

The 2018 amendment, by ch. 28, deleted former subsection (3), which read: “Each incorporator named in the articles must sign the articles” and redesignated former subsections (4) and (5) as present subsections (3) and (4).

Compiler’s Notes.

This section is derived from former § 30-3-17.

The bracketed insertions in paragraph (2)(b) and subsection (3) were added by the compiler to supply the probable intended terms.

§ 30-30-203. Incorporation. — (1) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(2) The secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

History.

I.C., § 30-30-203, as added by 2015, ch. 243, § 75, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-18.

§ 30-30-204. Liability. — All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this act [chapter], are jointly and severally liable for all liabilities created while so acting.

History.

I.C., § 30-30-204, as added by 2015, ch. 243, § 75, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-19.

The bracketed insertion near the middle of the section was added by the compiler to supply the probable intended term.

§ 30-30-205. Organization of corporation. — (1) After incorporation:

(a) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws and carrying on any other business brought before the meeting;

(b) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(i) To elect directors and complete the organization of the incorporation; or

(ii) To elect a board of directors who shall complete the organization of the corporation.

(2) Action required or permitted by this act [chapter] to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one (1) or more written consents describing the action taken and signed by each incorporator.

(3) An organizational meeting may be held in or out of this state in accordance with section 30-30-613 [30-30-612], Idaho Code.

History.

I.C., § 30-30-205, as added by 2015, ch. 243, § 75, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-20.

The bracketed insertion near the beginning of subsection (2) was added by the compiler to supply the probable intended term.

The bracketed insertion near the end of subsection (3) was added by the compiler to correct the statutory reference.

§ 30-30-206. Bylaws. — (1) The board of directors or members of a corporation shall adopt the initial bylaws for the corporation.

(2) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

(3) The patrons of a cooperative corporation, by dealing with the corporation, acknowledge that the terms and provisions of the articles of incorporation and bylaws, as well as policies, rules and regulations, shall constitute and be a contract between the corporation and each patron, and both the corporation and the patrons are bound by such contract, as fully as though each patron had individually signed a separate instrument containing such terms and provisions.

History.

I.C., § 30-30-206, as added by 2015, ch. 243, § 75, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-21.

CASE NOTES

Bylaw Violations.

Actions taken in violation of a corporation's bylaws are void. Where there is no evidence that a senior pastor position was filled following a church's bylaws, that appointment is void. Kemmer v. Newman, 161 Idaho 463, 387 P.3d 131 (2016).

§ 30-30-207. Emergency bylaws and powers. — (1) Unless the articles provide otherwise, the directors of a corporation may adopt, amend or repeal bylaws to be effective only in an emergency defined in subsection (4) of this section. The emergency bylaws, which are subject to amendment or repeal by the members, may provide special procedures necessary for managing the corporation during the emergency, including:

(a) How to call a meeting of the board; (b) Quorum requirements for the meeting; and (c) Designation of additional or substitute directors.

(2) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(3) Corporate action taken in good faith in accordance with the emergency bylaws: (a) Binds the corporation; and (b) May not be used to impose liability on a corporate director, officer, employee, or agent.

(4) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

History.

I.C., § 30-30-207, as added by 2015, ch. 243, § 75, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-22.

Part 3
Purposes and Powers

« Title 30 •, « Ch. 30 •, « Pt. 3 », • § 30-30-301 »

§ 30-30-301. Purposes. — (1) One (1) or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the secretary of state for filing.

(2) A corporation engaging in an activity that is subject to regulation under another statute of this state may incorporate under this act [chapter] only if incorporation under this act [chapter] is not prohibited by the other statute. The corporation shall be subject to all limitations of the other statute.

History.

I.C., § 30-30-301, as added by 2015, ch. 243, § 76, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-23.

The bracketed insertion twice in subsection (2) was added by the compiler to supply the probable intended term.

§ 30-30-302. General powers. — Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:

(1) To sue and be sued, complain and defend in its corporate name;

(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing or in any other manner reproducing it;

(3) To make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this state, for regulating and managing the affairs of the corporation;

(4) To purchase, receive, lease or otherwise acquire and to own, hold, improve, use and otherwise deal with real property, including water and water rights, and personal property, or any legal or equitable interest in property, wherever located;

(5) To sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property;

(6) To purchase, receive, subscribe for or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with, shares or other interests in or obligations of any entity;

(7) To make contracts and guaranties, incur liabilities, borrow money, issue notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises or income;

(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment, except as limited by section 30-30-620, Idaho Code;

(9) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity;

(10) To conduct its activities, locate offices and exercise the powers granted by this act [chapter] within or without this state;

(11) To elect or appoint directors, officers, employees and agents of the corporation, define their duties and fix their compensation;

(12) To pay pensions and establish pension plans, pension trusts and other benefit and incentive plans for any or all of its current or former directors, officers, employees and agents;

(13) To make donations not inconsistent with law for the public welfare or for charitable, religious, scientific or educational purposes and for other purposes that further the corporate interest;

(14) To impose dues, assessments, admission and transfer fees upon its members and to levy assessments upon the outstanding shares of stock, of a corporation with capital stock, if authorized by the articles of incorporation of that corporation;

(15) To establish conditions for admission of members, admit members and issue memberships;

(16) To carry on a business; and

(17) To do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

History.

I.C., § 30-30-302, as added by 2015, ch. 243, § 76, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-24.

The bracketed insertion near the end of subsection (10) was added by the compiler to supply the probable intended term.

§ 30-30-303. Emergency powers. — (1) In anticipation of or during an emergency defined in subsection (4) of this section, the board of directors of a corporation may:

(a) Modify lines of succession to accommodate the incapacity of any director, officer, employee or agent; and (b) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officer to do so.

(2) During an emergency defined in subsection (4) of this section, unless emergency bylaws provide otherwise: (a) Notice of a meeting of the board of directors need be given only to those directors it is practicable to reach and may be given in any practicable manner, including by publication and radio; and (b) One (1) or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(3) Corporate action taken in good faith during an emergency under this section to further the ordinary affairs of the corporation: (a) Binds the corporation; and

(b) May not be used to impose liability on a corporate director, officer, employee or agent.

(4) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

History.

I.C., § 30-30-303, as added by 2015, ch. 243, § 76, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-25.

§ 30-30-304. Ultra vires. — (1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(2) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by a director, or by a member or members in a derivative proceeding.

(3) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee or other legal representative.

History.

I.C., § 30-30-304, as added by 2015, ch. 243, § 76, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-26.

Part 4
Membership

§ 30-30-401. Admission of members. — (1) The articles or bylaws may establish criteria or procedures for admission of members.

(2) No person shall be admitted as a member without his or her consent.

(3) No person who is not an incorporator shall become a member of a cooperative corporation unless such person shall agree to use services furnished by the corporation when such service shall be available through its facilities.

History.

I.C., § 30-30-401, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-34.

§ 30-30-402. Consideration. — Except as provided in its articles or bylaws, a corporation may admit members for no consideration or for such consideration as is determined by the board, or by the articles of incorporation.

History.

I.C., § 30-30-402, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-35.

§ 30-30-403. No requirement of members. — A corporation, except a cooperative corporation, is not required to have members.

History.

I.C., § 30-30-403, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-36.

§ 30-30-404. Differences in rights and obligations of members. — All members shall have the same rights and obligations with respect to voting, dissolution, redemption and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations or divide voting rights by voting districts. All members shall have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

History.

I.C., § 30-30-404, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-37.

§ 30-30-405. Transfers. — Where transfer rights have been provided, no restriction on them shall be binding with respect to a member holding a membership issued prior to the adoption of the restriction unless the restriction is approved by the members and the affected member.

History.

I.C., § 30-30-405, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-38.

§ 30-30-406. Member's liability to third parties. — A member of a corporation is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation.

History.

I.C., § 30-30-406, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-39.

§ 30-30-407. Member's liability for dues, assessments and fees. — A member may become liable to the corporation for dues, assessments or fees.

History.

I.C., § 30-30-407, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-40.

§ 30-30-408. Resignation. — (1) A member may resign at any time. A person ceases to be a stockholder only when that person's shares of stock have all been disposed of.

(2) The resignation of a member, or the disposal of all stock of a stockholder, does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made prior to resignation.

(3) The provisions of title 42, Idaho Code, shall also apply to all resignations pursuant to this section if a company or corporation is regulated or governed pursuant to that title.

History.

I.C., § 30-30-408, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-41.

CASE NOTES

Commitment Made.

Members of a nonprofit water users cooperative who left the cooperative were not liable for their pro rata share of a USDA loan that had been reserved, but not yet funded, to assist the cooperative in complying with environmental quality consent orders in which it agreed to develop a new drinking water system for its members. Kidd Island Bay Water Users Coop. Ass'n v. Miller, 136 Idaho 571, 38 P.3d 609 (2001).

§ 30-30-409. Termination, expulsion and suspension. — (1) No member, except a member of a religious corporation, may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith.

(2) A procedure is fair and reasonable when either:

(a) The articles or bylaws set forth a procedure that provides:

(i) Not less than fifteen (15) days' prior written notice of the expulsion, suspension or termination and the reasons therefor; and

(ii) An opportunity for the member to be heard, orally or in writing, not less than five (5) days before the effective date of the expulsion, suspension or termination by a person or persons authorized to decide that the proposed expulsion, termination or suspension not take place; or

(b) It is fair and reasonable taking into consideration all of the relevant facts and circumstances.

(3) Any written notice given by mail must be given by first class or certified mail sent to the last address of the member shown on the corporation's records.

(4) Any proceeding challenging an expulsion, suspension or termination, including a proceeding in which defective notice is alleged, must be commenced within one (1) year after the effective date of the expulsion, suspension or termination.

(5) A member who has been expelled or suspended may be liable to the corporation for dues, assessments or fees as a result of obligations incurred or commitments made prior to expulsion or suspension.

History.

I.C., § 30-30-409, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-42.

§ 30-30-410. Purchase of memberships. — A corporation may purchase the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions set forth in or authorized by its articles or bylaws. No payment shall be made in violation of section 30-30-904, Idaho Code.

History.

I.C., § 30-30-410, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-43.

§ 30-30-411. Derivative suits. — (1) A proceeding may be brought in the right of a domestic or foreign nonprofit corporation to procure a judgment in its favor by:

(a) Any member or members having five percent (5%) or more of the voting power or by fifty (50) members, whichever is less; or

(b) Any director.

(2) In any such proceeding, each complainant shall be a member or director at the time of bringing the proceeding.

(3) A complaint in a proceeding brought in the right of a corporation must be verified and alleged with particularity to the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand. If a demand for action was made and the corporation's investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.

(4) On termination of the proceeding, the court may require the complainants to pay any defendant's reasonable expenses, including attorney's fees, incurred in defending the suit if it finds that the proceeding was commenced frivolously or in bad faith.

(5) If the proceeding on behalf of the corporation results in the corporation taking some action requested by the complainants or otherwise was successful, in whole or in part, or if anything was received by the complainants as the result of a judgment, compromise or settlement of an action or claim, the court may award the complainants reasonable expenses, including attorney's fees.

History.

I.C., § 30-30-411, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-44.

§ 30-30-412. Delegates. — (1) A corporation may provide in its articles or bylaws for delegates having some or all of the authority of members.

(2) The articles or bylaws may set forth provisions relating to: (a) The characteristics, qualifications, rights, limitations and obligations of delegates including their selection and removal; (b) Calling, noticing, holding and conducting meetings of delegates; and (c) Carrying on corporate activities during and between meetings of delegates.

History.

I.C., § 30-30-412, as added by 2015, ch. 243, § 77, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-45.

Part 5
Member Meetings

Idaho Code § 30-30-501

§ 30-30-501. Annual and regular meetings. — (1) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.

(2) A corporation with members may hold regular membership meetings at the times stated in or fixed in accordance with the bylaws.

(3) Annual and regular membership meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual and regular meetings shall be held at the corporation's principal office.

(4) At the annual meeting:

(a) The president and chief financial officer shall report on the activities and financial condition of the corporation; and

(b) The members shall consider and act upon such other matters as may be raised consistent with the notice requirements of section 30-30-505, Idaho Code.

(5) At regular meetings the members shall consider and act upon such matters as may be raised consistent with the notice requirements of section 30-30-505, Idaho Code.

(6) The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action.

History.

I.C., § 30-30-501, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-46.

§ 30-30-502. Special meeting. — (1) A corporation with members shall hold a special meeting of members:

(a) On call of its board or the person or persons authorized to do so by the articles or bylaws; or

(b) Except as provided in the articles or bylaws of a religious corporation if the holders of at least ten percent (10%) of the voting power of any corporation sign, date and deliver to any corporate officer one (1) or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(2) The close of business on the thirtieth day before delivery of the demand or demands for a special meeting to any corporate officer is the record date for the purpose of determining whether the ten percent (10%) requirement of subsection (1) of this section has been met.

(3) If a notice for a special meeting demanded under subsection (1)(b) of this section is not given pursuant to section 30-30-505, Idaho Code, within thirty (30) days after the date the written demand or demands are delivered to a corporate officer, regardless of the requirements of subsection (4) of this section, a person signing the demand or demands may set the time and place of the meeting and give notice pursuant to section 30-30-505, Idaho Code.

(4) Special meetings of members may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(5) Only those matters that are within the purpose or purposes described in the meeting notice required in section 30-30-505, Idaho Code, may be conducted at a special meeting of members.

History.

I.C., § 30-30-502, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-47.

CASE NOTES

Improper Call.

Where there was no evidence that two of three board members had resigned their positions, a special meeting called by the third board member alone was improperly called, and any action taken at that special meeting, including the election of new directors, was void. Kemmer v. Newman, 161 Idaho 463, 387 P.3d 131 (2016).

§ 30-30-503. Court-ordered meetings. — (1) The district court of the county where a corporation's principal office is located or, if none in this state, Ada county, may summarily order a meeting to be held:

(a) On application of any member or other person entitled to participate in an annual or regular meeting, if an annual meeting was not held within the earlier of six (6) months after the end of the corporation's fiscal year or fifteen (15) months after its last annual meeting; or

(b) On application of any member or other person entitled to participate in a regular meeting, if a regular meeting is not held within forty (40) days after the date it was required to be held; or

(c) On application of a member who signed a demand for a special meeting valid under section 30-30-502, Idaho Code, a person or persons entitled to call a special meeting, if:

(i) Notice of the special meeting was not given within thirty (30) days after the date the demand was delivered to a corporate officer; or

(ii) The special meeting was not held in accordance with the notice.

(2) The court may fix the time and place of the meeting, specify a record date for determining members entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

(3) If the court orders a meeting, it may also order the corporation to pay the member's costs, including reasonable attorney's fees, incurred to obtain the order.

History.

I.C., § 30-30-503, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-48.

§ 30-30-504. Action by written consent. — (1) Unless limited or prohibited by the articles or bylaws, action required or permitted by this act [chapter] to be approved by the members may be approved without a meeting of members if the action is approved by members holding at least eighty percent (80%) of the voting power. The action must be evidenced by one (1) or more written consents describing the action taken, signed by those members representing at least eighty percent (80%) of the voting power, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) If not otherwise determined under section 30-30-503 or 30-30-507, Idaho Code, the record date for determining members entitled to take action without a meeting is the date the first member signs the consent under subsection (1) of this section.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document filed with the secretary of state.

(4) Written notice of member approval pursuant to this section shall be given to all members who have not signed the written consent. If written notice is required, member approval pursuant to this section shall be effective ten (10) days after such written notice is given.

History.

I.C., § 30-30-504, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-49.

The bracketed insertion in the first sentence in subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-505. Notice of meeting. — (1) A corporation shall give notice consistent with its bylaws of meetings of members in a fair and reasonable manner.

(2) Any notice that conforms to the requirements of subsection (3) of this section is fair and reasonable, but other means of giving notice may also be fair and reasonable when all the circumstances are considered; provided however, that notice of matters referred to in subsection (3)(b) of this section must be given as provided in subsection (3) of this section.

(3) Notice is fair and reasonable if:

(a) The corporation notifies its members of the place, date, and time of each annual, regular and special meeting of members no fewer than ten (10) days, or if notice is mailed by other than first class or registered mail, thirty (30) days, nor more than sixty (60) days before the meeting date;

(b) Notice of an annual or regular meeting includes a description of any matters or matters that must be approved by the members under section 30-22-203, 30-22-303, 30-22-403, 30-22-503, 30-30-619, 30-30-626, 30-30-703, 30-30-709, 30-30-903 or 30-30-1003, Idaho Code; and

(c) Notice of a special meeting includes a description of the matter or matters for which the meeting is called.

(4) Unless the bylaws require otherwise, if an annual, regular or special meeting of members is adjourned to a different date, time or place, notice need not be given of the new date, time or place, if the new date, time or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 30-30-507, Idaho Code, however, notice of the adjourned meeting must be given under this section to the members of record as of the new record date.

(5) When giving notice of an annual, regular or special meeting of members, a corporation shall give notice of a matter a member intends to raise at the meeting if:

(a) Requested in writing to do so by a person entitled to call a special meeting; and

(b) The request is received by the secretary or president of the corporation at least ten (10) days before the corporation gives notice of the meeting.

History.

I.C., § 30-30-505, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-50.

§ 30-30-506. Waiver of notice. — (1) A member may waive any notice required in this act [chapter], the articles or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the member entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) A member's attendance at a meeting: (a) Waives objection to lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; or (b) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member objects to considering the matter when it is presented.

History.

I.C., § 30-30-506, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-51.

The bracketed insertion the first sentence in subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-507. Record date — Determining members entitled to notice and vote. — (1) The bylaws of a corporation may fix or provide the manner of fixing a date as the record date for determining the members entitled to notice of a members' meeting. If the bylaws do not fix or provide for fixing such a record date, the board may fix a future date as such a record date. If no such record date is fixed, members at the close of business on the business day preceding the day on which notice is given, or if notice is waived, at the close of business on the business day preceding the day on which the meeting is held, are entitled to notice of the meeting.

(2) The bylaws of a corporation may fix or provide the manner of fixing a date as the record date for determining the members entitled to vote at a members' meeting. If the bylaws do not fix or provide for fixing such a record date, the board may fix a future date as such a record date. If no such record date is fixed, members on the date of the meeting who are otherwise eligible to vote are entitled to vote at the meeting.

(3) The bylaws may fix or provide the manner for determining a date as the record date for the purpose of determining the members entitled to exercise any rights in respect of any other lawful action. If the bylaws do not fix or provide for fixing such a record date, the board may fix in advance such a record date. If no such record date is fixed, members at the close of business on the day on which the board adopts the resolution relating thereto, or the sixtieth day prior to the date of such other action, whichever is later, are entitled to exercise such rights.

(4) A record date fixed under this section may not be more than seventy (70) days before the meeting or action requiring a determination of members occurs.

(5) A determination of members entitled to notice of or to vote at a membership meeting is effective for any adjournment of the meeting unless the board fixes a new date for determining the right to notice or the right to vote, which it must do if the meeting is adjourned to a date more than seventy (70) days after the record date for determining members entitled to notice of the original meeting.

(6) If a court orders a meeting adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting, it may provide that the original record date for notice or voting continues in effect or it may fix a new record date for notice or voting.

History.

I.C., § 30-30-507, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-52.

§ 30-30-508. Action by mailed written ballot or absentee ballot. — (1) Unless prohibited or limited by the articles or bylaws, any action that may be taken at any annual, regular or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter. The articles or bylaws may provide that the members may vote by mail or by absentee ballot on any corporate action that may be taken at any annual, regular or special meeting of members.

(2) A written ballot for action taken without a meeting shall: (a) Set forth each proposed action; and

(b) Provide an opportunity to vote for or against each proposed action.

(3) Approval by written ballot alone pursuant to this section when a meeting is not held shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action and when the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(4) All solicitations for votes by written ballot shall: (a) Indicate the number of responses needed to meet the quorum requirements; (b) State the percentage of approvals necessary to approve each matter other than election of directors; and (c) Specify the time by which a ballot must be received by the corporation in order to be counted.

(5) Except as otherwise provided in the articles or bylaws, a written ballot may not be revoked.

History.

I.C., § 30-30-508, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-53.

§ 30-30-509. Members' list for meeting. — (1) After fixing a record date for a notice of a meeting, a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting. The list must show the address and number of votes each member is entitled to vote at the meeting. The corporation shall prepare on a current basis through the time of the membership meeting a list of members, if any, who are entitled to vote at the meeting but not entitled to notice of the meeting. This list shall be prepared on the same basis and be part of the list of members.

(2) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning two (2) business days after notice is given of the meeting for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a reasonable place identified in the meeting notice in the city where the meeting will be held. A member or a member's agent or attorney is entitled on written demand to inspect and, subject to the limitations of sections 30-30-1102(3) and 30-30-1104, Idaho Code, to copy the list, at a reasonable time and at the member's expense, during the period it is available for inspection.

(3) The corporation shall make the list of members available at the meeting, and any member or a member's agent or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(4) If the corporation refuses to allow a member or a member's agent or attorney to inspect the list of members before or at the meeting or copy the list as permitted by subsection (2) of this section, the district court of the county where a corporation's principal office is located, or if none in this state, Ada county, on application of the member, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete and may order the corporation to pay the member's costs, including reasonable attorney's fees, incurred to obtain the order.

(5) Unless a written demand to inspect and copy a membership list has been made under subsection (2) of this section prior to the membership

meeting and a corporation improperly refuses to comply with the demand, refusal or failure to comply with this section does not affect the validity of action taken at the meeting.

(6) The articles or bylaws of a religious corporation may limit or abolish the rights of a member under this section to inspect and copy any corporate record.

History.

I.C., § 30-30-509, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-54.

§ 30-30-510. Voting entitlement generally. — (1) Unless the articles or bylaws provide otherwise, each member is entitled to one (1) vote on each matter voted on by the members, or by one (1) vote for each share of stock in a corporation that issues shares of stock instead of memberships, when authorized by the articles of incorporation of said corporation.

(2) Unless the articles or bylaws provide otherwise, if a membership stands of record in the names of two (2) or more persons, their acts with respect to voting shall have the following effect: (a) If only one (1) votes, such act binds all; and (b) If more than one (1) votes, the vote shall be divided on a pro rata basis.

History.

I.C., § 30-30-510, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-55.

§ 30-30-511. Quorum requirements. — (1) Unless this act [chapter], the articles or bylaws provide for a higher or lower quorum, ten percent (10%) of the votes entitled to be cast on a matter must be represented in person, by proxy, by mailed written ballot or by absentee ballot at a meeting of members to constitute a quorum on that matter.

(2) A bylaw amendment to decrease the quorum for any member action may be approved by the members or, unless prohibited by the bylaws, by the board.

(3) A bylaw amendment to increase the quorum required for any member action must be approved by the members.

(4) Unless one-third (1/3) or more of the voting power is present in person, by proxy, by mailed written ballot or by absentee ballot, the only matters that may be voted upon at an annual or regular meeting of members are those matters that are described in the meeting notice.

History.

I.C., § 30-30-511, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-56.

The bracketed insertion near the beginning of subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-512. Voting requirements. — (1) Unless this act [chapter], the articles or the bylaws require a greater vote or voting by class, if a quorum is present, the affirmative vote of the votes represented and voting, which affirmative votes also constitute a majority of the required quorum, is the act of the members.

(2) A bylaw amendment to increase or decrease the vote required for any member action must be approved by the members.

History.

I.C., § 30-30-512, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-57.

The bracketed insertion near the beginning of subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-513. Proxies. — (1) Unless the articles or bylaws prohibit or limit proxy voting, a member may appoint a proxy to vote or otherwise act for the member by signing an appointment form either personally or by an attorney-in-fact.

(2) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for eleven (11) months unless a different period is expressly provided in the appointment form; provided however, that no proxy shall be valid for more than three (3) years from its date of execution.

(3) An appointment of a proxy is revocable by the member.

(4) The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(5) Appointment of a proxy is revoked by the person appointing the proxy: (a) Attending any meeting and voting in person; or (b) Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a written statement that the appointment of the proxy is revoked or a subsequent appointment form.

(6) Subject to section 30-30-516, Idaho Code, and any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment.

(7) The articles or bylaws of a corporation may prescribe reasonable conditions under which proxy voting may be exercised.

History.

I.C., § 30-30-513, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-58.

§ 30-30-514. Cumulative voting for directors. — (1) If the articles or bylaws specifically provide for cumulative voting by members, members may so vote by multiplying the number of votes the members are entitled to cast by the number of directors for whom they are entitled to vote, and cast the product for a single candidate or distribute the product among two (2) or more candidates.

(2) Cumulative voting is not authorized at a particular meeting unless: (a) The meeting notice or statement accompanying the notice states that cumulative voting will take place; or (b) A member gives notice during the meeting and before the vote is taken of the member's intent to cumulate votes, and if one (1) member gives this notice all other members participating in the election are entitled to cumulate their votes without giving further notice.

(3) A director elected by cumulative voting may be removed by the members without cause if the requirements of section 30-30-608, Idaho Code, are met unless the votes cast against removal, or not consenting in writing to such removal, would be sufficient to elect such director if voted cumulatively at an election at which the same total number of votes were cast, or, if such action is taken by written ballot, all memberships entitled to vote were voted, and the entire number of directors authorized at the time of the director's most recent election were then being elected.

(4) Members may not cumulatively vote if the directors and members are identical.

History.

I.C., § 30-30-514, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-59.

§ 30-30-515. Other methods of electing directors. — A corporation may provide in its articles or bylaws for election of directors by members or delegates:

(1) On the basis of chapter or other organizational unit; (2) By region or other geographic unit, including voting district and, in respect to each such voting district, the articles or bylaws shall describe the boundaries thereof and designate the number of directors that shall be elected by the members residing therein; (3) By preferential voting; or (4) By any other reasonable method.

History.

I.C., § 30-30-515, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-60.

§ 30-30-516. Corporation's acceptance of votes. — (1) If the name signed on a vote, consent, waiver or proxy appointment corresponds to the name of a member, the corporation, if acting in good faith, is entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the member.

(2) If the name signed on a vote, consent, waiver or proxy appointment does not correspond to the record name of a member, the corporation, if acting in good faith, is nevertheless entitled to accept the vote, consent, waiver or proxy appointment and give it effect as the act of the member if:

(a) The member is an entity and the name signed purports to be that of an officer or agent of the entity;

(b) The name signed purports to be that of an attorney-in-fact of the member and if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the member has been presented with respect to the vote, consent, waiver or proxy appointment;

(c) Two (2) or more persons hold the membership as cotenants or fiduciaries and the name signed purports to be the name of at least one (1) of the coholders and the person signing appears to be acting on behalf of all the coholders; and

(d) If:

(i) The name signed purports to be that of an administrator, executor, guardian or conservator representing the member and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver or proxy appointment;

(ii) The name signed purports to be that of a receiver or trustee in bankruptcy of the member, and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver or proxy appointment.

(3) The corporation is entitled to reject a vote, consent, waiver or proxy appointment if the secretary or other officer or agent authorized to tabulate

votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member.

(4) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the member for the consequences of the acceptance or rejection.

(5) Corporate action based on the acceptance or rejection of a vote, consent, waiver or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise.

(6) Contested elections shall be referred to the board of directors, which shall, after reviewing all ballots, proxies, reports of election inspectors or judges, and any other relevant documents or materials, certify the results of the election. In the case of a tie vote between candidates, the tie shall be determined by a toss of a coin. If allowed by the bylaws of the corporation, the board of directors shall have the power to call a new election if, after reviewing all relevant documents and information, the board of directors is unable to certify the results of the election.

History.

I.C., § 30-30-516, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-61.

§ 30-30-517. Voting agreements. — (1) If the articles or bylaws specifically allow for voting agreements, two (2) or more members may provide for the manner in which they will vote by signing an agreement for that purpose. Such agreements may be valid for a period of up to ten (10) years.

(2) A voting agreement created under this section is specifically enforceable.

History.

I.C., § 30-30-517, as added by 2015, ch. 243, § 78, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-62.

Part 6
Directors and Officers

§ 30-30-601. Requirement for and duties of board. — (1) Each corporation must have a board of directors.

(2) Except as provided in this act [chapter] or subsection (3) of this section, all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board.

(3) The articles may authorize a person or persons to exercise some or all of the powers that would otherwise be exercised by a board. To the extent so authorized, any such person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from such duties and responsibilities.

History.

I.C., § 30-30-601, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-63.

The bracketed insertion near the beginning of subsection (2) was added by the compiler to supply the probable intended term.

§ 30-30-602. Qualifications of directors. — All directors must be individuals. If the corporation is a cooperative, all directors must be members of the corporation, provided, that unless otherwise provided in the bylaws, a person who has the right to vote on behalf of an entity that is a member of the corporation may serve as a director. The articles or bylaws may prescribe other qualifications for directors.

History.

I.C., § 30-30-602, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-64.

§ 30-30-603. Number of directors. — (1) The board of directors must consist of three (3) or more individuals, with the number specified in or fixed in accordance with the articles or bylaws. Notwithstanding the foregoing, the board of directors of a religious corporation must consist of at least one (1) individual, with the number specified in or fixed in accordance with the articles or bylaws.

(2) The number of directors may be increased or decreased within the limitations contained in subsection (1) of this section from time to time by amendment to or in the manner prescribed in the articles or bylaws.

History.

I.C., § 30-30-603, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-65.

§ 30-30-604. Election, designation and appointment of directors. — (1) If the corporation has members, all the directors, except the initial directors, shall be elected at the first annual meeting of members, and at each annual meeting thereafter, unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person or designated.

(2) If the corporation does not have members, all the directors, except the initial directors, shall be elected, appointed or designated as provided in the articles or bylaws. If no method of designation or appointment is set forth in the articles or bylaws, the directors, other than the initial directors, shall be elected by the board.

History.

I.C., § 30-30-604, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-66.

§ 30-30-605. Terms of directors generally. — (1) The articles or bylaws must specify the terms of directors. Except for designated or appointed directors, the terms of directors may not exceed five (5) years. In the absence of any term specified in the articles or bylaws, the term of each director shall be one (1) year. Directors may be elected for successive terms.

(2) A decrease in the number of directors or term of office does not shorten an incumbent director's term.

(3) Except as provided in the articles or bylaws: (a) The term of a director filling a vacancy in the office of a director elected by members expires at the next election of directors by members; and (b) The term of a director filling any other vacancy expires at the end of the unexpired term that such director is filling.

(4) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors.

History.

I.C., § 30-30-605, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-67.

§ 30-30-606. Staggered terms for directors. — The articles or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform.

History.

I.C., § 30-30-606, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-68.

§ 30-30-607. Resignation of directors. — (1) A director may resign at any time by delivering written notice to the board of directors, its presiding officer or to the president or secretary.

(2) A resignation is effective when the notice is effective [delivered] unless the notice specifies a future effective date. If a resignation is made effective at a future date, the board may fill the pending vacancy before the effective date if the board provides that the successor does not take office until the effective date.

History.

I.C., § 30-30-607, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-69.

The bracketed insertion in the first sentence in subsection (2) was added by the compiler to supply the probable intended term.

§ 30-30-608. Removal of directors elected by members or directors. — (1) The members may remove one (1) or more directors elected by them without cause.

(2) If a director is elected by a class, chapter or other organizational unit or by region or other geographic grouping, the director may be removed only by the members of that class, chapter, unit or grouping.

(3) Except as provided in subsection (9) of this section, a director may be removed under subsection (1) or (2) of this section only if the number of votes cast to remove the director would be sufficient to elect the director at a meeting to elect directors.

(4) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the director's removal, or if the director was elected by a class, chapter, unit or grouping of members, a director may not be removed if the number of votes sufficient to elect the director by that class, chapter, unit or grouping is voted against the director's removal.

(5) A director elected by members may be removed by the members only at a meeting called for the purpose of removing the director and the meeting notice must state that the purpose, or one (1) of the purposes, of the meeting is removal of the director.

(6) In computing whether a director is protected from removal under subsections (2) through (4) of this section, it should be assumed that the votes against removal are cast in an election for the number of directors of the class to which the director to be removed belonged on the date of that director's election.

(7) An entire board of directors may be removed under subsections (1) through (5) of this section.

(8) A director elected by the board may be removed without cause by the vote of two-thirds (2/3) of the directors then in office or such greater number as is set forth in the articles or bylaws; provided however, that a director elected by the board to fill the vacancy of a director elected by the

members may be removed without cause by the members, but not the board.

(9) If, at the beginning of a director's term on the board, the articles or bylaws provide that the director may be removed for missing a specified number of board meetings, the board may remove the director for failing to attend the specified number of meetings. The director may be removed only if a majority of the directors then in office vote for the removal.

(10) The articles or bylaws of a religious corporation may:

(a) Limit the application of this section; and

(b) Set forth the vote and procedures by which the board or any person may remove with or without cause a director elected by the members or the board.

History.

I.C., § 30-30-608, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-70.

§ 30-30-609. Removal of designated or appointed directors. — (1) A designated director may be removed by an amendment to the articles or bylaws deleting or changing the designation.

(2) Appointed directors: (a) Except as otherwise provided in the articles or bylaws, an appointed director may be removed without cause by the person appointing the director; (b) The person removing the director shall do so by giving written notice of the removal to the director and either the presiding officer of the board or the corporation's president or secretary; and (c) A removal is effective when the notice is effective [delivered] unless the notice specifies a future effective date.

History.

I.C., § 30-30-609, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-71.

The bracketed insertion in paragraph (2)(c) was added by the compiler to supply the probable intended term.

§ 30-30-610. Vacancy on board. — (1) Unless the articles or bylaws provide otherwise, and except as provided in subsections (2) and (3) of this section, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) The members, if any, may fill the vacancy. If the vacant office was held by a director elected by a class, chapter or other organizational unit or by region or other geographic grouping, only members of the class, chapter, unit or grouping are entitled to vote to fill the vacancy if it is filled by the members;

(b) The board of directors may fill the vacancy; or

(c) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) Unless the articles or bylaws provide otherwise, if a vacant office was held by an appointed director, only the person who appointed the director may fill the vacancy.

(3) If a vacant office was held by a designated director, the vacancy shall be filled as provided in the articles or bylaws. In the absence of an applicable article or bylaw provision, the vacancy may not be filled by the board.

(4) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under section 30-30-607(2), Idaho Code, or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

History.

I.C., § 30-30-610, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-72.

§ 30-30-611. Compensation of directors. — Unless the articles or bylaws provide otherwise, a board of directors may fix the compensation, fees, insurance or benefits, if any, of directors.

History.

I.C., § 30-30-611, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-73.

§ 30-30-612. Regular and special meetings. — (1) If the time and place of a directors' meeting is fixed by the bylaws or the board, the meeting is a regular meeting. All other meetings are special meetings.

(2) A board of directors may hold regular or special meetings in or out of this state.

(3) Unless the articles or bylaws provide otherwise, a board may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

History.

I.C., § 30-30-612, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-74.

§ 30-30-613. Action without meeting. — (1) Unless the articles or bylaws provide otherwise, action required or permitted by this act [chapter] to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one (1) or more written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken.

(2) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

History.

I.C., § 30-30-613, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-75.

The bracketed insertion in the first sentence in subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-614. Call and notice of meetings. — (1) Unless the articles, bylaws or subsection (3) of this section provides otherwise, regular meetings of the board may be held without notice.

(2) Unless the articles, bylaws or subsection (3) of this section provides otherwise, special meetings of the board must be preceded by at least two (2) days' notice to each director of the date, time, and place, but not the purpose, of the meeting.

(3) In corporations without members, any board action to remove a director or to approve a matter that would require approval by the members if the corporation had members shall not be valid unless each director is given at least seven (7) days' written notice that the matter will be voted upon at a directors' meeting or unless notice is waived pursuant to section 30-30-615, Idaho Code.

(4) Unless the articles or bylaws provide otherwise, the presiding officer of the board, the president or twenty percent (20%) of the directors then in office may call and give notice of a meeting of the board.

History.

I.C., § 30-30-614, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-76.

§ 30-30-615. Waiver of notice. — (1) A director may, at any time before, during or after the meeting, waive any notice required by this act [chapter], the articles or bylaws. Except as provided in subsection (2) of this section, the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or the corporate records.

(2) A director's attendance at or participation in a meeting waives any required notice of the meeting unless the director upon arriving at the meeting or prior to the vote on a matter not noticed in conformity with this act [chapter], the articles or bylaws objects to lack of notice and does not thereafter vote for or assent to the objected to action.

History.

I.C., § 30-30-615, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-77.

The bracketed insertions near the beginning of subsection (1) and near the end of subsection (2) were added by the compiler to supply the probable intended term.

§ 30-30-616. Quorum and voting. — (1) Except as otherwise provided in this act [chapter], the articles or bylaws, a quorum of a board of directors consists of a majority of the directors in office immediately before a meeting begins. In no event may the articles or bylaws authorize a quorum of fewer than the greater of one-third (1/3) of the number of directors in office or two (2) directors.

(2) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board unless this act [chapter], the articles or bylaws require the vote of a greater number of directors.

History.

I.C., § 30-30-616, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-78.

The bracketed insertions near the beginning of subsection (1) and near the end of subsection (2) were added by the compiler to supply the probable intended term.

§ 30-30-617. Committees of the board. — (1) Unless prohibited or limited by the articles or bylaws, a board of directors may create one (1) or more committees of the board and appoint members of the board to serve on them. Each committee shall have two (2) or more directors, who serve at the pleasure of the board.

(2) The creation of a committee and appointment of members to it must be approved by the greater of: (a) A majority of all the directors in office when the action is taken; or (b) The number of directors required by the articles or bylaws to take action under section 30-30-616, Idaho Code.

(3) Sections 30-30-612 through 30-30-616, Idaho Code, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board, apply to committees of the board and their members as well.

(4) To the extent specified by the board of directors or in the articles or bylaws, each committee of the board may exercise the board's authority under section 30-30-601, Idaho Code.

(5) A committee of the board may not, however: (a) Authorize distributions; (b) Approve or recommend to members dissolution, merger, or the sale, pledge or transfer of all or substantially all of the corporation's assets; (c) Elect, appoint or remove directors or fill vacancies on the board or on any of its committees; or (d) Adopt, amend or repeal the articles or bylaws.

(6) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section 30-30-618, Idaho Code.

History.

I.C., § 30-30-617, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-79.

§ 30-30-618. General standards for directors. — (1) A director shall discharge his duties as a director, including his duties as a member of a committee:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the director reasonably believes to be in the best interests of the corporation.

(2) In discharging his duties, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

(a) One (1) or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants or other persons as to matters the director reasonably believes are within the person's professional or expert competence;

(c) A committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(d) In the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.

(3) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) A director is not liable to the corporation, any member, or any other person for any action taken or not taken as a director, if the director acted in

compliance with this section.

(5) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including, without limit, property that may be subject to restrictions imposed by the donor or transferor of such property.

History.

I.C., § 30-30-618, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-80.

§ 30-30-619. Director — Conflict of interest. — (1) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair at the time it was entered into or is approved as provided in subsection (2) of this section.

(2) A transaction in which a director of a corporation has a conflict of interest may be approved if: (a) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved or ratified the transaction; or (b) The material facts of the transaction and the director's interest were disclosed or known to the members and they authorized, approved or ratified the transaction.

(3) For purposes of this section, a director of the corporation has an indirect interest in a transaction if: (a) Another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction; or (b) Another entity of which the director is a director, officer or trustee is a party to the transaction.

(4) For purposes of subsection (2) of this section, a conflict of interest transaction is authorized, approved or ratified, if it receives the affirmative vote of a majority of the directors on the board or on the committee, who have no direct or indirect interest in the transaction. If a majority of the directors on the board who have no direct or indirect interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (2)(a) of this section if the transaction is otherwise approved as provided in subsection (2) of this section.

(5) For purposes of subsection (2)(b) of this section, a conflict of interest transaction is authorized, approved or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect

interest in the transaction, and votes cast by or voted under the control of an entity described in subsection (3)(a) of this section, may not be counted in a vote of members to determine whether to authorize, approve or ratify a conflict of interest transaction under subsection (2)(b) of this section. The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this act [chapter]. A majority of the voting power, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(6) The articles, bylaws or a resolution of the board may impose additional requirements on conflict of interest transactions.

History.

I.C., § 30-30-619, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-81.

The bracketed insertion in the next-to-last sentence in subsection (5) was added by the compiler to supply the probable intended term.

§ 30-30-620. Loans to or guarantees for directors and officers. — (1) Except with regard to loan or guarantee programs available to all members, a corporation may not lend money to or guarantee the obligation of a director or officer of the corporation, provided that a cooperative corporation may lend money to or guarantee the obligation of a director or officer with regard to loan or guarantee programs available to all members.

(2) The fact that a loan or guarantee is made in violation of this section does not affect the borrower's liability on the loan.

History.

I.C., § 30-30-620, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-82.

§ 30-30-621. Required officers. — (1) Unless otherwise provided in the articles or bylaws, a corporation shall have a president, a secretary, a treasurer and such other officers as are appointed by the board. Except in the case of religious corporations, any two (2) or more offices may be held by the same person, except the offices of president and secretary. A religious corporation is not required to have officers.

(2) The bylaws or the board shall delegate to one (1) of the officers responsibility for preparing minutes of the directors' and members' meetings and for authenticating records of the corporation.

(3) The same individual may simultaneously hold more than one (1) office in a corporation.

History.

I.C., § 30-30-621, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-83.

§ 30-30-622. Duties and authority of officers. — Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties and authority prescribed in a resolution of the board or by direction of an officer authorized by the board to prescribe the duties and authority of other officers.

History.

I.C., § 30-30-622, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-84.

§ 30-30-623. Standards of conduct for officers. — (1) An officer with discretionary authority shall discharge his duties under that authority:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.

(2) In discharging his duties, an officer is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

(a) One (1) or more officers or employees of the corporation who the officer reasonably believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants or other persons as to matters the officer reasonably believes are within the person's professional or expert competence; or

(c) In the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the officer believes justify reliance and confidence and who the officer believes to be reliable and competent in the matters presented.

(3) An officer is not acting in good faith if the officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.

(4) An officer is not liable to the corporation, any member, or other person for any action taken or not taken as an officer, if the officer acted in compliance with this section.

History.

I.C., § 30-30-623, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler’s Notes.

This section is derived from former § 30-3-85.

§ 30-30-624. Resignation and removal of officers. — (1) An officer may resign at any time by delivering notice to the corporation. A resignation is effective [delivered] when the notice is effective unless the notice specifies a future effective date. If a resignation is made effective at a future date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board provides that the successor does not take office until the effective date.

(2) A board may remove any officer at any time with or without cause.

History.

I.C., § 30-30-624, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-86.

The bracketed insertion in the first sentence in subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-625. Officers' authority to execute documents. — Any contract or other instrument in writing executed or entered into between a corporation and any other person is not invalidated as to the corporation by any lack of authority of the signing officers in the absence of actual knowledge on the part of the other person that the signing officers had no authority to execute the contract or other instrument if it is signed by any two (2) officers in category 1 of this section or by one (1) officer in category 1 of this section and one (1) officer in category 2 of this section.

Category 1 — The presiding officer of the board and the president.

Category 2 — A vice president, the secretary, treasurer and executive director.

History.

I.C., § 30-30-625, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-87.

§ 30-30-626. Indemnification of officers, directors, employees and agents. — (1) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, other than an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorney's fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner that he reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(2) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence

or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in that such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses that such court shall deem proper.

(3) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsection (1) or (2) of this section, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him in connection herewith.

(4) Any determination under subsection (1) or (2) of this section, unless ordered by a court, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsection (1) or (2) of this section. Such determination shall be made:

(a) By the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding; or

(b) If such quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or

(c) By the members.

(5) Expenses, including attorney's fees, incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the corporation as authorized in this section.

(6) The indemnification and advancement of expenses provided by, or granted pursuant to the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote

of shareholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office.

(7) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section; provided that credit unions chartered under the laws of the state of Idaho may provide indemnification only by insurance.

(8) For the purposes of this section, the term "corporation" includes, in addition to the resulting corporation, all constituent corporations and their predecessors absorbed in a consolidation or merger, which, if separate existence had continued, would have had power and authority to indemnify its directors, officers, employees or agents.

(9) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, and personal representatives of such a person.

History.

I.C., § 30-30-626, as added by 2015, ch. 243, § 79, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-88.

Part 7
Amendment of Articles of Incorporation and Bylaws

§ 30-30-701. Authority to amend articles. — A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles or to delete a provision not required in the articles. Whether a provision is required or permitted in the articles is determined as of the effective date of the amendment.

History.

I.C., § 30-30-701, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-89.

§ 30-30-702. Amendment of articles by directors. — (1) Unless the articles provide otherwise, a corporation's board of directors may adopt one (1) or more amendments to the corporation's articles without member approval:

(a) To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(b) To delete the names and addresses of the initial directors;

(c) To change the information required by section 30-21-404(a)(1), Idaho Code;

(d) To change the corporate name by substituting the word "corporation," "incorporated," "company," "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," for a similar word or abbreviation in the name, or by adding, deleting or changing a geographical attribution to the name; or

(e) To make any other change expressly permitted by this act [chapter] to be made by director action.

(2) If a corporation has no members, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one (1) or more amendments to the corporation's articles subject to any approval required pursuant to section 30-30-801, Idaho Code. The corporation shall provide notice of any meeting at which an amendment is to be voted upon. The notice shall be in accordance with section 30-30-614(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider a proposed amendment to the articles and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. The amendment must be approved by a majority of the directors in office at the time the amendment is adopted.

History.

I.C., § 30-30-702, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler’s Notes.

This section is derived from former § 30-3-90.

The bracketed insertion in paragraph (1)(e) was added by the compiler to supply the probable intended term.

§ 30-30-703. Amendment of articles by directors and members. — (1) Unless this act [chapter], the articles, bylaws, the members, acting pursuant to subsection (2) of this section, or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, an amendment to a corporation's articles to be adopted must be approved:

(a) By the board, if the amendment does not relate to the number of directors, the composition of the board, the term of office of directors, or the method or way in which directors are elected or selected;

(b) Except as provided in section 30-30-702(1), Idaho Code, by the members by two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in this section.

(2) The members may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(3) If the board initiates an amendment to the articles or board approval is required in subsection (1) of this section to adopt an amendment to the articles, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or any other basis.

(4) If the board or the members seek to have the amendment approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in writing in accordance with section 30-30-505, Idaho Code. The notice must state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(5) If the board or the members seek to have the amendment approved by the members by written consent or written ballot or absentee ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment.

History.

I.C., § 30-30-703, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-91.

The bracketed insertion in the introductory paragraph in subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-704. Class voting by members on amendments to articles. — (1) The members of a class in a corporation are entitled to vote as a class on a proposed amendment to the articles if the amendment would:

(a) Affect the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer of memberships in a manner different than such amendment would affect another class;

(b) Change the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer by changing the rights, privileges, preferences, restrictions or conditions of another class;

(c) Increase or decrease the number of memberships authorized for that class;

(d) Increase the number of memberships authorized for another class;

(e) Effect an exchange, reclassification or termination of the memberships of that class; or

(f) Authorize a new class of memberships.

(2) The members of a class of a religious corporation are entitled to vote as a class on a proposed amendment to the articles only if a class vote is provided for in the articles or bylaws.

(3) If a class is to be divided into two (2) or more classes as a result of an amendment to the articles of a corporation, the amendment must be approved by the members of each class that would be created by the amendment.

(4) Except as provided in the articles or bylaws of a religious corporation, if a class vote is required to approve an amendment to the articles of a corporation, the amendment must be approved by the members of the class by two-thirds (2/3) of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(5) A class of members of a corporation, except a religious corporation, is entitled to the voting rights granted in this section although the articles and bylaws provide that the class may not vote on the proposed amendment.

History.

I.C., § 30-30-704, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-92.

§ 30-30-705. Articles of amendment. — A corporation amending its articles shall deliver to the secretary of state articles of amendment setting forth:

(1) The name of the corporation; (2) The text of each amendment adopted; (3) The date of each amendment's adoption; (4) If approval of members was not required, a statement to that effect and a statement that the amendment was approved by a sufficient vote of the board of directors or incorporators; (5) If approval by members was required: (a) The designation, number of memberships outstanding, number of votes entitled to be cast by each class entitled to vote separately on the amendment, and number of votes of each class indisputably voting on the amendment; and (b) Either the total number of votes cast for and against the amendment by each class entitled to vote separately on the amendment or the total number of undisputed votes cast for the amendment by each class and a statement that the number cast for the amendment by each class was sufficient for approval by that class.

(6) If approval of the amendment by some person or persons other than the members, the board or the incorporators is required pursuant to section 30-30-801, Idaho Code, a statement that the approval was obtained.

History.

I.C., § 30-30-705, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-93.

§ 30-30-706. Restated articles of incorporation. — (1) A corporation's board of directors may restate its articles of incorporation at any time with or without approval by members or any other person.

(2) The restatement may include one (1) or more amendments to the articles. If the restatement includes an amendment requiring approval by the members or any other person, it must be adopted as provided in section 30-30-703, Idaho Code.

(3) If the restatement includes an amendment requiring approval by members, the board must submit the restatement to the members for their approval.

(4) If the board seeks to have the restatement approved by the members at a membership meeting, the corporation shall notify each of its members of the proposed membership meeting in writing in accordance with section 30-30-505, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy or summary of the restatement that identifies any amendments or other change it would make in the articles.

(5) If the board seeks to have the restatement approved by the members by written ballot or written consent, the material soliciting the approval shall contain or be accompanied by a copy or summary of the restatement that identifies any amendments or other change it would make in the articles.

(6) A restatement requiring approval by the members must be approved by the same vote as an amendment to articles under section 30-30-703, Idaho Code.

(7) If the restatement includes an amendment requiring approval pursuant to section 30-30-801, Idaho Code, the board must submit the restatement for such approval.

(8) A corporation restating its articles shall deliver to the secretary of state articles of restatement setting forth the name of the corporation and the

text of the restated articles of incorporation together with a certificate setting forth:

(a) Whether the restatement contains an amendment to the articles requiring approval by the members or any other person other than the board of directors and, if it does not, that the board of directors adopted the restatement; or

(b) If the restatement contains an amendment to the articles requiring approval by the members, the information required by section 30-30-705, Idaho Code; and

(c) If the restatement contains an amendment to the articles requiring approval by a person whose approval is required pursuant to section 30-30-801, Idaho Code, a statement that such approval was obtained.

(9) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(10) The secretary of state may certify restated articles of incorporation, as the articles of incorporation currently in effect.

History.

I.C., § 30-30-706, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-94.

§ 30-30-707. Effect of amendment and restatement of articles. — An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, any requirement or limitation imposed upon the corporation or any property held by it by virtue of any trust upon which such property is held by the corporation or the existing rights of persons other than members of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

History.

I.C., § 30-30-707, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-95.

§ 30-30-708. Amendment of bylaws by directors. — If a corporation has no members, its incorporators, until directors have been chosen, and thereafter its board of directors, may adopt one (1) or more amendments to the corporation's bylaws subject to any approval required pursuant to section 30-30-801, Idaho Code. The corporation shall provide notice of any meeting of directors at which an amendment is to be approved. The notice shall be in accordance with section 30-30-614(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider a proposed amendment to the bylaws and contain or be accompanied by a copy or summary of the amendment or state the general nature of the amendment. The amendment must be approved by a majority of the directors in office at the time the amendment is adopted.

History.

I.C., § 30-30-708, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-96.

§ 30-30-709. Amendment of bylaws by directors and members. — (1) Unless the articles or bylaws provide otherwise, an amendment to a corporation's bylaws to be adopted must be approved:

(a) By a simple majority of the board;

(b) By the members by a simple majority of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-30-801, Idaho Code.

(2) If the board initiates an amendment to the bylaws or board approval is required to adopt an amendment to the bylaws, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(3) If the board or the members seek to have the amendment approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in writing in accordance with section 30-30-505, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(4) If the board or the members seek to have the amendment approved by the members by written consent or written ballot or absentee ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment.

History.

I.C., § 30-30-709, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-97.

§ 30-30-710. Class voting by members on amendments to bylaws. — (1) If the members of a class in a corporation are entitled to vote as a class on amendments to the bylaws, they may vote as a class on a proposed amendment to the bylaws if the amendment would:

(a) Affect the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer of memberships in a manner different than such amendment would affect another class;

(b) Change the rights, privileges, preferences, restrictions or conditions of that class as to voting, dissolution, redemption or transfer by changing the rights, privileges, preferences, restrictions or conditions of another class;

(c) Increase or decrease the number of memberships authorized for that class;

(d) Increase the number of memberships authorized for another class;

(e) Effect an exchange, reclassification or termination of all or part of the memberships of that class; or

(f) Authorize a new class of memberships.

(2) The members of a class of a religious corporation are entitled to vote as a class on a proposed amendment to the bylaws only if a class vote is provided for in the articles or bylaws.

(3) If a class is to be divided into two (2) or more classes as a result of an amendment to the bylaws, the amendment must be approved by the members of each class that would be created by the amendment; and

(4) If a class vote is required to approve an amendment to the bylaws, the amendment must be approved by the members of the class by two-thirds (2/3) of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(5) A class of members is entitled to the voting rights granted by this section although the articles and bylaws provide that the class may not vote

on the proposed amendment.

History.

I.C., § 30-30-710, as added by 2015, ch. 243, § 80, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-98.

Part 8
Merger and Membership Exchanges

« Title 30 •, « Ch. 30 •, « Pt. 8 », • § 30-30-801 »

§ 30-30-801. Approval by third persons. — The articles may require an amendment to the articles or bylaws to be approved in writing by a specified person or persons other than the board. Such an article provision may only be amended with the approval in writing of such person or persons.

History.

I.C., § 30-30-801, as added by 2015, ch. 243, § 81, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-99.

§ 30-30-802. Approval of plan of merger. — (1) One (1) or more nonprofit corporations may merge into a business or nonprofit corporation, if the plan of merger is approved as provided in section 30-30-803, Idaho Code.

(2) The plan of merger must set forth: (a) The name of each corporation planning to merge and the name of the surviving corporation into which each plans to merge; (b) The terms and conditions of the planned merger; (c) The manner and basis, if any, of converting memberships of each merging corporation into memberships, obligations or securities of the surviving or any other corporation or into cash or other property in whole or part.

(3) The plan of merger may set forth: (a) Any amendments to the articles of incorporation or bylaws of the surviving corporation to be effected by the planned merger; and (b) Other provisions relating to the planned merger.

History.

I.C., § 30-30-802, as added by 2015, ch. 243, § 81, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-100.

§ 30-30-803. Action on plan by board, members and third persons. — (1) Unless this act [chapter], the articles, bylaws or the board of directors or members, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, a plan of merger to be adopted must be approved:

(a) By the board;

(b) By the members, if any, by two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-30-801, Idaho Code, for an amendment to the articles or bylaws.

(2) If the corporation does not have members, the merger must be approved by a majority of the directors in office at the time the merger is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with section 30-30-614(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed merger.

(3) The board may condition its submission of the proposed merger, and the members may condition their approval of the merger, on receipt of a higher percentage of affirmative votes or on any other basis.

(4) If the board seeks to have the plan approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with section 30-30-505, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the plan of merger and contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall include a copy or summary of the articles and bylaws that will be in effect immediately after the merger takes effect.

(5) If the board seeks to have the plan approved by the members by written consent or written ballot or absentee ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall include a copy or summary of the articles and bylaws that will be in effect immediately after the merger takes effect.

(6) Voting by a class of members is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation or bylaws, would entitle the class of members to vote as a class on the proposed amendment under section 30-30-704 or 30-30-710, Idaho Code. The plan is approved by a class of members by two-thirds (2/3) of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(7) After a merger is adopted, and at any time before articles of merger are filed, the planned merger may be abandoned, subject to any contractual rights, without further action by members or other persons who approved the plan in accordance with the procedure set forth in the plan of merger or, if none is set forth, in the manner determined by the board of directors.

History.

I.C., § 30-30-803, as added by 2015, ch. 243, § 81, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-101.

The bracketed insertion in the introductory paragraph in subsection (1) was added by the compiler to supply the probable intended term.

Part 9
Disposition of Assets

§ 30-30-901. Bequests, devises and gifts. — Any bequest, devise, gift, grant or promise contained in a will or other instrument of donation, subscription, or conveyance, that is made to a constituent corporation and that takes effect or remains payable after the merger, inures to the surviving corporation unless the will or other instrument otherwise specifically provides.

History.

I.C., § 30-30-901, as added by 2015, ch. 243, § 82, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-105.

§ 30-30-902. Sale of assets in regular course of activities and mortgage of assets. — (1) A corporation may on the terms and conditions and for the consideration determined by the board of directors:

(a) Sell, lease, exchange or otherwise dispose of all, or substantially all, of its property in the usual and regular course of its activities; or (b) Mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in the usual and regular course of its activities.

(2) Unless the articles require it, approval of the members or any other person of a transaction described in subsection (1) of this section is not required.

History.

I.C., § 30-30-902, as added by 2015, ch. 243, § 82, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-106.

§ 30-30-903. Sale of assets other than in regular course of activities. — (1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, with or without the goodwill, other than in the usual and regular course of its activities on the terms and conditions and for the consideration determined by the corporation's board if the proposed transaction is authorized in subsection (2) of this section.

(2) Unless this act [chapter], the articles, bylaws or the board of directors or members, acting pursuant to subsection (4) of this section, require a greater vote or voting by class, the proposed transaction to be authorized must be approved:

(a) By the board;

(b) By the members by a simple majority of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-30-505, Idaho Code, for an amendment to the articles or bylaws.

(3) If the corporation does not have members the transaction must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with section 30-30-614(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the sale, lease, exchange or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(4) The board may condition its submission of the proposed transaction, and the members may condition their approval of the transaction, on receipt of a higher percentage of affirmative votes or on any other basis.

(5) If the corporation seeks to have the transaction approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with section 30-30-505, Idaho Code. The notice must also state that the purpose, or one

(1) of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(6) If the board needs to have the transaction approved by the members by written consent or written ballot or absentee ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of a description of the transaction.

(7) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further action by the members or any other person who approved the transaction in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors.

History.

I.C., § 30-30-903, as added by 2015, ch. 243, § 82, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-107.

The bracketed insertion in the introductory paragraph in subsection (2) was added by the compiler to supply the probable intended term.

§ 30-30-904. Prohibited distributions. — Except as authorized in section 30-30-905, Idaho Code, a corporation shall not make any distributions.

History.

I.C., § 30-30-904, as added by 2015, ch. 243, § 82, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-108.

§ 30-30-905. Authorized distributions. — (1) Corporations may make distributions upon dissolution in conformity with section 30-30-1005 or 30-30-1006, Idaho Code.

(2) The operations of a corporation that is a cooperative corporation shall be so conducted that all members will, through their membership, furnish capital for the corporation as provided in the corporation's bylaws. No interest or dividends shall be paid or payable by the corporation on any capital furnished by its members. The corporation is obligated to account on a membership basis to all its members for all amounts received and receivable from the furnishing of service and from other sources in excess of operating costs and expenses properly chargeable against the furnishing of service. The corporation is obligated to pay by credits to a capital account for each member all such amounts in excess of operating costs and expenses. The books and records of the corporation shall be set up and kept in such a manner that at the end of each fiscal year the amount of capital, if any, so furnished by each member is clearly reflected and credited in an appropriate record to the capital account of each member. In the event of dissolution or liquidation of the corporation, after all outstanding indebtedness of the corporation shall have been paid, outstanding capital credits shall be retired without priority on a pro rata basis before any payments are made on account of property rights of members. If, at any time prior to dissolution or liquidation, the board shall determine that the financial condition of the corporation will not be impaired thereby, the capital credited to members' accounts may be retired in full or in part.

History.

I.C., § 30-30-905, as added by 2015, ch. 243, § 82, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-109.

Part 10
Dissolution

§ 30-30-1001. Dissolution by incorporators or directors and third persons. — (1) A majority of the incorporators or directors of a corporation that has no members may, prior to the organization meeting of directors and subject to any approval required by the articles or bylaws, dissolve the corporation by delivering to the secretary of state articles of dissolution.

(2) The corporation shall give notice of any meeting at which dissolution will be approved. The notice shall be in accordance with section 30-30-614(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider dissolution of the corporation.

(3) The incorporators or directors in approving dissolution shall adopt a plan of dissolution indicating to whom the assets owned or held by the corporation will be distributed after all creditors have been paid.

History.

I.C., § 30-30-1001, as added by 2015, ch. 243, § 83, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-110.

§ 30-30-1002. Dissolution by directors, members and third persons. — (1) Unless this act [chapter], the articles, bylaws or the board of directors or members, acting pursuant to subsection (3) of this section, require a greater vote or voting by class, dissolution is authorized if it is approved:

(a) By the board;

(b) By the members, if any, by two-thirds (2/3) of the votes cast or a majority of the voting power, whichever is less; and

(c) In writing by any person or persons whose approval is required by a provision of the articles authorized in section 30-30-801, Idaho Code, for an amendment to the articles or bylaws.

(2) If the corporation does not have members, dissolution must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with section 30-30-614(3), Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider dissolution of the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(3) The board may condition its submission of the proposed dissolution, and the members may condition their approval of the dissolution on receipt of a higher percentage of affirmative votes or on any other basis.

(4) If the board seeks to have dissolution approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with section 30-30-505, Idaho Code. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider dissolving the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(5) If the board seeks to have dissolution approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan of dissolution.

(6) The plan of dissolution shall indicate to whom the assets owned or held by the corporation will be distributed after all creditors have been paid.

History.

I.C., § 30-30-1002, as added by 2015, ch. 243, § 83, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-111.

The bracketed insertion in the introductory paragraph in subsection (1) was added by the compiler to supply the probable intended term.

§ 30-30-1003. Articles of dissolution. — (1) At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state articles of dissolution setting forth:

(a) The name of the corporation; (b) The date dissolution was authorized; (c) A statement that dissolution was approved by a sufficient vote of the board; (d) If approval of members was not required, a statement to that effect and a statement that dissolution was approved by a sufficient vote of the board of directors or incorporators; (e) If approval by members was required: (i) The designation, number of memberships outstanding, number of votes entitled to be cast by each class entitled to vote separately on dissolution, and number of votes of each class indisputably voting on dissolution; and (ii) Either the total number of votes cast for and against dissolution by each class entitled to vote separately on dissolution or the total number of undisputed votes cast for dissolution by each class and a statement that the number cast for dissolution by each class was sufficient for approval by that class; and (f) If approval of dissolution by some person or persons other than the members, the board or the incorporators is required pursuant to section 30-30-1002(1)(c), Idaho Code, a statement that the approval was obtained.

(2) A corporation is dissolved upon the effective date of its articles of dissolution.

History.

I.C., § 30-30-1003, as added by 2015, ch. 243, § 83, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-112.

§ 30-30-1004. Effect of dissolution. — (1) A dissolved corporation continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs, including:

(a) Preserving and protecting its assets and minimizing its liabilities;

(b) Discharging or making provision for discharging its liabilities and obligations;

(c) Disposing of its properties that will not be distributed in kind;

(d) Returning, transferring or conveying assets held by the corporation upon a condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, in accordance with such condition;

(e) Transferring, subject to any contractual or legal requirements, its assets as provided in or authorized by its articles of incorporation or bylaws;

(f) If no provision has been made in its articles or bylaws for distribution of assets on dissolution, it may transfer, subject to any contractual or legal requirement, its assets:

(i) To one (1) or more persons described in section 501(c)(3) of the Internal Revenue Code; or

(ii) To its members or, if it has no members, to those persons whom the corporation holds itself out as benefiting or serving; and

(g) Doing every other act necessary to wind up and liquidate its assets and affairs.

(2) Dissolution of a corporation does not:

(a) Transfer title to the corporation's property;

(b) Subject its directors or officers to standards of conduct different from those prescribed in sections 30-30-618 and 30-30-623, Idaho Code;

(c) Change quorum or voting requirements for its board or members; change provisions for selection, resignation or removal of its directors or

officers or both; or change provisions for amending its bylaws;

(d) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(e) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(f) Terminate the authority of the registered agent.

History.

I.C., § 30-30-1004, as added by 2015, ch. 243, § 83, p. 758.

STATUTORY NOTES

Federal References.

Section 501(c)(3) of the internal revenue code, referred to in paragraph (1)(f)(i), is codified as 26 U.S.C.S. § 501(c)(3).

Compiler's Notes.

This section is derived from former § 30-3-113.

§ 30-30-1005. Known claims against dissolved corporation. — (1) The directors of a dissolved corporation may dispose of the known claims against it by following the procedure described in this section.

(2) The directors of a dissolved corporation shall notify its known claimants in writing of the dissolution at any time after its effective date. The written notice must: (a) Describe information that must be included in a claim; (b) Provide a mailing address where a claim may be sent; (c) State the deadline, which may not be fewer than one hundred twenty (120) days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and (d) State that the claim will be barred if not received by the deadline.

(3) A claim against the dissolved corporation is barred: (a) If a claimant who was given written notice under subsection (2) of this section does not deliver the claim to the dissolved corporation by the deadline; or (b) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within ninety (90) days from the effective date of the rejection notice.

(4) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

History.

I.C., § 30-30-1005, as added by 2015, ch. 243, § 83, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-114.

§ 30-30-1006. Unknown claims against dissolved corporation. — (1) The directors of a dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(2) The notice must:

(a) Be published one (1) time in a newspaper of general circulation in the county where the dissolved corporation's principal office is or was located, or, if none in this state, in Ada county;

(b) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(c) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five (5) years after publication of the notice.

(3) If the directors of a dissolved corporation publish a newspaper notice in accordance with subsection (2) of this section, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five (5) years after the publication date of the newspaper notice:

(a) A claimant who did not receive written notice under section 30-30-1005, Idaho Code;

(b) A claimant whose claim was timely sent to the dissolved corporation but not acted on; and

(c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(4) A claim may be enforced under this section:

(a) Against the dissolved corporation to the extent of its undistributed assets; or

(b) If the assets have been distributed in liquidation, against any person, other than a creditor of the corporation, to whom the corporation distributed its property to the extent of the distributee's pro rata share of

the claim or the corporate assets distributed to such person in liquidation, whichever is less, but the distributee's total liability for all claims under this section may not exceed the total amount of assets distributed to the distributee.

History.

I.C., § 30-30-1006, as added by 2015, ch. 243, § 83, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-115.

Part 11
Records and Reports

§ 30-30-1101. Corporate records. — (1) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors as authorized in section 30-30-617(4), Idaho Code.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation shall maintain a record of its members in a form that permits preparation of a list of the name and address of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.

(4) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A corporation shall keep a copy of the following records at its principal office:

(a) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(b) Its bylaws or restated bylaws and all amendments to them currently in effect;

(c) Resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations and obligations of members or any class or category of members;

(d) The minutes of all meetings of members and records of all actions approved by the members for the past three (3) years;

(e) All written communications to members generally within the past seven (7) years, including the financial statements furnished for the past seven (7) years under section 30-30-1105, Idaho Code;

(f) A list of the names and business or home addresses of its current directors and officers; and

(g) Its most recent annual report delivered to the secretary of state under section 30-21-213, Idaho Code.

History.

I.C., § 30-30-1101, as added by 2015, ch. 243, § 84, p. 758.

STATUTORY NOTES

Cross References.

Secretary of state, § 67-901 et seq.

Compiler's Notes.

This section is derived from former § 30-3-130.

CASE NOTES

Decisions Under Prior Law

Right to Inspect.

The right to inspect by a member of a nonprofit corporation was no less than that of a shareholder of a business corporation under the terms of the applicable statutes. Stueve v. Northern Lights, Inc., 118 Idaho 422, 797 P.2d 130 (1990).

§ 30-30-1102. Inspection of records by members. — (1) Subject to subsection (5) of this section and section 30-30-1103(3), Idaho Code, a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in section 30-30-1101(5), Idaho Code, if the member gives the corporation written notice or a written demand at least fifteen (15) business days before the date on which the member wishes to inspect and copy.

(2) Subject to paragraph (c) of this subsection, a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (3) of this section and gives the corporation written notice at least fifteen (15) business days before the date on which the member wishes to inspect and copy:

(a) Excerpts from any records required to be maintained under section 30-30-1101(1), Idaho Code, to the extent not subject to inspection under subsection (1) of this section;

(b) Accounting records of the corporation; and

(c) Subject to section 30-30-1104, Idaho Code, the membership list.

(3) A member may inspect and copy the records identified in subsection (2) of this section only if:

(a) The member's demand is made in good faith and for a proper purpose reasonably related to the member's interest as a member of the corporation;

(b) The member describes with reasonable particularity the purpose and the records the member desires to inspect;

(c) The records are directly connected with this purpose; and

(d) The board of directors shall determine whether a member's request is for a proper purpose.

(4) The provisions of this section do not affect:

(a) The right of a member to inspect records under section 30-30-509, Idaho Code, or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

(b) The board of directors may restrict or deny inspection of personnel and employment records and confidential attorney-client communications if it determines that such restriction or denial of access to said records or information is in the best interests of the corporation.

(5) The articles or bylaws of a religious corporation may limit or abolish the right of a member under this section to inspect and copy any corporate record.

History.

I.C., § 30-30-1102, as added by 2015, ch. 243, § 84, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-131.

§ 30-30-1103. Scope of inspection rights. — (1) A member's agent or attorney has the same inspection and copying rights as the member the agent or attorney represents.

(2) The right to copy records under section 30-30-1102, Idaho Code, includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means.

(3) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. The charge may not exceed the estimated cost of production or reproduction of the records.

(4) The corporation may comply with a member's demand to inspect the record of members under section 30-30-1102(2)(c), Idaho Code, by providing the member with a list of its members that was compiled no earlier than the date of the member's demand.

History.

I.C., § 30-30-1103, as added by 2015, ch. 243, § 84, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-132.

§ 30-30-1104. Limitations on use of membership list. — Without consent of the board, a membership list or any part thereof may not be obtained or used by any person for any purpose unrelated to a member's interest as a member. Without limiting the generality of the foregoing and without the consent of the board, a membership list or any part thereof may not be:

(1) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the corporation; (2) Used for any commercial purpose; or (3) Sold to or purchased by any person.

History.

I.C., § 30-30-1104, as added by 2015, ch. 243, § 84, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-133.

§ 30-30-1105. Financial statements for members. — (1) Except as provided in the articles or bylaws of a religious corporation, a corporation upon written demand from a member shall furnish that member its latest annual financial statements, which may be consolidated or combined statements of the corporation and one (1) or more of its subsidiaries or affiliates, as appropriate, that include a balance sheet as of the end of the fiscal year and statement of operations for that year. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis.

(2) If annual financial statements are reported upon by a public accountant, the accountant's report must accompany them. If not, the statements must be accompanied by the statement of the president or the person responsible for the corporation's financial accounting records: (a) Stating the president's or other person's reasonable belief as to whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and (b) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year.

History.

I.C., § 30-30-1105, as added by 2015, ch. 243, § 84, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-134.

§ 30-30-1106. Report of indemnification to members. — If a corporation indemnifies or advances expenses to a director under section 30-30-626, Idaho Code, in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the members with or before the notice of the next meeting of members.

History.

I.C., § 30-30-1106, as added by 2015, ch. 243, § 84, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-135.

Part 12
Transition Provisions

§ 30-30-1201. Application to existing domestic nonprofit corporations. — This chapter applies to all domestic nonprofit corporations in existence on July 1, 2015, that were incorporated under the laws of this state.

History.

I.C., § 30-30-1201, as added by 2015, ch. 243, § 85, p. 758; am. 2015, ch. 337, § 1, p. 1269.

STATUTORY NOTES

Amendments.

The 2015 amendment, by ch. 337, substituted "July 1, 2015" for "July 1, 1993".

Compiler's Notes.

This section is derived from former § 30-3-142.

§ 30-30-1202. Application to qualified foreign nonprofit corporation. — A foreign nonprofit corporation authorized to transact business in this state on July 1, 2015, is subject to this chapter but is not required to obtain a new certificate of authority to transact business under this chapter.

History.

I.C., § 30-30-1202, as added by 2015, ch. 243, § 85, p. 758; am. 2015, ch. 337, § 2, p. 1269.

STATUTORY NOTES

Amendments.

The 2015 amendment, by ch. 337, substituted "July 1, 2015" for "July 1, 1993".

Compiler's Notes.

This section is derived from former § 30-3-143.

§ 30-30-1203. Application to canal companies and Carey act companies. — Should any provision of this chapter, as it pertains to canal companies or Carey act companies, conflict with the provisions of title 42, Idaho Code, the provisions of title 42, Idaho Code, shall prevail.

History.

I.C., § 30-30-1203, as added by 2015, ch. 243, § 85, p. 758.

STATUTORY NOTES

Federal References.

The carey act, referred to in this section, is codified as 43 USCS § 641.

Compiler's Notes.

This section is derived from former § 30-3-143A.

§ 30-30-1204. Saving provisions. — (1) Except as provided in subsection (2) of this section, the repeal of a statute by this chapter does not affect:

(a) The operation of the statute or any action taken under it before its repeal;

(b) Any ratification, right, remedy, privilege, obligation or liability acquired, accrued or incurred under the statute before its repeal;

(c) Any violation of the statute or any penalty, forfeiture or punishment incurred because of the violation, before its repeal;

(d) Any proceeding, reorganization or dissolution commenced under the statute before its repeal, and the proceeding, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed; or

(e) Any meeting of members or directors or action by written consent noticed or any action taken before its repeal as a result of a meeting of members or directors or action by written consent.

(2) If a penalty or punishment imposed for violation of a statute repealed by this chapter is reduced by this chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter.

(3) Except as specifically provided in this chapter, this chapter shall not affect the provisions of other statutes applicable to any form of nonprofit corporation.

History.

I.C., § 30-30-1204, as added by 2015, ch. 243, § 85, p. 758.

STATUTORY NOTES

Compiler's Notes.

This section is derived from former § 30-3-144.

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